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SUBJECT INDEX

'A'

Arbitration and Conciliation Act, 1996- Section 8- Respondent entered into an agreement with the petitioner, whereby loan of Rs. 13,30,000/- was sanctioned along with the finance charges of Rs. 3,69,740/- - loan was repayable in 46 EMIs- respondent defaulted in the payment of the installments- respondent instituted a suit for restraining the petitioner from taking the forcible possession- petitioner filed an application for referring the dispute to Arbitrator - application was dismissed by the trial Court- held, that agreement specifically provided that all disputes, differences and/or claims arising out of or touching upon the Agreement are to be settled by arbitration – non-payment of the loan would be a dispute arising out of the agreement- once it was brought to the notice of the Court that its jurisdiction had been taken away by a special statue, the civil court should first see whether there is ouster of jurisdiction or not- petition allowed and the order of trial Court set aside. Title: IndusInd Bank Ltd. & another Vs. Ramesh Kumar Page-861

Arbitration and Conciliation Act, 1996- Section 13 and 33- Petitioner was awarded contract of construction of Lift Irrigation Scheme- a dispute arose between the parties, which was referred to Arbitrator- Arbitrator allowed the claim of the petitioner and held the petitioner entitled to Rs. 78,947/- over and above the amount paid to him – amount of Rs. 12,582/- was awarded as interest- State preferred objections, which were allowed and award was set aside- an appeal was preferred by the petitioner before District Judge who allowed the same and awarded Rs. 64,074/- over and above the final payment - however, no interest was awarded- aggrieved from the order of District Judge, a revision petition was filed- held that State has not preferred any appeal against the order of the District Judge which means that State has accepted the order of the District Judge as correct- Petitioner had no remedy of appeal- therefore, he had rightly filed the revision petition- District Judge had not assigned any reason for not awarding the interest- once petitioner is held entitled to the amount, he is also entitled to interest- petition allowed and the interest @ 12% per annum awarded from the date when award was made the decree of the Court till payment. Title: C.M. Chawla Vs. State of Himachal Pradesh Page-52

'C'

Code of Civil Procedure, 1908- Section 47- Order 21 Rule 97 to 101- An eviction petition was filed on the ground of arrears of rent and subletting the premises, which was allowed ex-parte- civil suit was filed for restraining the landlord from interfering in the possession of the defendant- suit was dismissed- appeal was partly allowed – a further appeal was filed, which was allowed and the suit was ordered to be dismissed- objections were filed, which were also dismissed- held, that petitioners had filed a civil suit and had delayed the execution- petitioners have abused the process of the court by filing objections after the dismissal of the suit - they have stopped the delivery of the possession and have not even paid the arrears of rent for which they were held liable- false pleas and defences abusing the process of the Court should be dealt with heavy hands - Court's proceedings are sacrosanct and should not be polluted by unscrupulous litigants- Court should be careful that process of the Civil Court and law of procedure are not abused by the judgment-debtors in such a way as to make Courts of law instrumental in defrauding creditors- it is the duty of the Court to put a ceiling on unnecessary delay in the matter of enjoying the fruits by a decree holder – landlord directed to be put in physical possession of the premises within a period of four weeks and petitioners directed to pay use and occupation charges at a rate to be determined by the executing court- direction issued to award meaningful cost in favour of landlord and in case of failure to pay the amount, Executing Court directed to attach the property of the petitioners and to sell the same. Title: Prakash Chand & anr Vs. Durga Singh & anr Page-776

Code of Civil Procedure, 1908- Section 96- Appellant No. 1 is a registered society under Societies Registration Act and owns brick kilns in village Basdehra- its stock and raw material were insured against the damage by flood, fire etc. - there were heavy rains resulting in floods- appellants suffered extensive damage - their stocks of coal, unfired bricks, labour huts etc. were washed away- intimation was given to the insurer but the claim was refuted- insurer pleaded that no loss was sustained by the appellants- suit was dismissed by the Court- held, that Patwari and Kanungo were not produced in evidence and the report prepared by them was not proved by the appellants- certificate does not prove the case of the appellants- statements of witnesses only establish that there was rainfall of 119.14 mm at Una but this fact does not establish the case of the appellants- surveyor had found that no loss was caused to the appellants- suit was rightly dismissed- appeal dismissed. Title: M/s Durga Gram Udyog & Another Vs. United India Insurance Company & Another. (D.B.) Page-611

Code of Civil Procedure, 1980- Section 100- Plaintiff filed a civil suit for recovery of Rs. 42,545/- pleading that he and defendant were real brothers and joint owners of Maruti Gypsy- vehicle was used by the defendant with the consent of the plaintiff- vehicle was stolen in the year 1998 and was found in an accidental condition- it was insured with National Insurance Company- matter was reported to the National Insurance Company- a Surveyor was appointed to assess the damage- but no amount was paid- plaintiff wrote a letter to the Insurance Company and was informed that amount of Rs. 63,500/- had been paid to the defendant- plaintiff filed a civil suit for claiming half of the amount- suit was decreed by the trial court- an appeal was preferred, which was allowed- held, in second appeal that plaintiff had examined himself and two witnesses to prove his case- defendant had not examined any person to corroborate his version- bills produced on record to substantiate the version of the defendant that he had spent money on the repair of the vehicle were not proved- vehicle was jointly registered in the name of plaintiff and defendant- in these circumstances, plaintiff was entitled to ½ of the amount- Appellate Court had wrongly set aside the judgment of the trial Court- appeal allowed. Title: Gajinder Singh Vs. Heminder Singh alias Mohinder Singh Negi Page-1079

Code of Civil Procedure, 1908- Section 100- A civil suit was filed by the plaintiffs pleading that they have Bartandari rights in the suit land according to Naksha Bartan and Wazib UI Arj- suit land is part of UPF and DPF- defendants allotted the suit land to defendant No. 3 in violation of Conservation of Forests Act- suit was dismissed by the trial Curt- an appeal was preferred, which was also dismissed- held, that Forest Guard had admitted that suit land was part of Jungle - customary rights were duly recorded in Wazib Ul Arj- merely because list of Bartandaran was not filed is not sufficient to doubt the plaintiff's version- provision of Section 91 of CPC were not applicable in the present case- appeal allowed- judgment and decree passed by the trial Court set aside. Title: Jaidrath and others Vs. Deputy Commissioner, Mandi and others Page-902

Code of Civil Procedure, 1908- Section 100- Plaintiff filed a civil suit for recovery of Rs. 81,100/- on the ground that he was owner in possession of two storeyed house- A middle school was opened in the Village- son of the plaintiff was persuaded by the Headmaster of the Primary School and the villagers to provide accommodation of three rooms- three rooms were allotted to the School- one room in the upper story was occupied by the Headmaster- plaintiff demanded the rent for the premises, which was not paid, on which suit was filed- suit was dismissed by the trial Court- an appeal was preferred, which was allowed- held, in second appeal that possession of the suit premises had been handed over to plaintiff by the State – plaintiff was estopped from filing the suit because of his own act and conduct- Middle School started running in the premises on the basis of affidavit given by the son of plaintiff - legal notice was served in September, 2002- no material was placed on record to show as to what action was taken by the plaintiff for occupying the premises from the date of occupation till September, 2002 unauthorizedely – plaintiff was residing in the same premises, where the school was being run- therefore, an inference can be drawn that premises were handed over to the defendant by son of the plaintiff with his consent and permission and that's why he remained silent for two years- further, no material was brought

on record to show that plaintiff is entitled to the amount - appeal allowed and judgment of the Appellate Court set aside. Title: State of Himachal Pradesh Vs. Dagu Ram Page-726

Code of Civil Procedure, 1908- Section 100- Plaintiff filed a suit for recovery of Rs. 50,000/- paid by him to the defendant- suit was decreed by the trial Court- an appeal was preferred, which was dismissed- held that High Court should not disturb the concurrent findings of fact in second appeal unless it is shown that the findings recorded by the Court are perverse being based on no evidence or that no reasonable person could have come to the conclusion drawn by the court on the basis of evidence on record - defendant had taken a plea which was not taken before the trial Court or before the Appellate Court which is not permissible - appeal dismissed. Title: Asgar Ali Saiyad Vs. Krishan Chand Page-660

Code of Civil Procedure, 1908- Order 1 Rule 10- Plaintiff filed a civil suit for recovery of Rs. 48 lacs on the ground that suit land is shown to be sold for Rs. 12 lacs but in fact was sold for Rs. 16 lacs- presence of purchaser is necessary to decide the controversy and to settle all questions- purchaser had alienated the property in favour of 'P' who is also necessary party- hence, both P and M ordered to be impleaded as parties. Title: Satya daughter of late Sh Molku and others Vs. Jagdish son of late Sh Puran Chand and another Page-1063

Code of Civil Procedure, 1908- Order 6 Rule 17- Plaintiff filed a civil suit for declaration, which was decreed by the trial Court- an appeal was preferred asserting that deceased had revoked the earlier Will by executing a revocation deed- however, it was not suggested during the course of trial that Will was revoked by deceased - application for amendment was filed after eight months of filing of appeal for incorporating the fact that Will was revoked– it was pleaded that this fact could not be mentioned earlier as it came to the notice of the applicant when the summons were received from the Court of learned Civil Judge (Junior Division), Bilaspur during the pendency of the appeal- application was allowed by the Appellate Court- held, that application for amendment cannot be allowed after the commencement of trial, 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 the trial- due diligence means diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation- it was specifically asserted in the memo of appeal that Will was revoked- it was falsely explained that applicant came to know about the revocation after receiving the summons – there was no due diligence and the application could not have been allowed- petition allowed and order of the Appellate Court set aside- application dismissed. Title: Bachan Singh Vs. Rattan Singh and another Page-954

Code of Civil Procedure, 1908- Order 6 Rule 17- Plaintiffs filed a civil suit for seeking injunction- an application for amendment was filed pleading that after filing of the suit defendants had got the window panes of the glaze of second floor towards the house of the plaintiffs and this fact was required to be pleaded- application was opposed by the defendants- held, that application was filed to incorporate the subsequent fact- hence, same is allowed subject to the payment of cost of Rs.6,000/-. Title: Neeraj and others Vs. Rajinder Kumar and others Page-360

Code of Civil Procedure, 1908- Order 20 Rule 5- Trial Court had framed eight issues- issues No. 1 to 4 and 4-C were discussed together while issue No. 4-A and 4-B were discussed separately- it was contended that judgment of trial court is vitiated as the issues were discussed together - held, that there is no bar in clubbing issues together, if evidence is common- case cannot be remanded on the ground that issues had been clubbed together- trial Court had answered all the issues by returning findings duly supported by reasons- it cannot be said that there was non-compliance of order 20 Rule 5- appeal dismissed. Title: Narain Singh and others Vs. Jagadi Devi and others Page-471

Code of Civil Procedure, 1908– Order 39- Plaintiff filed an application for interim injunction which was allowed- an appeal was preferred which was dismissed- held, that a joint owner is not entitled to raise construction over the joint land- defendants pleaded that they may be permitted to raise the construction of cattle shed but there is no evidence that old cattle shed is in the danger of falling, therefore, they cannot be permitted to raise construction over the joint land - the courts had rightly granted the injunction - appeal dismissed. Title: Balwant Singh & another Vs. Ashok Kumar & others. Page-664

Code of Civil Procedure, 1908- Order 39 Rule 2-A- Petitioner instituted a suit against the defendant seeking permanent prohibitory injunction and in the alternative mandatory injunction- the Court directed the respondent to remove iron stair with immediate effect- respondent filed an undertaking in the Court that he had removed the iron stair case and would not cause any hindrance on the disputed path till the disposal of the suit- however, defendant continued with the construction- Local Commissioner was appointed who submitted the report- Court directed the parties to maintain status quo but the defendant erected iron stair case and blocked the path of the petitioner in violation of the order of the Court- respondent denied the allegations- an appeal was preferred, which was allowed and the order was set aside- held, that appeal was allowed only on the ground that suit was dismissed but thereafter the suit had been decreed in the first appeal- therefore, case remanded to the Appellate Court to decide the same afresh in accordance with the law. Title: Jagdish Ram Vs. Ved Prakash Page-1123

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiffs filed a civil suit pleading that M was owner of the suit land to the extent of 1/8th share- Will was executed by M in favour of 'D' – suit land is ancestral and cannot be bequeathed - ad-interim injunction was prayed which was declined by the trial Court- an appeal was preferred, which was allowed- defendant was restrained from alienating, transferring or creating any charge over the suit land- held, that Aks Shazra Nasab Malkaan prima facie shows that land was inherited by the parties from their grand-father- hence, nature of the property is proved to be ancestral - allowing defendant to alienate, encumber, dispose or even change the nature of the suit land will lead to multiplicity of litigation, which may not be in the interest of the parties- Appellate Court had rightly granted the injunction- petition dismissed. Title: Roshan Lal Vs. Beli Ram and others Page- 724

Code of Civil Procedure, 1908- Order 47 Rule 1- A- Civil Suit for recovery was filed by the petitioner which was dismissed as withdrawn with liberty to file a claim before the arbitrator- A CMPMO was filed against the order which was disposed of - an application for review has been filed - held, that an objection was taken that Civil Suit is not maintainable in view of the arbitration clause - therefore, it is not permissible to say that the liberty was wrongly granted to the plaintiff- there is no error apparent on the face of the record- petition dismissed. Title: H.P. General Industries Corporation Ltd. through its Managing Director Vs. Kavita Bhaskar w/o Sh. Rakesh Bhaskar. Page-745

Code of Civil Procedure, 1908- Order 47 Rule 1- Appeal preferred by the State was allowed- judgments passed by the Courts below were quashed- respondents No. 8, 9 and 17 had died during the pendency of appeal – deceased were duly represented by the Counsel who had failed to inform the Court about the death- judgment is sought to be recalled on this ground- held, that judgment had been passed without taking note of the death of respondents No. 8, 9 and 17- therefore, there is an error apparent on the face of the record, which is required to be corrected- appeal restored to its original number on the file. Title: Tarsem Kumar & Others Vs. State of H.P. & Others Page- 333

Code of Criminal Procedure, 1973- Section 100- Plaintiff is a private limited concern, which carries on business of leasing, hire purchase, housing, general finance and investment- plaintiff advanced a sum of Rs. 18,000/- to the defendant No. 1 with interest @ 22% per annum with quarterly rests- defendants No. 2 and 3 stood guarantors - defendant No. 1 paid only two

installments of Rs. 1100/- and failed to make payment of the rest of the amount- defendant No. 1 admitted taking of loan and asserted that vehicle was forcibly possessed by the plaintiff and was sold for Rs. 1,60,000/-- defendant No. 1 is entitled for money from the plaintiff- suit was decreed by the trial Court- an appeal was preferred, which was dismissed- held, in second appeal taking loan was not disputed by defendant No.1- rate of interest was specifically mentioned in the loan agreement- loan was taken for plying bus on commercial basis- therefore, rate of interest cannot be said to be excessive - it was not proved that vehicle was forcibly taken away- suit was rightly decreed by the trial court - appeal dismissed. Title: Dev Raj Sharma Vs. Lakhan Pal Finance & Investments Ltd. and others Page-544

Code of Criminal Procedure, 1973- Section 125- A petition for maintenance was filed which was allowed by the trial court- a revision was preferred which was allowed by the Ld. Sessions Judge and the judgment of trial court was set aside on the ground that marriage was not proved- held, that version of the claimant was not corroborated by her witness regarding the marriage- she had leveled allegations for the commission of offence punishable under Sections 420 and 376 of IPC in a complaint filed by her which was withdrawn- The Sessions Court had rightly reversed the judgment of the trial court- petition dismissed. Title: Master Sanjeev Kumar (minor) through his natural guardian Smt. Leela Devi Vs. Sh. Kehar Singh Page-298

Code of Criminal Procedure, 1973- Section 125- Petitioner No. 1 is legally wedded wife of respondent- one daughter and son were born from the marriage- respondent treated petitioner No. 1 with cruelty and demanded dowry- matter was brought to the notice of Pardhan and Pardhan got the same compromised - complaint under Protection of Women from Domestic Violence Act, 2005 was filed- petitioner no. 2 was beaten by respondent- petitioner No. 1 was thrown out of matrimonial home- trial Court granted maintenance of Rs. 2,000/- per month to petitioner No. 1 and Rs. 5,000/- to petitioners No. 2 and 3- respondent filed a revision, which was allowed and the maintenance awarded to petitioner No. 1 was set aside- held in revision, respondent has admitted that he had not paid any maintenance despite order of the Courts- he was not looking after the petitioner - it is the duty of the parents to ensure good education to the children- respondent had maltreated the petitioners- he is employed in a factory and it can be presumed that his income is not less than Rs. 15,000/-- petitioners were forced to reside separately- Court has to take into consideration the status of the parties- order passed by Sessions Judge set aside- petitioner No. 1 held entitled to the maintenance of Rs. 2,000/- per month. Title: Radha Devi and others Vs. Ram Singh Page- 625

Code of Criminal Procedure, 1973- Section 161- Keeping in view the fact that witnesses are resiling from their earlier statements, Principal Secretary (Home) directed to issue necessary directions to Superintendents of Police to follow proviso to Section 161 (3) in letter and spirit by recording statements of witnesses in writing as well as by audio/video/electronic means to curb the tendency of the witnesses resiling from/disowning their earlier statements. Title: State of Himachal Pradesh Vs. Gian Chand (D.B.) Page-270

Code of Criminal Procedure, 1973- Section 321- Criminal case was pending before the Court for the commission of offences punishable under Sections 418, 420, 465, 468, 471, 472 read with Section 120-B of Indian Penal Code and Section 13 (2) of Prevention of Corruption Act- application for withdrawal was filed, which was allowed- a revision petition was preferred, which was allowed- petitioner now claimed that notice was issued to him- he should be joined as party- held, that foremost guiding factors for moving an application for withdrawal is in the interest of justice- public prosecutor can seek withdrawal in furtherance of the cause of public justice- it is incumbent upon the prosecutor to show that he may not be able to produce sufficient evidence to sustain the charge – it was not mentioned in what manner withdrawal would serve public interest- permission was also granted in a cursory manner- accused No. 1 misused his official position by purchasing land of his son at an exorbitant cost- order granting permission to

withdraw the case set aside and the Court directed to proceed further in the matter in accordance with law. Title: Capt. Ram Singh Vs. State of Himachal Pradesh & Others Page-1027

Code of Criminal Procedure, 1973- Section 384 and 386- appeal was listed for hearing and was dismissed in default- held, that Appellate Court is bound to adjudicate the appeal on merit and cannot dismiss the same in default- a jurisdictional error was committed by the Appellate Court- appeal allowed and the case remanded to Appellate Court to decide the appeal on merit. Title: Tilak Raj Dogra Vs. Bachitter Kumar Page-1011

Code of Criminal Procedure, 1973- Section 391- An application was filed to bring on record the fact that petitioner had issued number of cheques including cheque in question in furtherance of agreement which was relied upon in the subsequent complaint- petitioner wanted to place on record complaint and agreement filed by the respondent in subsequent case, which was rejected – held, that no suggestion was given to the witnesses regarding issuance of cheque for reasons other than those stated in the complaint- additional evidence is not necessary to decide the present case- cheques are not the subject matter of complaint proposed to be placed on record as an additional evidence- additional evidence can not be led to substitute the evidence which has already been led - in absence of any defence or plea additional evidence could not have been led - application was rightly dismissed by the trial Court. Title: Bidhi Chand Vs. Vinod Kumar and another Page-538

Code of Criminal Procedure, 1973- Section 436- Accused was found in possession of 1.5 grams Heroin- held, that quantity of drug recovered from the accused is small quantity and the offence is bailable – the fact that three cases had been registered against the accused for the commission of offence punishable under NDPS Act and he had been convicted in the one of the cases or that one case had been registered against him under Excise Act is of no significance as he is entitled to bail under Section 436 of Cr.P.C- bail granted. Title: Kans Raj Vs. State of Himachal Pradesh Page-966

Code of Criminal Procedure, 1973- Section 438- Accused was declared a proclaimed offender by the Court of Judicial Magistrate 1St Class, Manali- he applied for bail- held, that ordinarily a person who has been declared a proclaimed offender should not be granted anticipatory bail- however, matter was compromised in the present case- therefore, direction issued not to arrest the applicant on the way to appear and surrender in the Court- it is left open to the trial Judge to consider and pass appropriate order on the bail application. Title: Vinod Chadha Vs. State of H.P and another Page-949

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for the commission of offences punishable under Sections 376, 506, 323 read with section 34 of I.P.C. – it has been pleaded that petitioners have joined investigation and they be released on bail in the event of their arrest- held, that petitioners are permanent residents of Chamba and are not in a position to flee from justice – they are cooperative and had joined the investigation- therefore, petitioners are ordered to be released on bail of Rs. 25,000/-. Title: Mohammad Yasin @ Sonu & anr. Vs. State of Himachal Pradesh Page-678

Code of Criminal Procedure, 1973- Section 439- A car was checked and 20 bottles of Corex and 299 bottles of Nitrazepam Nitrosum-10 were recovered from it - it was contended that petitioner was not found in possession of any manufactured drugs- held, that Codeine has been declared a manufactured drug - its small and commercial quantity have also been prescribed - prohibition applies to the entire mixture or any solution or any one or more of narcotic drugs or psychotropic substances- mere fact that drugs are covered under Drugs and Cosmetic Act would not mean that the offender can be penalized only under the Drugs and Cosmetic Act and not under N.D.P.S. Act- petition dismissed. Title: Praduman Justa Vs. State of Himachal Pradesh Page-479

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Sections 302 and 201 of I.P.C- it has been pleaded that petitioner is inside the jail since December, 2015- he has been apprehended on the basis of suspicion alone- held, that considering the gravity of offence and the manner in which offence has been committed, bail cannot be granted- petition dismissed. Title: Deepak Kumar Vs. The State of Himachal Pradesh Page-666

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the accused for the commission of offences punishable under Sections 323, 324, 326, 307 and 354 of the Indian Penal Code- investigation is complete- challan has been filed in the Court- case has been committed to Court of Sessions and is fixed for consideration of charge- accused is not required to be detained in custody as he is not so influential as to win over the prosecution witnesses or tamper with the prosecution case – he will not abscond or flee away from justice- hence, bail application allowed and the accused ordered to be released on bail.Title: Anil Kumar Vs. State of H.P. Page-716

Code of Criminal Procedure, 1973- Section 439- The accused was found in possession of 30 bottles of Rexcof and 60 strips of Tramadol Hydrochloride Paracetamol tablets- 2 bottles were recovered during the course of investigation – he filed bail application pleading that he is innocent and has been falsely implicated – held, that the accused is involved in a crime which is affecting the society-many cases have been registered against one of the co-accused- there is every possibility that offence will be repeated- bail application dismissed. Title: Ajay Dhiman Vs. State of Himachal Pradesh. Page-882

Code of Criminal Procedure, 1973- Section 482- Accused was convicted by the trial court for the commission of offences punishable under Sections 326 and 323 of I.P.C. – an appeal was preferred, which was dismissed- parties entered into a compromise during the pendency of the revision petition- it was prayed that proceedings be quashed- held, that power to quash the proceedings is not to be exercised in heinous and serious offences having a serious impact on the society- mere compromise at the appellate stage is not sufficient to acquit the accused- application to quash the proceedings dismissed. (Para-2 to 11) Title: Baldev Raj Vs. State of H.P. Page-68

Code of Criminal Procedure, 1973- Section 482- An FIR was registered against the petitioners for the commission of offences punishable under Section 447 of IPC and Section 3(I)(V) of Scheduled Castes & The Scheduled Tribes (Prevention of Atrocities) Act – it was pleaded that petitioners were interfering with the land of the informant- a civil suit was also instituted in which interim relief was granted- it was asserted in the FIR that petitioners were aggressive and were likely to cause interference at every stage of enjoyment of land by the informant - this leads to an inference that FIR was filed regarding the civil dispute- a civil dispute cannot be permitted to be converted into criminal offence - where the allegations were made to foist criminal liability, FIR should be quashed- petition allowed and the FIR quashed. Title: Rajesh Thakur and another Vs. State of Himachal Pradesh and another Page-686

Code of Criminal Procedure, 1973- Section 482- An FIR was registered against the petitioner for the commission of offences punishable under Sections 498-A, 323, 325 and 506 of I.P.C with the allegations that he had treated the respondent No. 2 with cruelty- present petition was filed for quashing the FIR on the ground that matter has been compromised between the parties- held, that when the matter has been settled between the parties and does not affect the party at large- proceedings can be quashed- petition allowed and the FIR quashed. Title: Sanjay Kumar Rana Vs. State of Himachal Pradesh & another Page-694

Code of Criminal Procedure, 1973- Section 482- An FIR was registered against the petitioner for the commission of offences punishable under Sections 279 and 337 of Indian Penal Code and

Sections 181 and 182 of M.V. Act- petitioner entered into a compromise with the injured and sought quashing of FIR- held, that FIR can be quashed in appropriate cases to meet ends of justice- when the Court is satisfied that parties have settled the disputes amicably without any pressure, FIR and subsequent proceedings can be quashed- FIR quashed and consequent proceedings are thereby rendered infructuous. Title: Jagjit Singh Vs. State of Himachal Pradesh & another Page-673

Code of Criminal Procedure, 1973- Section 482- An FIR was registered against the petitioner for the commission of offence punishable under Section 20 of N.D.P.S. Act- challan was filed against him and the court framed the charge - it was contended that petitioner is real brother of proprietor of M/s Jain Medical Agency having wholesale drugs licence - he was entitled to sell, stock, exhibit or offer for sale or distribute medicines – held, that according to licence, sale shall be made under the supervision of competent person- it was licensed to stock or exhibit or to offer for sale or distribute the drugs in the shop No. 7 in Haryana - Agency was never authorized to distribute the medicines/drugs throughout the State of Himachal Pradesh- a prima facie case is made out against the petitioner- hence, FIR and consequent proceedings cannot be quashed- petition dismissed. Title: Chandan Jain Vs. State of H.P. Page-603

Code of Criminal Procedure, 1973- Section 482- Complaint was filed by the petitioner for registering the case for the commission of offences punishable under Section 166-B, 337 and 338 of Indian Penal Code pleading that daughter of the informant had suffered pain and was taken to hospital- she was prescribed medicines- she again complained of pain- she was referred to respondent No. 2 who noticed that her appendix had burst- operation was conducted- respondent No. 2 never visited the patient despite repeated requests- her condition deteriorated and she was sent to PGI which concluded that Doctor was negligent while performing duty- complaint was filed, which was dismissed- aggrieved from the order, present petition has been filed- held, that contents of the complaint prima facie disclose the negligence of respondent No. 2 while treating daughter of the informant- merely because affidavit has not been filed along with application under Section 156(3) Cr.P.C. cannot lead to its rejection- order set aside and SHO directed to register the case against respondent No. 2 and to complete investigation. Title: Shashi Pal Vs. State of Himachal Pradesh and another Page-432

Code of Criminal Procedure, 1973- Section 482- Complaint was filed against the petitioner stating that 8 bags containing 3307 tubes of drug 'Freeze Gel' were found during inspection - respondent No. 2 and the petitioners did not have permission to manufacture the drug- it was contended that petitioners are not in-charge and responsible to the Company- however, record shows that error was found in the printing and respondent was requested to return the drug- respondent No. 2 could not have retained the drug- petitioners are Directors of the Company and responsible for conducing its business – conduct of the petitioners is not fair – petition dismissed. Title: Ankur Gulati and another Vs. State of H.P. and others Page-1003

Code of Criminal Procedure, 1973- Section 482- Parties entered into the compromise and prayed that FIR registered for the commission of offences punishable under Sections 279, 337 and 338 IPC be quashed- held, that offence punishable under Section 279 is a not personal criminal offence but is a criminal offence against public at large- permission cannot be granted to compound criminal offence filed against public at large- petition dismissed. Title: Madan Lal Mehta son of late Sh H.L.Mehta Vs. State of Himachal Pradesh and another Page- 1055

Code of Criminal Procedure, 1973- Section 482- Petitioner was convicted for the commission of offence punishable under Section 354 of I.P.C- application was filed for quashing the proceedings on the ground that matter had been compromised between the parties- held, that power to quash the proceedings can be exercised in cases having pre-dominantly civil character, particularly arising out of commercial transactions, matrimonial relationship or family disputes - in the

present case, accused had been convicted and it will not be proper to quash the proceedings- petition dismissed. Title: Rajesh Kumar @ Raju Vs. State of H.P. Page-7

Code of Criminal Procedure, 1973- Section 482- Petitioner was summoned by the trial Court for the commission of offences punishable under Section 504 and 506 of I.P.C.-aggrieved from the order, present petition was filed- held, that at the time of summoning of the accused, Court has to see, whether there are sufficient grounds to proceed against the accused or not- delay will be seen during the course of trial- complicated questions of law are also to be seen during the trial- merely because closure report was filed earlier is no ground to discharge the accused - petition dismissed. Title: Kashmir Singh s/o Lt. Sh. Phandi Ram Vs. State of H.P. & Others Page-605

Companies Act, 1956- Section 433(e)- Petitioner firm rendered services to the respondent-Company for preparation of detailed project report, conducting audit, making liaison with the banks for procuring term loan and getting the working capital limits sanctioned - a sum of Rs. 12,06,580/- was payable to the petitioner – company was also liable to pay Rs. 30,000/- as services tax and Rs. 1,50,000/- for not honouring the contract- company did not pay the outstanding amount- learned Single Judge held that the debt was disputed and there were substantial grounds to resist the same- it was not shown that company had become insolvent and was unable to pay tax, hence, petition was dismissed- held, in appeal that learned Single Judge had discussed the reply and had referred to various judgments- company was in a sound position and has not become insolvent - intricate questions of fact are involved in the instant case, which cannot be gone into in a Company Petition- company Judge had rightly applied the law- appeal dismissed. Title: Soni Gulati and Co. Vs. JHS Svendgaard Laboratories Ltd. (D.B.) Page-984

Constitution of India, 1950- Article 226- A reference was made to Labour Court-cum-Industrial Tribunal, Dharamshala as to whether services of the claimant had been legally terminated as Beldar by the Executive Engineer, HPSEB- the reference petition was partly allowed by the Labour Court- aggrieved from the award, present writ petition has been filed- held, that persons engaged after the engagement of the claimant were continued after the disengagement of the claimant, meaning that the Board had not followed the principle of 'first come last go'- it was also not established that claimant had abandoned the job- claimant was disengaged without complying with the provision of Section 25-G of Industrial Disputes Act- Writ Court cannot sit in appeal and set aside the award made by the Labour Court, which is based on evidence and facts- findings recorded by the Labour Court should not be interfered with, unless and until the findings are perverse or not borne out from the material on record- appeal dismissed. Title: Himachal Pradesh State Electricity Board & Anr. Vs. Mohan Singh & Anr. Page-185

Constitution of India, 1950- Article 226- Consolidation of land started- a scheme was prepared for repartition - every right holder was given right to reserve particular portion of the land upon which the Act will not be applicable and whose possession will remain with the right holder- some land was deducted for common purposes- petitioner and predecessor-in-interest of the respondent agreed that Khasra No. 307/276/197 and Khasra No. 264/169 would remain with the right holders vide Resolution No. 24 dated 24.03.1989- subsequently, predecessor-in-interest of the respondent filed objection before the Consolidation Authority seeking cancellation of resolution No. 24 – resolution was revoked and land was distributed- an appeal was preferred, which was dismissed- further appeal was preferred, which was accepted- revision was preferred - held, that predecessor–in-interest of the respondents No. 3 to 16 had agreed to give his 7-3 kanals of land to the petitioners in lieu of 2-18 kanals of land- he was 87 years of age- he had objected to the resolution immediately after its passing- resolution of exchange was found to be unreasonable by the Revenue Authorities- no interference is required with the same- petition dismissed. Title: Ram Kishan Vs. State of Himachal Pradesh & others Page-1132

Constitution of India, 1950- Article 226- **Electricity Act, 2003**- Section 127- Petitioner is consumer of the respondent board for consumption of the electricity- petitioner applied for the supply of electricity for load of 216.77 KW- load was enhanced to 3285.39 KW and a contract demand of 1460 KVA was made- officer of the board visited the area of the petitioner and it was found that the connected load was 4843.18 KW against the sanctioned load of 216.77/1085.97 KW- an amount of Rs. 53,03,974/- was demanded- an appeal was preferred, which was dismissed- aggrieved from the order, present writ petition was filed- held, that notice was issued to the parties on 25.10.2013 but there is nothing on record to show that petitioner was served or he had appeared before the Appellate Authority- petition was disposed of without hearing the petitioner- petition allowed and parties directed to appeal before the Appellate Authority on 22.8.2016. Title: Parbati Hydroelectric Project Stage-II Vs. H.P.S.E.B. Ltd. & others (**CWP No.4410 of 2014)** Page-361

Constitution of India, 1950- Article 226- **Electricity Act, 2003**- Section 127- Petitioner is a consumer of the respondent board for consumption of the electricity- petitioner applied for the supply of electricity for load of 403.82 KW and load was enhanced to 2539.85 KW - officer of the board visited the area of the petitioner and it was found that the connected load was 1118.26 KW against the sanctioned load of 403.82 KW - an amount of Rs. 22,92,844/- was demanded- an appeal was preferred, which was dismissed- aggrieved from the order, present writ petition was filed- held, that notice was issued to the parties on 25.10.2013 but there is nothing on record to show that petitioner was served or he had appeared before the Appellate Authority- petition was disposed of without hearing the petitioner- petition allowed and parties directed to appeal before the Appellate Authority on 22.8.2016. Title: Parbati Hydroelectric Project Stage-II Vs. H.P.S.E.B. Ltd. & others(**CWP No.4441 of 2014**) Page-364

Constitution of India, 1950- Article 226- Father of the petitioner was employed as regular Mazdoor with Telephone Exchange, OCB Dharamshala - he died in harness on 31.1.2008, leaving behind his wife and three children, including the petitioner- legal heirs applied for compassionate appointment, which was rejected- aggrieved from the order, original application was filed, which was dismissed on the ground of delay- held, that petitioner had filed application after more than four years- the family which had survived for four years after the death of earning member cannot be said to be indigent and entitled for compassionate appointment- petition dismissed. Title: Sanjeev Kumar Vs. Chief General Manager Telecom and others (D.B.) Page-559

Constitution of India, 1950- Article 226- Father of the petitioner was serving under the respondent Board as Chowkidar- he died in harness – petitioner applied for compassionate appointment but his application was returned with the observation that compassionate appointment had been discontinued in view of new policy - held, that at the time of death there was no policy to offer compassionate appointment to the family members- petitioner pleaded that his case should be treated as special case for grant of appointment on compassionate basis- however, it was not explained as to how appointment could be granted on compassionate basis in absence of the policy - Board had provided that instead of compassionate appointment, a lump sum payment can be made to help the family- compensation was duly paid to the family of the deceased- compassionate appointment is not source of recruitment- compassionate appointment cannot be granted as a matter of right in absence of the rules- petition dismissed. Title: Tej Singh vs. Bhakra Beas Management Board and another Page-707

Constitution of India, 1950- Article 226- Gram panchayat had challenged the notification, whereby the areas of Tahliwal were declared as Nagar Panchayat, Tahliwal – writ petition was dismissed on 24.8.2015- SLP was filed, which was dismissed as withdrawn- another writ petition was filed- held, that matter is covered by previous litigation and the present petition is barred by principle of res-judicata- re-litigation is an example of abuse of process of Court- petition dismissed with cost of Rs. 20,000/-. Title: Arjun Singh Vs. State of H.P. and others (D.B.) Page-1025

Constitution of India, 1950- Article 226- Grievance of the petitioner is that respondents have failed to abide by their undertaking that no building/mini secretariat will be built on the land and that it shall be used as a playground by the Government Senior Secondary School, Manali – petitioner and three other persons had earlier filed a writ petition, which was disposed of in view of undertaking- another writ petition was filed, in which application for impleadment was filed by the petitioner, which was allowed- subsequently writ petition was dismissed as withdrawn- held, that Court had directed the respondents to use the land in the best public interest and the State Government had proposed to construct a Cultural Centre in addition to multi level parking over the land- petitioner had also filed a contempt petition in which Deputy Commissioner had stated that he had complied with the orders passed by the High Court and Contempt petition was dismissed- interim orders were not vacated but were discharged- respondents had complied with the orders passed by the Court and whatever had been done, cannot be undone- petition dismissed. Title: Rulda Ram Vs. State of Himachal Pradesh and another (D.B.) Page-634

Constitution of India, 1950- Article 226- Interviews were conducted for the post of Physical Education Teacher by PTA - petitioner was selected and posted as PTE - State had constituted committees to inquire into the cases of irregular appointment- a complaint was filed before the Committee that appointment of petitioner was illegal- Committee ordered the removal of the petitioner- appeal was preferred before Deputy Commissioner, Kullu, which was dismissed- held, that committee was required to ascertain whether appointment of petitioner was in accordance with the rules or not- mere redrawing of the merit list is not sufficient to conclude that appointment was illegal- petition allowed and Committee asked to examine the appointment on the basis of PTA Rules, 2006. Title: Tej Ram Vs. State of H.P. & others Page-577

Constitution of India, 1950- Article 226- It was pleaded that the properties of the petitioner have been directly and indirectly damaged on account of tunneling work being carried out by respondent for the development of four lane road from Kiratpur to Ner Chowk Section of NH-21 from Km 73.2 to Km 186.5– respondent stated that joint inspection was carried out, in which minor cracks were seen in the houses and cowsheds of the residents, which were old and not due to blasting and vibrations - a committee was constituted by Sub Divisional Collector, Sundernagar for evaluating loss/damage to the houses of the petitioners – respondent further claimed that they had taken the precautionary measures - held, that dispute involves adjudication of the facts - the Court would be required to determine whether the properties of the petitioners were damaged and only after determining the same, the individual claims of compensation can be determined by leading evidence and cross-examination of the witnesses- compensation can be awarded in exercise of writ jurisdiction, where facts are not disputed - an alternative and efficacious remedies of approaching the civil Court is available- petition disposed of with liberty to the petitioners to approach the Civil Court. Title: Krishan Vs. Union of India and others (D.B.) Page- 1046

Constitution of India, 1950- Article 226- Labour Court had examined the facts as well as law and had dismissed the reference- Writ Court also held that Labour Court had marshaled and thrashed the facts in right perspective- Writ Court cannot sit as an Appellate Court and set aside the award made by the Labour Court- findings of fact can be questioned if it is shown that Tribunal had erroneously refused to admit admissible and material evidence or has erroneously admitted inadmissible evidence – appeal dismissed. Title: Mohan Lal Vs. The Divisional Forest Officer, Chamba (D.B.) Page-1125

Constitution of India, 1950- Article 226- Learned Counsel for the petitioner had withdrawn the petition with liberty to seek appropriate remedy and the period spent in prosecuting the writ petition ordered to be excluded in terms of Section 14 of the Limitation Act- prayer allowed and petition permitted to be withdrawn with liberty to seek appropriate remedy. Title: M/s Himsun Power Pvt. Ltd. Vs. State of H.P. and others (D.B.) Page-974

Constitution of India, 1950- Article 226- One G filed an application for partition of the land, which was allowed by Assistant Collector 1st Grade- present petitioner R challenged the order by filing an appeal – order of partition was upheld – order was challenged by R in revision petition, which was allowed and the case was remanded to Assistant Collector 1st Grade for a fresh decision- Assistant Collector 1st Grade passed an order of partition, which was again challenged by filing an appeal- appeal was dismissed- a revision was preferred and the case was recommended to Financial Commissioner (Appeals) with observations that opportunity of being heard was not given to the petitioner – Financial Commissioner set aside the recommendation made by the Collector and upheld the order of partition- held, that Financial Commissioner had rightly held that Collector Sirmaur had no jurisdiction to entertain an appeal or a revision- however, Financial Commissioner had erred in upholding the order of partition- parties should have been given an opportunity to assail the order before the appropriate authority- writ petition allowed and the order modified to the extent that parties will have liberty to assail the order before appropriate authority under Land Acquisition Act. Title: Vichiter Singh and others Vs. Jaipal Singh and others Page-736

Constitution of India, 1950- Article 226- Petitioner was appointed as Assistant Cashier-cum-Godown Keeper in the bank- he was promoted to the Officer Cadre and was asked to join at Hyderabad- petitioner did not join and submitted a representation to the Bank Authorities expressing his inability to join at Hyderabad – request was declined – a new promotion policy was circulated- petitioner applied for promotion according to new promotion policy, however, maximum age of promotion was fixed as 56 years in the new policy –case of petitioner was turned down - held, that petitioner has not questioned the new promotion policy- eligibility of the petitioner was to be determined as per the Rules occupying the field at the time of notification of vacancy- writ petition was rightly dismissed- appeal dismissed. Title: Roshan Lal Vs. UCO Bank and others (D.B.) Page-1057

Constitution of India, 1950- Article 226- Petitioner and 7 other candidates appeared for the post of Anganwari Worker- respondent No. 6 was appointed- petitioner contended that respondent No. 6 did not fulfill the eligibility criteria as she was living jointly with her father-in-law and had separated on 31.12.2006, whereas, relevant date was 1.1.2004- husband of respondent No. 6 works as Senior Platoon Commander in Himachal Pradesh Home Guards - he owns 10 bighas of land and is enrolled as Contractor in Himachal Pradesh Public Works Department- an appeal was preferred, which was dismissed- aggrieved from the order, present writ petition has been filed- held, that respondent No. 6 is Prabhakar and has taken admission in B.A. 1st year, which means that Prabhakar is higher qualification than matriculation- no evidence was brought on record to show that income certificate issued to respondent No. 6 does not show her actual income- petition dismissed. Title: Beena Sharma Vs. State of Himachal Pradesh & others Page-341

Constitution of India, 1950- Article 226- Petitioner applied for loan to start tailoring and stitching factory for readymade garments - project report submitted by the petitioner was proved and the case was sent for financing the project- project was sponsored under the margin money scheme of the Khadi and Village Industries Commission (KVIC) – a sum of Rs. 90,000/- was to be kept as subsidy in a fixed deposit- contribution of the petitioner was to be 10% in case of general category and 5% in case of weaker section- loan of Rs. 3 lacs was sanctioned out of which equity of the petitioner was Rs. 0.15 lac- case of the petitioner was sent for releasing Rs. 90,000/-- respondent no. 1 instead of releasing the amount, issued a notice asking the respondent No. 2 to refund Rs. 90,000/- as margin money and interest thereon to respondent no. 1 - aggrieved from the letter, writ petition was filed- respondent no. 1 stated that project of the petitioner was not a new project- petitioner had started the project prior to the sanction of the loan- petitioner was not eligible and was wrongly sanctioned the loan- held, that loan was approved on 3.7.2003- bills were issued in favour of the petitioner prior to the date of sanction for purchase of the machinery – this shows that unit of the petitioner was already in existence before the sanction of the loan-

petitioner had shifted the unit from Shimla to Manali- petitioner had withheld the material facts from the Court and had not come to the Court with clean hands- petition dismissed with cost of Rs. 10,000/-. Title: Anju Rais Vs. Chief Executive Officer, Khadi and Village Industrial Board and another Page-391

Constitution of India, 1950- Article 226- Petitioner filed a writ petition that certain influential persons including respondents No. 5 were keen to get the road constructed in a forest area and had relied upon some documents in support of their claim- respondents stated that building plan of respondent No. 5 was sanctioned as per law- path is in existence and is being maintained by M.C. Shimla- held, that no material was placed on record to show that petition has been filed in public interest- petitioner had chosen to target respondent No. 5 and no other person - petitioner had filed the present petition to espouse his private interest- he is resident of Jutogh situated at a distance of 5 kilometers from the place – no tree was cut or uprooted- no debris was put- petitioner has filed the present writ petition to conduct fishing and roving inquiry, which is not permissible- petition dismissed with cost of Rs. 50,000/-. Title: Ajnesh Kumar Vs. State of H.P. and others (D.B.) Page-584

Constitution of India, 1950- Article 226- Petitioner sought a direction to get the case registered for the commission of offences punishable under Sections 376 and 506 of I.P.C. and to get it investigated from some investigating Agency or from the Officer not below the rank of Dy. S.P. – petitioner got registered an FIR alleging that minor girl of the petitioner was raped by the accused who had drugged her- this fact was narrated to some persons but they asked her not to disclose this incident- investigation was conducted- accused was arrested- persons to whom incident was narrated denied the prosecution version- nothing was found against those persons- challan was filed before the Court- an application was filed before Learned Special Judge, which was dismissed- held, in petition that criminal case is sub judice and trial is going on- therefore, no observation can be made regarding merit of the case - direction issued to Dy.S.P. to further investigate the allegations made in the petition in accordance with law- petition dismissed. Title: Mohd. Sajid Vs. State of Himachal Pradesh and others (D.B.) Page-679

Constitution of India, 1950- Article 226- Petitioner stated that it is running its business in the premises as tenant- respondents No. 1 and 2 have passed orders for sealing the premises, whereby petitioner has been thrown out of its business - held, that writ petition is maintainable at the instance of a tenant- petitioner is running business in the premises as tenant which stands locked- possession of the petitioner is lawful, and petitioner cannot be deprived of the possession without following the mandate of law- petitioner will be unable to run the business and to pay salary to the employees- therefore, direction issued to respondents No. 1 and 2 to unlock the premises and hand over the possession to the petitioner within a week on furnishing an undertaking that petitioner will hand over the possession after four months. Title: Saluja Motors Pvt. Ltd. Vs. District Magistrate and others (D.B.) Page-1059

Constitution of India, 1950- Article 226- Petitioner was appointed as Anganwari Worker – her appointment was challenged by respondent No. 6- her appointment was set aside on the ground that income of her family was more than Rs. 12,000/- per month- an appeal was preferred before Divisional Commissioner, Mandi, who dismissed the same- writ petition was filed, which was disposed of with a direction to take appropriate steps to get the income verified from the Competent Authority and thereafter to afford an opportunity to the affected party to participate in the proceedings – petition was heard by the Appellate Authority and it was found that appointment was bad as certificate of the income produced by the petitioner showing her family to be separate was contrary to parivar register- an appeal was preferred, which was dismissed- held, that Appellate Authority had not referred the matter to the Competent Authority to examine the veracity of the income certificate of the petitioner in accordance with the direction of the High Court- writ petition allowed- order set aside and direction issued to decide the same after

affording opportunity to the parties to put forth their case in accordance with the direction of the High Court. Title: Raksha Devi Vs. State of H.P. and others Page-1226

Constitution of India, 1950- Article 226- Petitioner was appointed as Medical Officer (Part-time) on a monthly salary of Rs. 5000/- under the scheme for Prevention of Alcoholism and Substances (Drugs) Abuse- rehabilitation centre was closed without the prior approval of respondents No. 1 and 2- hence, direction was sought to quash the order of closing the de-addiction and rehabilitation centre, Una- Respondent No. 1 stated that Indian Red Cross Society, Una, was running the De-addiction and Rehabilitation Centre - it has capacity of 15 beds only one beneficiary was found in the centre- many other deficiencies were also found- held, that de-addiction centre was not adhering to the conditions contemplated under the scheme- therefore, release of grant-in-aid was rightly stopped- appointment was on contract basis and the services could be terminated at any time without assigning any reason- closure of the de-addiction centre was not arbitrary- petition has been filed without any basis and is dismissed with cost of Rs.10,000/- Title: Dr. Mohinder Paul Sharma Vs. Union of India & Ors. Page-898

Constitution of India, 1950- Article 226- Petitioner was appointed as Scientific Assistant Grade I in Salal Hydro Electric Project – he was reappointed as Research Assistant and was posted in Quality Control Division- services of the petitioner were transferred to NHPC- petitioner was promoted to the post of Manager Research in NHPC- respondent invited application for the post of Research Officer- a person with M.Sc in Chemistry or Physics was eligible for the said post- petitioner pleaded that a person with M.Sc in Chemistry or Physics with experience in the field of Concrete Technology and Soil Mechanics is not fit to work in the field- promotion policy was formulated to benefit the favourites of the respondent- petitioner filed a representation, which was rejected- held, that petitioner has retired from the services - he will not benefit from the judgment of the Court - respondent had rejected the representation of the petitioner without assigning any reasons - however, directing the respondent to reconsider the representation will not serve any fruitful purpose - it is the prerogative of rule making authority to prescribe mode of selection and minimum qualification for any recruitment and the action of the respondent cannot be faulted. Title: Jagan Nath Vs. National Hydro-Electric & another Page-40

Constitution of India, 1950- Article 226- Petitioner was denied back wages by the Labour Court – aggrieved from the order, present petition has been filed- held, that Labour Court ought to have awarded back wages at least from the date of raising the industrial dispute- Award passed by Labour Court modified to the extent that petitioner shall be entitled for back wages from the date of raising industrial dispute till the date of re-employment. Title: Kulvinder Singh Vs. Executive Engineer, HPPWD Page-195

Constitution of India, 1950- Article 226- Petitioner, a registered organization to protect Cow and to preserve its varieties, sought complete ban on cow slaughter- held, that Constitution does not merely speak of protection of human rights but preservation and protection of man as well as animals, all creatures, plants, rivers, hills and environment – animals have freedom from hunger, thirst and malnutrition, freedom from fear and distress, freedom from physical and thermal discomfort, freedom from pain, injury and disease and freedom to express normal patterns of behavior- citizen must show compassion to the animal kingdom and animals have their own fundamental rights – affidavits have been filed by Superintendents of Police and Deputy Commissioners outlining the steps taken by them- further directions issued on the basis of affidavits - Chief Secretary has also filed an affidavit- direction issued to take up the matter for declaring MSP for 107 commodities- further directions issued to constitute the State Agriculture Commission and to implement Pradhan Mantri Fasal Bima Yojana (PMFBY) – direction issued to Union of India to enact a law prohibiting slaughtering of cow/calf, import or export of cow/calf, selling of beef or beef products and to ensure release of sufficient funds for the construction of gausadans. Title: Bhartiya Govansh Rakshan Sanverdhan Parishad, H.P. Vs. The Union of India & ors. (D.B.) Page-1166

Constitution of India, 1950- Article 226- Petitioners are engaged in the business of liquor and are holders of L-1 Licence- Government approved Liquor Sourcing Policy and Liquor Sales Policy for 2016-17- aggrieved from the policy, present writ petition has been filed contending that the petitioners had deposited money for renewal of the licence granted to them and had invested huge amount for running their business- Government has created a Company namely H.P. Beverage Corporation Limited and it wants to monopolize the entire business – respondents contended that petitioners did not have any right to carry on the liquor business and the decision was taken in the public interest- held, that State Government had made its intention clear to create company/corporation to replace the old system of L-1 wholesale dealers – State Government is competent to make rules for regulating manufacture, supply, storage or sale of liquor- State has power to control the trade of liquor- therefore, decision of the State Government to create Corporation/company for carrying liquor business cannot be held to be illegal or unjustifiable- there is no fundamental right to trade in intoxicants like liquor- State Government is within its right to establish a company/corporation replacing the old system of issuance of licenses to the wholesalers - decision to create a corporation was a policy decision and Courts should not interfere with the same- mere fact that licence fee has been deposited is not sufficient to prove that licence stood renewed in absence of an order to this effect - there cannot be any legitimate expectation when it was made known that a corporation will be created for carrying out wholesale liquor business- petition dismissed. (Para- 19 to 59) Title: Himalayan Wine & Others Vs. State of H.P. & Others (D.B.) Page-99

Constitution of India, 1950- Article 226- Petitioners are owners of the land which was utilized by respondents for the construction of the road without compensating them in accordance with law- respondents admitted the use of the land for construction of the road and stated that no objection was raised by the petitioners at the time of construction of road - now petitioners cannot be permitted to claim that their land should be acquired and they should be compensated- held, that land of the petitioners was utilized for the construction of the road- no material was placed on record to show that the utilization of land was with the consent of the petitioners- it was not explained as to why, the land of the petitioners was not acquired, whereas, land of other persons was acquired- notification was issued after decision of the Court dated 23.12.2008- no material was placed on record to show that petitioners were told that no compensation would be paid to them- petition cannot be said to be hit by delay and laches- State is not entitled to utilize the land of the petitioner without compensating them in accordance with law- petition allowed and respondents directed to initiate the proceedings for acquisition of the land of the petitioners. Title: Shankar Singh and others Vs. State of HP and another Page-425

Constitution of India, 1950- Article 226- Petitioners are owners of the land which is being threatened to be utilized by respondents for construction/widening of Tattapani-Lamshar Khanderi Savindhar Road constructed under the Pradhan Mantri Gram Sarak Yojna- respondents asserted that no objection was raised by the petitioner at the time of survey of the road- there is no provision of acquisition of land under PMGSY- held, that State cannot deprive a citizen of his property without following due process of law- road can only be constructed under PMGSY only on furnishing of affidavits by land owners that they will not claim any compensation for utilization of the land- right to property is a constitutional right and no person can be deprived of the same- writ petition allowed and direction issued to the respondents not to utilize the land of the petitioner without consent of the petitioner or in the alternative without acquiring the same. Title: Tek Chand and others Vs. State of Himachal Pradesh and another Page-457

Constitution of India, 1950- Article 226- Petitioners have set up unit in Himachal for manufacturing steel and other steel products- department of Industry had notified a policy for promoting the industrial activities- rules regarding grant of incentives, concessions and facilities to industrial units in H.P. 2004 were notified- according to petitioners, they are entitled for Power Concessions as per rules and policy- held, that Industrial Units of the petitioners are in the negative list - purpose of negative list is to dissuade entrepreneurs from setting up units

mentioned in the negative list- authority had rightly held that industry in the negative list is not entitled to the benefit- petition dismissed. Title: M/s. SPS Steel Rolling Mills Ltd. Vs. State of Himachal Pradesh and others Page-1127

Constitution of India, 1950- Article 226- Petitioners were on deputation with SJVN- they are aggrieved by the decision of the respondent to implement office memorandum, issue letter and circular for providing different salaries- held, that SJVN is a Mini Rattana Government Company- stipulations, guidelines, notifications and circulars issued from time to time by the Department of Public Enterprises or any other Department of Government of India are to be strictly followed by S.J.V.N.- petitioners are entitled to be paid what has been prescribed in the guidelines, notifications, circulars etc. issued from time to time- expectation based on sporadic, casual or random act or which is unreasonable, illogical or invalid cannot be legitimate expectation- no material was placed by the petitioner to indicate that any promise/assurance was made at any point of time by respondent No. 1- petitioners have failed to prove that they have any legal right to be paid allowance and other benefits –writ of mandamus cannot be issued in absence of breach of duty- petitioners were aware of office memorandums dated 26.11.2008 and 8.6.2009 and had opted for deputation despite knowledge - they have no other person to blame but themselves- petition dismissed. Title: Kewal Singh Shandil and others Vs. Union of India and Others Page-907

Constitution of India, 1950- Article 226- Proceedings were drawn against the petitioner which resulted in an eviction order- an appeal was preferred, which was disposed by a non-speaking order- direction issued to the Appellate Authority to decide the appeal afresh after hearing the parties. Title: Rameshwar Vs. State of H.P. and others (D.B.) Page-1022

Constitution of India, 1950- Article 226- Respondent admitted in their reply that bye laws were made but the water was not supplied due to objections of the villagers - water supply scheme had been constructed and water would be supplied to the petitioner - in view of this reply, petition allowed and respondent directed to supply water and to do the needful. Title: Capt. H.C. Chandel Vs. State of H.P. and others. Page-856

Constitution of India, 1950- Article 226- Respondent constructed a road using the land of the petitioner without paying any compensation- petitioner made request to pay the amount but no action was taken- respondents admitted that land of the petitioner was utilized for construction of the road- however, it was asserted that petition is barred by delay and latches – held, that notification was issued on 28.5.2007 - similarly situated persons were paid compensation- it was not explained as to why petitioner was singled out - it was not pleaded that petitioner had donated the land , therefore, he is entitled to receive compensation- petition allowed and respondents directed to start acquisition proceedings and to pay compensation to the petitioner. Title: Upender Kumar Vs. State of H.P. and Ors. Page- 86

Constitution of India, 1950- Article 226- Respondent filed a writ petition pleading that his land and house were acquired for the construction of Chamera Hydro Electric Power Project Stage-II, District Chamba- he had become houseless and was entitled to employment in terms of the scheme formulated by the State Government- Deputy Commissioner Chamba was directed to decide the representation of respondent no. 1- Deputy Commissioner, Chamba recommended the name of the respondent for employment - aggrieved from the order, present writ petition has been filed- held, that the oustees who have been deprived of their land are entitled to compensation in lieu of the acquisition of their land /house- scheme provided for the employment to the oustee or his family members- no material was placed on record that respondent no. 1 has house or land after the acquisition of the land- therefore, he is entitled to the benefit of employment as per scheme – the employment was provided to other oustees who were rendered homeless/landless - the Deputy Commissioner had rightly passed the order for providing suitable employment for respondent no. 1- writ petition dismissed. Title: National Hydro Electric Power Corp. Ltd. Vs. Karam Chand & Ors. Page-615

Constitution of India, 1950- Article 226- Respondent issued an advertisement for allotment of its retail outlet dealership, which was reserved for the Scheduled Caste category- petitioner applied and secured the highest position- S questioned the selection of the petitioner- respondent informed the complainant that the selection of the petitioner had been made in a fair and transparent manner in accordance with the guidelines and prescribed norms- the respondent vide letter dated 26.7.2010 abruptly cancelled the Letter of Intent- respondent received a mail dated 25.11.2005 from the Head Office, wherein it was mentioned that the advertisement under "Corpus Fund Scheme", where interviews were yet to be conducted, should be cancelled- land had not been procured till the time of interview and it was decided to cancel the Letter of Intent- feeling aggrieved from the order, present petition has been preferred- held, that the respondent itself had been supporting and justifying the selection of the petitioner- all administrative orders are to be considered prospective in nature and when a policy decision is required to be given retrospective operation, it must be stated so expressly or by necessary implication- case of the petitioner was considered as per the terms and conditions of advertisement and LOI has also been issued - the benefit accrued in favour of the petitioner cannot be unilaterally withdrawn by the respondent only on the ground of change of criteria- petition allowed and the order/communication dated 26.7.2010, whereby the Letter of Intent issued in favour of the petitioner was ordered to be cancelled, set aside- respondent Corporation directed to award the retail outlet dealership in question to the petitioner. Title: Rajnish Sonkhla Vs. Indian Oil Corporation Ltd. Page-631

Constitution of India, 1950- Article 226- Respondent joined services of the petitioners as Junior Engineers on 02.08.1976 - he was promoted as Assistant Engineer in 1984- he was placed under suspension but was allowed to cross efficiency bar- prosecution lodged against him resulted into acquittal- period of suspension was ordered to be treated as on duty- review DPC was held to consider the grant of second ACP and the case of the respondent was rejected- respondent filed an original application, which was allowed- aggrieved from the order, present writ petition has been filed- held, that respondent was due for crossing of the efficiency bar and was allowed to cross the same- therefore, it was unfair on the part of the petitioners to seek review of the same after more than 11 years- competent authority could not have denied the favourable consideration after permitting the respondent to cross efficiency bar- petition dismissed. Title: Union of India and others Vs. P.K. Sarin (D.B.) Page- 1075

Constitution of India, 1950- Article 226- Respondent No. 2 issued an advertisement for filling up 15 posts of Assistant District Attorney- petitioners had also participated in the selection process- respondents were selected- petitioners filed a writ petition seeking quashing of the selection- held, that once a candidate had participated in the selection process, he cannot question the same- he is caught by principles of estoppel, waiver and acquiescence – writ petition was rightly dismissed – appeal dismissed. Title: Amar Nath Rana Vs. State of Himachal Pradesh and others (D.B.) Page-950

Constitution of India, 1950- Article 226- Respondent No. 4 acquired huge chunk of land belonging to private land owners as well as the Government in the year, 2005- amount of compensation was deposited by respondent No. 4- petitioners claimed that they are not only entitled to compensation but also to resettlement according to the Scheme- they further claimed compensation and resettlement under the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013- respondents contended that land was acquired as per the provisions of the Act applicable at the time of acquisition – land of choice could not be given to the petitioner and compensation of Rs. 11 lacs was paid to the oustees- held, that petitioners are part of joint family headed by 'B' who had received Rs. 11 lacs under the Scheme and Rs. 83,16,551/- as compensation - relevant date for determining the family is the date of notification issued under Section 4 of the Act- land was acquired in the year 2005 and the family of the petitioners was recorded separately w.e.f. 5.11.2006 till date- petitioners were

residing with 'B' to whom compensation was paid- petition dismissed. Title: Sant Ram & another Vs. State of H.P. & others (D.B.) Page-699

Constitution of India, 1950- Article 226- Respondent no. 6 was engaged as a cook by School Management Committee - subsequently she was disengaged on the ground that she resided in a Panchayat other than the one where the school was located-she filed a writ petition which was disposed of with liberty to approach the second respondent – she was re-engaged - aggrieved from the engagement a writ petition was filed – held, that respondent no. 6 has a residence within the domain of Gram Panchayat where the school was located- respondent no. 6 was engaged prior to the petitioner and applying the principle of last come first go, she is entitled to reinstatement – petition dismissed. Title: Dolma Kumari Vs. State of H.P & others. Page-133

Constitution of India, 1950- Article 226- Respondent was engaged as Beldar on daily wages in 1998 and continued to work till 7th July, 2005- she was retrenched- a reference was made to the Labour Court who concluded that respondent was entitled to reinstatement with 50% back wages- aggrieved from the award, present writ petition was filed- held, that State Government is aggrieved by the award of 50% back wages on the ground of financial difficulty- however, financial difficulty is no ground to set aside the award- work was available with the Department- workmen junior to the respondent were retained in violation of the provision of the Act- petition dismissed. Title: State of H.P. Vs. Lajja Devi Page-645

Constitution of India, 1950- Article 226- Respondent/applicant was appointed as Resident Medical Officer in the Indian Institute of Advanced Study, which was a solitary post in the institution - she was confirmed as such- an Assured Career Progression Scheme was introduced by the Government of India to mitigate hardship of acute stagnation either in a cadre or in an isolated post- applicant made a representation for granting higher pay scale but representation was rejected- aggrieved from the order, an original application was filed before the Central Administrative Tribunal, which was allowed- aggrieved from the order, writ petition was filed- held, that Government of India came out with Dynamic Assured Career Progression Scheme (DACPS) which was made applicable to all Medical Officers- applicant is entitled to the benefit under DACPS as her service conditions were the same as of any medical officer serving in CHS- parent organization of the petitioners was not owned and controlled by the Union of India - the benefit cannot be denied to the respondent/applicant as she is similarly situated- petition dismissed. Title: Union of India and others Vs. Meenu Aggarwal (D.B.) Page-711

Constitution of India, 1950- Article 226- Respondents were directed to process and settle the claim of predecessor-in-interest of the petitioners as per applicable law and there is no justification for filing the appeal- appeal dismissed. Title: Union of India through Secretary (Relief & Rehabilitation) & Ors. Vs. Chander Pal Singh and another Page-894

Constitution of India, 1950- Article 226- Respondents No. 3 and 4 filed an application pleading that they were not given any passage during the consolidation – Director Consolidation directed the Consolidation Officer, Hamirpur to visit the spot and submit report- Case was remanded to provide passage to the respondents- aggrieved from the order, present writ petition has been filed- held, that Consolidation Officer after visiting the spot had held that respondents required passage to approach their land- subsequently a notification was issued- Consolidation Officer had no jurisdiction to pass the order after issuance of the notification- order passed by the Consolidation Officer set aside. Title: Balwant Singh and Ors. Vs. Director Consolidation and Ors. Page-90

Constitution of India, 1950- Article 226- Respondents, particularly, respondent no. 13 has not complied with the directions passed by the Court to construct a multi-storeyed parking- notice ordered to be issued to show cause as to why contempt proceedings may not be issued against the respondent. Title: Asha Chauhan Vs. Himachal Pradesh Bus Stand Management and Development Authority and others. Page-884

Constitution of India, 1950- Article 226- Services of the petitioners were terminated- a reference was made to the Labour Court who dismissed the claim- held, that award passed by the Labour Court is based upon facts and evidence led by the parties- Writ Court cannot sit over factual findings returned by the Labour Court, unless these are trash and illegal- Labour Court had rightly made the award after examining the facts and appreciating the evidence, which was rightly upheld by the Writ Court- appeal dismissed. Title: Surender Kumar Vs. The State of Himachal Pradesh & others (D.B.) Page-814

Constitution of India, 1950- Article 226- Society was registered under Societies Registration Act, 1860 which Act came to be repealed by virtue of Section 58 of the Himachal Pradesh Societies Registration Act, 2006- Chairman and respondents No. 6 and 7 were primarily responsible for establishing the Society and for setting up an educational institution- dispute between them resulted into the matter being brought to the notice of statutory authorities- SDM constituted an inquiry – Tehsildar found that Chairman had forged the resolutions No. 2 and 6- a show cause notice was issued – chairman of the society explained the position clarifying that the persons mentioned in the resolution had participated in the proceedings of general house- students also lodged a complaint against chairman for collecting fee and issuing fake receipts - this fact was brought to the notice of the chairman - SDM ordered the removal of the chairman and deposit of Rs. 4,91,701/- into the account of the Society, appointment of an Administrator and convening of a meeting- this order was confirmed by Appellate/Revisional Authority- held that petitioner was aware of the allegations pending against him- SDM was competent authority to inquire into the allegations made against the chairman of the society and the chairman cannot raise any claim of violation of natural justice – Court cannot appreciate the evidence to disturb the finding of fact returned by the authorities- petition dismissed. Title: Bhardwaj Shikshan Sansthan, Karsog Through its Chairman/President Vs. State of Himachal Pradesh & others Page-1119

Constitution of India, 1950- Article 226- Son of the petitioner was engaged as the conductor in a JCB machine- one J was employed as driver in the machine- machine developed some defect – defective parts were taken to Chandigarh in a pickup**-** driver boarded the jeep but the deceased did not accompany the driver and slipped into a gorge causing his death- matter was reported to police on which FIR was registered - it was contended by the father of the deceased that investigation was not conducted properly and a prayer was made for investigation by CBI- material shows that investigation was conducted properly- there is no merit in the petition, hence, dismissed. Title: Krishan Vs. State of H.P. & others (D.B.) Page-968

Constitution of India, 1950- Article 226- The impugned judgment is not in accordance with the judgment of Hon'ble Supreme Court in ***Raghubir Singh versus General Manager, Haryana Roadways, Hissar, reported in 2014 AIR SCW 5515*** hence, the judgment set-aside - Labour Commissioner directed to make a reference to Industrial Tribunal- cum-Labour Court within six weeks. Title: Dhian Singh Vs. State of Himachal Pradesh and others. Page-886

Constitution of India, 1950- Article 226**-** The matter is covered by the judgment of Punjab and Haryana High Court in LPA No. 406 of 2009, titled as Senior Superintendent of Post Offices, Jalandhar Division, Jalandhar versus Darshan Ram decided on 28-2-2014- the courts should give respect to the law laid down by other High Courts- writ petition disposed of in terms of judgment of Punjab and Haryana High Court. Title: Union of India and another Vs. Ram Kishan Page-893

Constitution of India, 1950- Article 226- The petitioner joined the service of the State as Assistant Conservator of Forest- he was transferred from DFO (T), Bilaspur as DFO (Flying Squad), North Bilaspur- an original application was filed against the order of the transfer which was dismissed- aggrieved from the order, present writ petition was filed- held, that transfer is an incidence of service and the authority has an unfettered power to transfer a person- the

petitioner being a state government employee is liable to be transferred from one place to another- administrative guidelines can furnish a reason to approach the high authority for redressal but cannot have the consequence of depriving the power of transferring an Officer - Judicial review of the order of transfer is permissible when the order is made on irrelevant consideration – the approval of Civil service board had already been obtained by the respondent – the post to which the petitioner was transferred is an equal post- the order was rightly passed by administrative tribunal- petition dismissed. Title: H.K. Sarwata Vs. State of Himachal Pradesh and another. Page-822

Constitution of India, 1950- Article 226- The petitioner was selected and appointed as T.G.T. by Parents Teacher Association- guidelines were framed by the government for dealing with the complaints regarding the appointments of the teachers- a complaint was filed against the petitioner that his appointment was not in accordance with Rules- his appointment was cancelled by S.D.M., Theog- the petitioner preferred an appeal which was dismissed- held, that the committee looking into complaint had not prepared the comparative statement to show that merit was ignored – petitioner was appointed as T.G.T. by P.T.A. in terms of PTA Rules, 2006- orders set-aside and directions issued to the respondent to permit the petitioner to work as PTA. Title: Manorma Verma Vs. State of HP & Ors. Page-203

Constitution of India, 1950- Article 226- Vidhan Sabha invited applications for filling up one post of Driver- appellant and respondent No. 2 appeared in the selection process- 16 marks were awarded to the petitioner and 17 marks were awarded to selected candidate- petitioner filed a writ petition, which was dismissed- held, that selected candidate was senior in age and was rightly appointed- appeal dismissed. Title: Rajesh Kumar Vs. Himachal Pradesh Vidhan Sabha and another (D.B.) Page-558

Constitution of India, 1950- Article 226- Writ Court concluded that Labour Court had not appreciated the evidence in right perspective- learned Counsel for the appellant conceded that Writ Court had rightly made appreciation of evidence- appeal dismissed. Title: The Executive Engineer HPSEB and another Vs. Surinder Singh (D.B.) Page-1003

Constitution of India, 1950- Article 226- Writ petition was dismissed by the Court on the ground that civil suit is pending between the parties- it was not disputed that civil suit is pending adjudication before the civil court- held, that writ petition is not maintainable and was rightly dismissed by the Single Judge- appeal dismissed. Title: Urmila Sharma and others Vs. State of H.P. and others (D.B.) Page-1078

Constitution of India, 1950- Article 299- Plaintiff was a registered potato grower- he supplied 55 bags of certified seed potato @ of Rs. 950/- per bag to defendant No. 3- potato was supplied to the growers under subsidy scheme of the Government- plaintiff is entitled to Rs. 52,250/- but this amount was not paid to him- hence, suit was filed for recovery of the amount- defendants denied the case of the plaintiff- it was asserted that potato was unloaded without any supply order- growers were requested to take back the potato but these were not taken and got rotten- 532 bags were sold and 470 bags got rotten- suit was dismissed by the trial Court- an appeal was preferred, which was allowed- held, in second appeal that receipt of 55 bags of potato seed was not disputed by the defendants- it was also not disputed that receipt was issued in favour of the plaintiff- maximum bags were sold by the defendants and money was retained- defendants had taken benefit and are liable to restore the same- they cannot take benefit of Article 299 of the Constitution of India- appeal was rightly allowed by the Appellate Court- appeal dismissed. Title: State of Himachal Pradesh and others Vs. Devender Singh Page-526

'H'

H.P. Tourism and Trade Act, 1988- Sections 42 and 49- Accused opened a hotel without mandatory registration - a composition fee of Rs. 1,28, 700/- was imposed – the amount was not

deposited on which a complaint was filed – the accused confessed their guilt and fine of Rs. 5,000/- was imposed- an appeal was preferred on which a fine of Rs. 100/- per day was imposed from 25-2-2000 till 18-11-2002 - aggrieved from the judgment, appeal was preferred – held, that it was open for the complainant to prefer an appeal even in a case where the accused had confessed to the commission of crime - confession meant that accused admitted their liability to pay the statutory sum of money - imposition of fine of Rs. 5,000/- was not proper- Ld. Sessions Judge should have imposed fine from the date of the opening of the hotel till the production of the certificate- appeal allowed - fine imposed from the date of opening of the hotel till the production of documents. Title: Tourism and Civil Aviation Vs. Smt. Sunita Bhandari & Another. Page-582

H.P. Urban Rent Control Act, 1987- Section 14- Landlord sought the eviction of the tenant on the ground of non-payment of rent as well as on the ground that the tenant had failed to occupy the premises- the petition was allowed by the Trial Court on the ground of arrears of rent and that the tenant had ceased to occupy the premises - an appeal was preferred which was partly allowed and the findings that tenant had ceased to occupy premises without any reasonable cause were set-aside - aggrieved from the order of the appellate authority, a revision was preferred – held, that the statements of witnesses show that the tenant had shifted to her village after the death of her husband - she was not residing in the premises for 4-5 years- premises remained closed w.e.f. 26-6-2007 till Oct., 2008- it was also admitted that the original tenant had died in the village which probablises the version of the petitioner/landlord- the Appellate Court had wrongly modified the judgment of the Trial Court- Revision allowed. Title: Mohinder Kumar Walia and Ors. Vs. Prakasho Devi and Ors. Page-349

Hindu Marriage Act, 1955- Section 13- Marriage between parties was solemnized on 24.11.1988- husband filed a divorce petition pleading that wife had left matrimonial home without any reasonable cause and had caused cruelty to him- petition was allowed by the trial Court- marriage was dissolved on the ground of desertion – held, in appeal that wife was ousted from the matrimonial home and was maltreated by the husband- husband had contracted second marriage and had two children from the second marriage- maintenance was awarded in favour of the wife- husband had not taken any steps to bring the wife to matrimonial home- divorce petition was wrongly allowed by the trial Court- appeal allowed and judgment of trial Court set aside. Title: Reeta Devi Vs. Manohar Lal Page-689

Hindu Marriage Act, 1955- Section 13- Marriage between the parties was solemnized in the month of March, 1993- a daughter and a son were born from wedlock – behaviour of the wife was harsh, cruel and insulting towards the appellant- she started pressurizing the appellant to reside separately from the parents- she stopped doing household works and used to misbehave with the husband, his mother and his sister- she left home without any reason- divorce was sought on all these grounds- petition was dismissed by the trial Court- held, in appeal that allegations made in the petition are vague and sketchy- husband had failed to prove that wife had treated him with cruelty- mere failure to do household work will not amount to cruelty- on the other hand, it was proved that husband had treated wife with cruelty- he cannot take advantage of his own wrongs- petition was rightly dismissed by the trial Court- appeal dismissed. Title: Pawan Kumar Sharma Vs. Kiran Sharma Page-58

'I'

Indian Contract Act, 1872- Section 56- Plaintiff invited tenders from labour supply mates for extraction of resin and carriage of the same up to road side Depot- tender of the defendant was accepted and as per agreement 354 Qtls. of pure resin was to be extracted from 10,106 blazes at the rate of Rs. 580 per Qtls.- defendant extracted 249.710 Qtls. pure resin and there was shortage of 104.290 Qtls.- relaxation of 67.830 Qtls. of resin was granted – plaintiff is entitled to Rs. 2,44,447/- - defendant denied the claim and filed a counter claim for the recovery of Rs. 79,535/-- suit was dismissed by the trial Court and counter claim was decreed- an appeal was preferred, which was dismissed- held, in second appeal that it was admitted in Ex.PW-4/A that there was a heavy rain fall due to which target was not completed- heavy rain frustrated the

defendant to achieve the contractual target- learned Trial Court had rightly dismissed the suit- appeal dismissed. Title: H.P. State Forest Corporation Vs. Narain Singh Page-858

Indian Evidence Act, 1872- Section 72- Petitioner is defendant no. 2, who stood guarantor for the re-payment of the loan taken by defendant No. 1- defendant No. 2 had taken a plea that defendant no. 1 is a habitual defaulter- defendant no. 1 had managed to forge his signature on the guarantee deed- application for comparison of signature of defendant No. 1 was filed- held, that defendant No. 2 is not competent to dispute the signatures of the defendant No. 1- defendant No. 1 himself could have disputed the signatures- application was rightly dismissed by the trial Court- petition dismissed. Title: Kishori Lal Vs. Jammu and Kashmir Bank Limited & anr Page-348

Indian Forest Act, 1927- Sections 32 and 33- Forest Guard found that one second class kail tree was cut and the accused persons were converting the tree into logs- the accused were tried and acquitted by the Trial Court- held in appeal, PW-1 had admitted that a criminal case was pending between him and the accused which shows animosity on his part- iron saw and two axes were not seized by the Forest Guard- testimony of PW-4 was contradictory - prosecution version was not proved and trial court had rightly acquitted the accused - appeal dismissed. Title: State of H.P. Vs. Harji & others. Page-705

Indian Penal Code, 1860- Section 147, 148, 149, 323, 324, 325, 452, 506 and 341- Accused formed a group to harass the complainant and her family members – accused D and S attacked K, brother of the complainant- when complainant rescued her brother, accused bit the finger of the brother and M due to which they suffered injuries- accused D inflicted a blow on the face of the complainant- accused followed the complainant to her house and threatened to kill her- accused pelted stones on the house causing damage - accused were tried and acquitted by the trial Court- an appeal was preferred, which was dismissed- held, in revision that complainant had presented an exaggerated version, which is not in accordance with initial version- medical evidence did not support the prosecution version- Appellate Court had agreed with the findings of the trial Court - it cannot be said that judgments of the Courts are perverse or the findings are not supported by the evidence- evidence of the complainant did not inspire confidence- High Court will not interfere and re-appreciate the evidence, unless there is perversity or the material evidence was overlooked- there is no infirmity or perversity with the judgments passed by the Courts- revision dismissed. Title: Sunita Devi Vs. Deep Chand & Ors. Page-1150

Indian Penal Code, 1860- Section 147, 148, 452, 302, 323 and 506 read with Section 149- PW-1 had purchased the land in the year 1991 from D- lands of K and Dinesh were situated on two sides of this land- PW-1 filed an application for partition- land was partitioned in the year 2006- he constructed a house on his land - his mother was in the house- all the accused came in a Maruti- they parked the car on the road side and started beating with stone, danda and fist blows- B came on the spot and she was beaten by the accused - she went inside the room- she was followed by the accused who gave her beatings- she fell down and died- accused were tried and acquitted by the trial Court- held, in appeal that adjacent shopkeepers were not cited as witnesses- PW-1 had improved her version- he stated that he was thrown into the pit by the accused but no pit was found on the spot- PW-2 and PW-5 did not support the prosecution version- injuries could have been caused by way of fall- demarcation was not conducted in the presence of the accused- informant party had tried to raise construction on the disputed land and was asked by the accused to stop construction but the informant did not agree- accused had right to protect their property - death of the mother of the informant had taken place due to fall from stair- trial Court had rightly acquitted the accused- appeal dismissed. Title: State of Himachal Pradesh Vs. Dinesh Kumar and others (D.B.) Page-147

Indian Penal Code, 1860- Section 279- Accused was driving a bus in a rash and negligent manner, which hit a Mahindra pick up- he was tried and acquitted by the trial Court- aggrieved

from the order, an appeal was preferred- held, in appeal that PW-1 and PW-3 had attributed negligence to the accused- accused had swerved his vehicle towards wrong side of the road- he had applied brakes on seeing the Mahindra pick-up while informant had slowed the vehicle- photographs also corroborated the version that accused had taken the vehicle towards wrong side of the road- negligence of the accused was established- trial Court had wrongly acquitted the accused- appeal allowed- accused convicted of the commission of offence punishable under Section 279 of I.P.C. and sentenced to undergo imprisonment for a period of two months and to pay fine of Rs.1,000/- . Title: State of H.P. Vs. Raj Kumar Page-144

Indian Penal Code, 1860- Section 279- Accused was driving a truck with high speed under the state of intoxication- he was tried and convicted by the trial Court- an appeal was preferred, which was dismissed- held, in revision that 162.2 milligram and 270.3 milligram alcohol was found in the blood and urine samples of the accused, which shows that he was unable to drive the vehicle according to norms with due care and caution – quantity of liquor was more than permissible limit- testimony of eye-witness established that accused had swerved the vehicle to wrong side of the road, which shows his negligence- prosecution case was proved beyond reasonable – accused was rightly convicted by the trial Court- appeal dismissed. Title: Karam Chand Vs. State of Himachal Pradesh Page-879

Indian Penal Code, 1860- Section 279 & 337- Accused was driving a bus in a rash and negligent manner - he lost control over the vehicle due to which the bus turned turtle- occupants of the bus suffered injuries – the accused was tried and acquitted by the Trial Court- held, in appeal the informant and eye witnesses had not disclosed that accused was talking on the mobile phone while driving the vehicle which makes their testimonies in the Court to this effect doubtful- width of the road was not mentioned in the site plan- possibility of sudden collapsing of kacha portion causing the vehicle to turn turtle cannot be ruled out - prosecution case is not proved beyond reasonable doubt - the accused was rightly acquitted by the Trial court- appeal dismissed. Title: State of H.P.Vs. Kamlesh Kumar. Page-562

Indian Penal Code, 1860- Section 279 and 337- Accused was driving the vehicle in a rash and negligent manner so as to endanger human life and personal safety of others - he struck the vehicle with informant Gurpal Singh who was walking by side of road- accused was tried and acquitted by the trial Court- held, in appeal that PW-2 had specifically stated that vehicle was approaching from Shimla to Solan in fast speed and had hit the injured- this testimony is corroborated by the testimony of PW-3- Medical Officer noticed injuries on the person of the injured- there is no material contradiction between the testimonies of PW-2 and PW-3- minor contradictions are bound to come with the passage of time- trial Court had not properly appreciated the evidence- prosecution case was proved beyond reasonable doubt- appeal allowed and accused convicted of the commission of offences punishable under Sections 279 and 337 of I.P.C. Title: State of H.P. Vs. Vijendra Kumar son of late Shri Ram Nath Page-944

Indian Penal Code, 1860- Section 279, 337 and 304-A**-** Accused hit the vehicle against the pedestrians walking on the road- the vehicle fell 40 feet down the road and occupants sustained injuries- the accused was tried and convicted by the Trial Court – an appeal was preferred which was dismissed- held in revision, the statement of eyewitnesses duly proved that accused was driving the vehicle rashly and negligently – the mechanical expert found the vehicle in a neutral gear- the vehicle was being driven down the hill and it could be presumed that the driver had put the vehicle in neutral gear to save the fuel which shows the rashness and negligence of the accused – the road was 25 feet wide and there was 30 feet long retaining wall- there was 6 inch wall on the side of the road - the vehicle after hitting the wall had fallen in the gorge- this clearly corroborates the version of the eyewitnesses that vehicle was being driven with high speed- the accused was rightly convicted by the Trial Court- Revision dismissed, however, sentenced modified. Title: Sanjay Singh Vs. State of Himachal Pradesh. Page-230

Indian Penal Code, 1860- Section 279, 337 and 304-A- Accused was driving the bus with high speed and hit a car – a person sustained injuries and three persons died in the accident- the accused were tried and acquitted by the Trial Court- held, in appeal one feet snow was found on the spot- PW-2 denied this fact and his testimony cannot be relied upon- the car was being driven towards the wrong side of the road – in these circumstances the negligence of the accused was not proved- appeal dismissed. Title: State of H.P.Vs. Chaman Lal. Page-560

Indian Penal Code, 1860- Section 279, 337 and 338- Accused was driving a truck in a fast speed- he could not control the truck and hit the informant and S- accused was tried and convicted by the trial Court- an appeal was preferred, which was dismissed- held, in revision that medical officer had noticed the injuries on the legs of the victims- PW-5 admitted in the cross-examination that they were perched on the stone, which was within the expanse of the road - they had alighted the stones on seeing the vehicle and were hit by the same - this shows that the misfeasance of the informant had led to the accident- stone was not shown by Investigating Officer, which shows that investigation was not fair - prosecution version was not proved beyond reasonable doubt and the accused was wrongly convicted by the trial Court- revision accepted. Title: Sohan Lal Vs. State of Himachal Pradesh Page-1136

Indian Penal Code, 1860- Section 279, 337, 338 and 304-A- Accused was driving a truck with a high speed - he could not control the vehicle and it went off the road – one person received grievous injuries and died - other persons sustained multiple injuries – the accused was tried and acquitted by the Trial Court- aggrieved from the judgment an appeal was preferred- held, that eye witnesses had specifically stated that accident had not taken place due to the negligence of the accused - the Trial Court had rightly acquitted the accused- appeal dismissed. Title: State of HP. Vs. Kamal Kumar son of Sh Rasil Singh. Page-887

Indian Penal Code, 1860- Section 302 and 201- Husband of the informant went to a sawmill of R but did not return - his dead body was found on the next day- an FIR was registered – investigations revealed that accused had given lift to one K on motorcycle- deceased was found under the influence of liquor – accused was seen following the deceased- accused was tried and acquitted by the trial Court- held, in appeal that prosecution had relied upon the fact that a complaint of intimidation was filed in the year 2007, which furnished the motive for commission of crime- however, the incident had taken place in the year 2011- therefore, motive is not established- Chappal recovered from the spot was not connected to the accused- it was also not proved that accused was last seen with the deceased- circumstances do not lead to the inference of the guilt of the accused- trial Court had rightly acquitted the accused- appeal dismissed. Title: State of Himachal Pradesh Vs. Alamgir Alias Aalo (D.B.) Page-260

Indian Penal Code, 1860- Section 302 read with Section 34- Deceased S had gone to Theog to attend a case- he did not return and his dead body was found- sharp edged weapon wounds were found on his head and left leg- many other injuries were found on his person- accused were arrested who made disclosure statements leading to recovery of weapon- accused were tried and acquitted by the trial Court- held, in appeal that no person had seen the incident and the prosecution had relied upon circumstantial evidence- PW-10, PW-23, PW-24 and PW-25 had not supported the prosecution version - the fact that accused were last seen with the deceased was not proved- there are contradictions and discrepancies regarding the recovery of dead body- weapons of offence did not have any blood- these were not shown to the Doctor who had conducted autopsy- it was not proved that weapons were used by accused for the commission of offence- motive was also not established- these factors were considered by the trial Court who had rightly acquitted the accused- appeal dismissed. Title: State of Himachal Pradesh Vs. Rajinder Thakur alias Raju & Ors. (D.B.) Page- 1064

Indian Penal Code, 1860- Section 306- Accused came to the house of the informant- he abused and threatened the informant that he would take away his daughter forcibly – earlier, a case for

commission of offence punishable under Section 376 of Indian Penal Code was registered against the accused- daughter of the informant committed suicide by pouring kerosene oil on herself and setting herself ablaze- she was referred to PGI but was brought back by the informant as he had no money- accused was acquitted by the trial court- held, in appeal that statement of the deceased was recorded in the presence of Doctor- accused was acquitted on the ground that deceased was not fit to write Ex. PW-2/A and no certificate of mental condition was issued-it is evident from the handwriting that deceased was in tremendous pain and agony- she had written that accused was responsible for her death- PW-2 also admitted that a complaint was lodged with him against the accused and he had asked the accused to mend his ways – accused had threatened the informant in his house- statements of prosecution witnesses are trustworthy- it was duly proved that deceased had committed suicide by pouring kerosene oil on herself - trial Court had wrongly acquitted the accused- appeal allowed and accused convicted of the commission of offence punishable under Section 306 of I.P.C. Title: State of Himachal Pradesh Vs. Pawan Kumar (D.B.) Page-154

Indian Penal Code, 1860- Section 306- Deceased was married to the accused- accused started maltreating and beating the deceased under the influence of liquor – deceased used to disclose about the ill treatment and beatings to her brother-in-law- matter was also reported to the Gram Panchayat- compromise was effected between the parties- deceased committed suicide by jumping into the river- accused was tried and acquitted by the trial Court- held, in appeal that accused is alleged to have subjected the deceased to cruelty under the influence of liquor – matter was reported to Panchayat in the year 2005- incident had taken place in the year 2008- there was discrepancy between the incident and the report- testimonies of prosecution witnesses were contradictory to each other- prosecution case was not proved beyond reasonable doubt and the accused was rightly acquitted by the trial Court- appeal dismissed. Title: State of H.P. Vs. Bajro (D.B.) Page-987

Indian Penal Code, 1860- Section 306 and 498-A- Deceased was married to the accused - accused picked up quarrels with the deceased under the influence of liquor- he started torturing the deceased physically as well as mentally- deceased committed suicide by hanging herself – accused was acquitted by the trial Court- held, in appeal that PW-1 stated that accused used to consume liquor- brother of the deceased had made inquiry from the accused on which accused told him that quarrel had taken place- blue marks were found on the face and leg of the deceased- mother of the deceased stated that accused had taken a sum of Rs. 50,000/- - she had also noticed injuries on the person of the deceased- Medical Officer found 40 injuries on the person of the deceased- trial Court had given perverse findings that prosecution was required to prove that deceased did not have any injury prior to arrival of accused - it was wrongly observed that deceased might be aggressor and accused would not be liable- deceased was severely beaten up and thereafter she had committed suicide- prosecution case was proved beyond reasonable doubt and the accused was wrongly acquitted by the trial Court- appeal accepted- accused convicted of the commission of offences punishable under Section 306 and 498-A of I.P.C. Title: State of H.P. Vs. Shashi Bhushan Mankotia (D.B.) Page-994

Indian Penal Code, 1860- Section 307, 333 read with Section 34- Informant was driving a bus- when bus reached village Khajjan, a tractor was parked on the road side and 2-3 persons were standing on the road- informant blew horn but the persons did not move- accused S and N caught the collar of the Uniform of the informant, dragged him to the road and started beating him- Conductor tried to intervene but he was also beaten- passengers were also beaten by the accused- accused were tried and acquitted by the trial Court- held, in appeal that recovery memo was suspicious and the recovery of weapon of offence was not proved- PW-1 was relative of the informant- no independent witness was associated- there are major contradictions and discrepancies in the testimonies of the prosecution witnesses- suspicion cannot take the place of proof – trial Court had rightly held that prosecution version was not proved and the accused was

rightly acquitted by the trial Court- appeal dismissed. Title: State of Himachal Pradesh Vs. Sanjeevan Singh & others Page-1113

Indian Penal Code, 1860- Section 323 and 326- Informant and F were cutting grass in their fields- accused came and started abusing informant- accused N was holding a danda in his hand and gave a blow on the left wrist of the informant- accused B gave a blow of darati on the small finger of the left hand of the informant- accused were tried and convicted by the trial Court- an appeal was preferred, which was dismissed- held, that PW-1 and PW-2 are related to the each other- no independent witness was examined, although M was cited as an eye witness- court had found that case was not proved against M and K- same evidence could not have been used to convict accused B- injury could have been sustained while cutting grass- two views are appearing on record one of which is favourable to the accused- the view favourable to the accused should have been accepted - Trial Court had wrongly convicted the accused- revision allowed and accused acquitted. Title: Baldev Raj Vs. State of H.P. Page-68

Indian Penal Code, 1860- Section 324 and 506- The informant and one 'R' had gone to the shop of 'B' – the accused was sitting inside the shop- the accused started abusing the informant and threatened to do away with his life – the accused picked a glass and threw it towards the informant- accused caught hold of the informant and gave beatings to him- the accused was tried and convicted by the Trial Court - an appeal was preferred which was allowed- held, in appeal PWs 2 and 5 have admitted that a duel had taken place between the accused and the informant- the possibility of sustaining injuries by way of fall cannot be ruled out- the Appellate Court had rightly acquitted the accused- appeal dismissed. Para 9-11) Title: State of H.P. Vs. Suresh Mehta. Page-564

Indian Penal Code, 1860- Section 325- Informant was in his house when he was told that some persons were quarreling- informant went to the spot to separate them- accused was also present - when the informant tried to save 'S', accused pushed 'S' and informant due to which informant and 'S' fell down- accused was tried and acquitted by the trial Court- held, in appeal that testimonies of prosecution witnesses were contradictory- PW-5 had not supported the prosecution version- there was delay in reporting the matter to police- trial Court had taken a view, which was reasonable- appeal dismissed. Title: State of Himachal Pradesh Vs. Rajpal Singh Page-575

Indian Penal Code, 1860- Section 341, 325, 323, 427 read with Section 34- Accused in furtherance of their common intention wrongfully restrained the informant and gave him beatings due to which he sustained simple and grievous injuries- accused also damaged car of the informant- accused were tried and convicted by the trial Court- an appeal was preferred- learned Sessions Judge modified the sentence but maintained conviction- held, in revision that PW-5 had specifically stated that accused had given beatings to him and had damaged the vehicle- his testimony was duly corroborated by PW-6- Medical Officer also found the injuries on the person of the informant- there are no material contradictions in the testimonies of the witnesses- minor contradictions are bound to come with the passage of time – testimonies of witnesses are trustworthy, reliable and inspire confidence- Court had rightly convicted the accused- revision dismissed. Title: Bir Singh alias Bir Nath son of Dile Ram and another Vs. State of HP Page-597

Indian Penal Code, 1860- Section 354- Informant was returning to her house - petitioner came on a scooter and gave lift to the informant- when she alighted from the scooter, accused caught hold of her arm and asked her as to when he should visit her house- he caught hold of the string of her salwar- this was heard by V- matter was reported to the police – accused was tried and convicted by the trial Court- an appeal was preferred, which was dismissed but the sentence was modified- held, in revision that informant had specifically stated that accused had caught hold of her arm and had asked her to oblige him with sexual favours - it was not asserted that there was any enmity between the parties- version of prosecutrix was corroborated by her husband- delay was properly explained- defence version is not probable- prosecution version was proved beyond

reasonable doubt- accused was rightly convicted by the trial Court – however, benefit of Section 4 of the Probation of Offender Act granted. Title: Rajesh Kumar @ Raju Vs. State of H.P. Page-7

Indian Penal Code, 1860- Section 354 and 506- **Protection of Children from Sexual Offences Act, 2012-** Sections 10 and 21(2)- Prosecutrix was attending lecture of English- her teacher started coughing- prosecutrix brought glass of water from the room of the accused- when she went to return the glass, accused caught hold of her, forcibly kissed her and pressed her breasts- matter was reported the police- accused was tried and convicted by the trial Court- held, in appeal that prosecutrix had supported the prosecution version - PW-2 and PW-4 corroborated the prosecution version- PW-11 proved the birth certificate of the prosecutrix- delay in lodging FIR was properly explained- statement of DW-1 was not satisfactory – prosecution version was duly proved against the accused- however, it was not proved that principal of the School had asked the prosecutrix to patch up the matter or had threatened her - appeal preferred by the accused dismissed and appeal preferred by the Principal allowed. Title: O.P. Chopra Vs. State of Himachal Pradesh Page- 1017

Indian Penal Code, 1860- Section 363, 366 and 376- Prosecutrix went to Sundernagar but did not return- she was recovered from Tanda along with accused- accused was arrested – it was found on investigation that accused had taken away the prosecutrix with the promise to marry her and had sexual intercourse with her against her wishes- accused was tried and acquitted by the trial Court- held, in appeal that prosecutrix had admitted that she had not raised any alarm at Sundernagar Bus Stand or at Chandigarh Bus Stand- her date of birth is shown to be 4.6.1993 and her age was more than 17 years as per ossification test- it was not proved on what basis her date of birth was recorded- her age was more than 18-19 years at the time of incident- prosecutrix had numerous opportunities to raise alarm or to escape- injuries were not noticed on her person- in these circumstances, prosecution version was doubtful and accused was rightly acquitted- appeal dismissed. Title: State of Himachal Pradesh Vs. Raj Kumar (D.B.) Page-330

Indian Penal Code, 1860- Section 363 and 376- Accused had enticed away the prosecutrix with the promise to marry her but it was revealed that he was married and had two children- matter was reported to police- prosecutrix was recovered from the house of the accused- accused was tried and acquitted by the trial Court- held, in appeal that prosecutrix had stated that no bad act was committed with her- she was declared hostile- she admitted during cross-examination that no bad act was done by the accused with her- she further admitted that she had left the Village and reached Tapri after travelling 50 k.m.- prosecutrix was not proved to be minor and the evidence in support of her date of birth was not satisfactory – prosecution version was not proved beyond reasonable doubt and the trial Court had rightly acquitted the accused- appeal dismissed. Title: State of Himachal Pradesh Vs. Dev Raj (D.B.) Page-1139

Indian Penal Code, 1860- Section 363, 366 and 376- Prosecutrix was subjected to sexual intercourse without her consent and against her will- parents of the prosecutrix reported the matter to the police- accused was tried and acquitted by the trial Court- aggrieved from the judgment, present appeal has been preferred- held, that date of birth of the prosecutrix was stated to be 1.5.1994- incident had taken place on 3.8.2008- however, date of birth was not proved satisfactorily- the person at whose instance the prosecutrix was admitted in the school was not examined and no reliance can be placed on the certificate - prosecutrix was not proved to be less than 16 years of age on the date of incident- she had voluntarily accompanied the accused- prosecution case was not proved beyond reasonable doubt- appeal dismissed. Title: State of Himachal Pradesh Vs. Negi Ram son of Sh. Lal Chand Page-1

Indian Penal Code, 1860- Section 376 (g)- Prosecutrix is suffering from mental disorder- B called the informant and informed him that a lady was crying by the side of tank- informant found the prosecutrix with accused and one boy who was wearing ear rings- one accused was lying there as his arm was fractured- prosecutrix informed them that she had been raped and her leg had been

fractured- father-in-law of the prosecutrix made inquiries from informant and requested him to accompany him to police station- an FIR was registered against the accused- accused were tried and acquitted by the trial Court- held, in appeal that Medical Officer has stated that there was no recent sexual intercourse with the prosecutrix- no application was moved for examination to ascertain the mental state of the prosecutrix- no identification parade of the accused was conducted - respondent has been arrayed as accused on the basis of the alleged recovery of ear ring- recovery of ear ring has also not been established beyond reasonable doubt by the prosecution- PW-10 has not supported the prosecution version- chain of circumstances is totally incomplete and it cannot be said that the case against respondent No. 3 is proved- in view of these circumstances, there is no infirmity or perversity in the findings recorded by the trial Court- appeal dismissed. Title: State of Himachal Pradesh Vs. Giri Raj alias Denny and others (D.B.) Page- 566

Indian Penal Code, 1860- Section 376- **Protection of Children from Sexual Offences Act, 2012**- Section 4- Accused is uncle of prosecutrix- she went to the house of the accused to play with his son - prosecutrix was sleeping with the son of the accused- accused carried the prosecutrix to his bed and raped her- incident was narrated to PW-6 who informed father of the prosecutrix, grandmother and other members of the family- however, they instructed her not to talk to any one- PW-6 narrated the incident to her mother- matter was reported to the police- prosecutrix was minor at the time of incident- accused was tried and convicted by the trial Court- held, in appeal that age of the prosecutrix was proved by her birth certificate- her radiological age was also proved by Medical Officer- Medical Officer also found that prosecutrix was exposed to coitus- accused is uncle of the prosecutrix- mother had no motive to falsely implicate anyone- version of the sister of the prosecutrix that no action was taken by her father has gone unrebutted – delay of six days is not material in these circumstances - testimony of the prosecutrix is inspiring confidence and is corroborated by the testimony of her sister- minor contradictions are not sufficient to make the prosecution case doubtful- appeal dismissed. Title: Bansari Lal Vs. State of Himachal Pradesh (D.B.) Page-281

Indian Penal Code, 1860- Section 376- **Protection of Children from Sexual Offences Act, 2012-** Section 4 and 6- Accused had raped the prosecutrix- he was tried and convicted by the trial Court- held, in appeal that prosecutrix had categorically deposed that accused had raped her - her statement was duly corroborated by the statement of PW-4 to whom incident was narrated- Medical Officer found that prosecutrix was sexually assaulted- DNA profile obtained from the shirt of the prosecutrix matched with the DNA profile of the accused, which corroborates the statement of the prosecutrix- prosecutrix was proved to be minor- prosecution version was proved beyond reasonable doubt and the accused was rightly convicted by the trial Court- appeal dismissed. Title: Krishan Chand Vs. State of H.P. (D.B.) Page-922

Indian Penal Code, 1860- Section 376 & 506- Prosecutrix was studying in Class-8th - accused is a teacher in the school who raped her – the matter was reported to police- accused was tried and convicted by the Trial Court- held in appeal the prosecutrix has supported the prosecution version- Medical officer found that prosecutrix was subjected to sexual intercourse- the accused had also confessed by executing a document Ext. PW-4/A- the Prosecution version was proved beyond reasonable doubt - the accused was rightly convicted by the Trial Court - appeal dismissed. Title: Manoj Kumar Vs. State of H.P. Page-197

Indian Penal Code, 1860- Section 376 and 506- **Protection of Children from Sexual Offences Act, 2012-** Section 4- Mother of the prosecutrix left matrimonial home due to beatings given by the father of the prosecutrix/accused- accused used to ravish the prosecutrix - she left home and was noticed by the police at ISBT, Shimla - she was taken to Kasturba Balika Asharam, Durgapur - she left the asharm with her friend and was apprehended by the police- she narrated the incident to police, on which FIR was registered- accused was tried and convicted by the trial Court- held, that prosecutrix was born on 4.3.2000 according to school leaving certificate- she

has given her date of birth as 3.3.2000 in her testimony but that is not sufficient to doubt her version- she was minor on the date of incident - she has supported the prosecution version- there is no reason to disbelieve her testimony- trial Court had rightly appreciated her testimony- appeal dismissed. Title: Mohan Lal vs. State of H.P. (D.B.) Page-970

Indian Penal Code, 1860- Section 376 read with Sections 511 and 354(C)- Prosecutrix was taking bath after raising a curtain with a bed sheet- accused came to her and caught hold of her from her leg and then pushed her down on the ground- he tried to rape her - her niece and some other persons reached at the spot- accused ran away on seeing them- prosecutrix sustained injuries on her neck and leg- accused was tried and convicted by the trial Court- held in appeal that version of the prosecurix was duly corroborated by PW-2 and PW-3- Injuries were noticed on her person- accused was rightly convicted by trial Court- appeal dismissed. Title: Raj Kumar Vs. State of HImachal Pradesh Page- 367

Indian Penal Code, 1860- Section 406 and 420- An advertisement was issued in the newspaper inviting admission to M.Sc. course- informant paid Rs. 30,000/- to one A and handed over the testimonials of his daughter to A- daughter of the informant was not admitted in M.Sc course nor the amount was refunded- accused was tried and acquitted by the trial Court- an appeal was preferred before learned Sessions Judge, which was dismissed- aggrieved from the order, present revision petition has been filed- held in revision that prosecution witnesses had not proved the version of the informant that a sum of Rs. 30,000/- was paid to the accused for admission of the daughter of the informant- informant had himself stated that money was paid to A who was not arrayed as accused- prosecution version was not proved- accused was rightly acquitted by the trial Court- revision dismissed. Title: State of Himachal Pradesh Vs. Ravi Dutt Page- 44

Indian Penal Code, 1860- Section 409 and 420- **Prevention of Corruption Act, 1988-** Section 13(2)- PW-3 had obtained a loan of Rs. 50,000/- for running a karyana shop from H.P. Minorities Finance and Development Corporation- he defaulted - notice was issued to him - accused visited the house of PW-3 and received a sum of Rs.21,000/-- PW-3 informed the corporation regarding the payment made to the accused- notice was issued to the accused and the accused admitted receipt of money- he also deposited a sum of Rs.21,000/- in the account- an FIR was registered against the accused- he was tried and convicted by the trial Court- held, in appeal that accused had admitted receipt of money- he had also admitted deposit of Rs. 21,000/-- a receipt was also issued by the accused- prosecution case was duly proved- accused was rightly convicted by the trial Court. Title: Bhag Chand Soni Vs. State of H.P. Page-396

Indian Penal Code, 1860- Section 420, 409 and 120-B- **Prevention of Corruption Act, 1988-** Section 13(2)- R and V were working as Divisional Manager and Administrative Officer in the United India Insurance Company Limited- Government of Himachal Pradesh had taken a group personnel insurance policy from the company after inviting the quotations- Accused No.1 was working as an agent of the company- accused No. 2 and 3 had paid 10% commission to accused No. 1- Government of Himachal Pradesh had not taken service of any agent for taking the policy- accused had defrauded the company- accused were tried and convicted by the trial Court- held, in appeal that there is no reference of any brokerage/ commission in Memorandum for consideration of the Council of Ministers- United India Insurance Company was requested to furnish cover note and stamped receipt - Government had directly dealt with the Divisional Managers of Insurance Companies- accused No. 1 was not instrumental in the procurement of the premium and the payment of commission to him was illegal and unjustified- accused R and V were aware that accused was not entitled to commission and had issued cheque in favour of D- sanction was properly given by a person who was competent to remove the accused- prosecution case was proved beyond reasonable doubt- appeal dismissed. Title: Rajesh Gupta Vs. Central Bureau of Investigation Page-863

Indian Penal Code, 1860- Section 447, 354, 504, 506 read with Section 34- Informant had gone to toilet - accused put torch light on her, attacked and tore her clothes- informant raised hue and cry on which persons came at the spot- wife of the accused also arrived at the spot who was holding a danda and gave beatings to the informant- accused were tried and acquitted by the trial Court- an appeal was preferred before Sessions Judge, which was dismissed as not maintainable- held, that Section 506 of Indian Penal Code has been declared to be cognizance and non-bailable offence – appeal lies to the Court of Sessions from an order of acquittal passed by a Magistrate in respect of cognizable and non-bailable offence- some of the sections were cognizable and some of the sections were bailable- there are contradictions in the testimonies of eye-witnesses - prosecution version was not proved beyond reasonable doubt- accused was rightly acquitted by the trial Court- petition dismissed. Title: State of Himachal Pradesh Vs. Kamal Singh & another Page-31

Indian Penal Code, 1860- Section 451, 325, 323 read with Section 34- Informant was cutting fuel wood in his court yard- accused tried to take the cattle through the court yard- informant objected to the same, on which accused P inflicted a blow with spade on his face- when wife of the informant tried to rescue him, accused R and S gave blows on the head and other parts of the body with Battans- accused were tried and acquitted by the trial Court- held, in appeal that PW-1 had improved upon his version- presence of PW-4 and PW-5 was doubtful- spade and battans were not connected to the commission of crime- no disclosure statement was made by the accused leading to the recovery of these articles- prosecution version was not proved beyond reasonable doubt- trial Court had appreciated evidence in wholesome and harmonious manner- appeal dismissed. Title: State of H.P. Vs. Prem Chand and others Page- 135

Indian Penal Code, 1860- Section 468, 471, 409, 120B- Prevention of Corruption Act, 1988- Section 13(2)- Accused R was posted as Clerk-cum-cashier in the office of Project Director, Desert Development Project Kaza- accused D (since dead) was posted as SDC - all the projects were under ADC - building of the Veterinary Dispensary was being constructed under Desert Development Project- Executive Engineer Kaza was executing the work- amount of Rs. 3 lacs was disbursed to PWD but the amount of Rs. 2 lacs was deposited- it was found that accused had misappropriated a sum of Rs.1 lac- accused R was convicted by the trial Court for the commission of offences punishable under Sections 409 and 468 of I.P.C. and Section 13(2) of Prevention of Corruption Act and acquitted of the commission of offences punishable under Sections 467 and 120-B of I.P.C.- aggrieved from the judgment, present appeal has been preferred- held, that audit report shows that amount of Rs. 1,00,000/- was transmitted to PWD but was never paid as per account book- Rs. 3 lacs were shown to have been paid to PWD but actually Rs. 2 lacs were paid- thus, misappropriation of Rs. 1 lac was duly proved- the plea taken by the accused that he had paid Rs. 1 lac is not acceptable- there was no justification for making payment by cash- accused was a public servant and guardian of government property- he had misappropriated government money and had misconducted himself - accused was rightly convicted by the trial Court- appeal dismissed. Title: Rajinder Singh Vs. State of H.P. Page- 797

Indian Penal Code, 1860- Section 497- Accused developed illicit relation with informant and committed sexual intercourse with her- a complaint was filed against the accused, which was sent to police for investigation – challan was filed for the commission of offence punishable under Section 497 – accused was tried and convicted by the trial Court- an appeal was preferred, which was dismissed- held, in revision that there are various contradictions in the testimonies of eye-witnesses - police had found that no case was made out against the accused for the commission of offences punishable under Sections 366 and 376 of Indian Penal Code – complaint was signed by husband and wife, which is not maintainable as only a complaint filed by the husband is maintainable- prosecution had failed to prove its case beyond reasonable doubt and the Court had wrongly convicted the accused- revision accepted. Title: Dharam Dass Vs. State of Himachal Pradesh Page-171

Indian Penal Code, 1860- Section 498-A and 302- Deceased was married to the accused- accused subjected her to cruelty due to which she committed suicide by setting herself on fire- accused was tried and acquitted by the trial Court- held, in appeal that marriage was not in dispute- it was duly proved by PW-1 and PW-2 that accused used to physically assault the deceased- a complaint was also filed before Panchayat and police but the same was compromised- deceased was taken in burnt condition to the hospital, where she made a dying declaration before PW-5, a nurse- there is no law that dying declaration has to be made in a particular manner before a particular person- deceased had stated that she was burnt with kerosene oil, which fact was also confirmed by the accused, who brought her to the hospital- she had asked that her parents be informed – nurse advised the accused to take deceased to Ayurvedic Hospital but accused brought her to home- incident had taken place within 7 years of marriage and there is a presumption under Indian Evidence Act- daughter of the deceased had also deposed that accused had put the deceased on fire- her testimony is reliable – there was no sign of bursting of a stove at the spot- prosecution version was proved beyond reasonable doubt and the trial court had wrongly acquitted the accused- appeal allowed and accused convicted of the commission of offences punishable under Sections 498-A and 302 of I.P.C. Title: State of H.P. Vs. Ramesh Chand Page-829

Indian Penal Code, 1860- Section 498-A and 306- Deceased was married to P- she told her parents after one year that she was being ill-treated for not bringing sufficient dowry- she was sent to her matrimonial home after advising in-laws to mend their behavior – however, there was no change in their behavior – Pardhan was taken to the house of the accused and the in-laws of the deceased assured not to repeat such behavior in future- deceased was brought in burnt condition in the hospital - she was referred to Shimla but she died on the way- accused were acquitted by the trial Court- held, in appeal that compromise was effected between the parties but no allegations of physical abuse was made against the husband- no allegation of demand of dowry was made- no evidence was placed on record to show that deceased was subjected to cruelty after this compromise- no independent witness was associated to establish that deceased was being subjected to cruelty and harassment by the accused- no specific act was mentioned on the part of accused which can be termed to be an act of abetment to commit suicide- trial Court had rightly acquitted the accused- appeal dismissed. Title: State of Himachal Pradesh Vs. Pawan Kumar and others (D.B.) Page-654

Indian Penal Code, 1860- Section 498-A and 306 read with Section 34- Deceased was married to accused R as per Hindu rites and customs- she used to disclose that she was being beaten and tortured by her father-in-law, mother-in-law and brother-in-law for bringing insufficient dowry – she died due to asphyxia after consuming phosphate releasing poison- accused were tried and acquitted by the trial Court- held, in appeal that 25 injuries were found on the person of the deceased- probable time between injury and the death was few minutes to few hours – injuries were possible with danda, kick and fist blows- prosecution witnesses categorically deposed that deceased used to tell about the harassment and the torture for bringing insufficient dowry- injuries could not be self inflicted – this shows that deceased was mercilessly beaten by the accused- statements of official witnesses cannot be discarded- deceased could only confide to her close relative – act of the accused had led the deceased to commit suicide- trial Court had wrongly acquitted the accused- appeal allowed- accused convicted of the commission of offences punishable under Sections 498-A and 306 read with Section 34 of Indian Penal Code. Title: State of Himachal Pradesh Vs. Suneel Dutt and others (D.B.) Page-451

Indian Penal Code, 1860- Section 498-A, 306 and 201 read with Section 34- Deceased was married to the accused- accused started maltreating her after one year of the marriage- father of the deceased paid Rs. 20,000/- on four different occasions- she was turned out of her home- she made a telephonic call that she was being beaten and tortured by her in-laws and someone should come and take her therefrom- uncle of the deceased received a call that deceased had expired - when her parents arrived at the spot, her dead body was being cremated- Two vials of

pesticides were taken into possession by the police- accused were tried and acquitted by the trial Court- held, in appeal that deceased had committed suicide in her matrimonial home, however, the allegation that deceased was being subjected to cruelty for bringing insufficient dowry was not established as no complaint was made to the police or panchayat- father of the deceased admitted that accused had not demanded any dowry at the time of marriage- allegation that Rs. 20,000/- was paid by him to the accused on four different occasions was not established- the person in whose presence money was paid was not examined- mere fact that dead body was cremated without informing the relatives of the deceased is not sufficient to infer the guilt of the accused- prosecution had failed to prove its case beyond reasonable doubt and the accused were rightly acquitted by the trial Court- appeal dismissed. (Para-11 to 22) Title: State of H.P. Vs. Tilak Raj & Another (D.B.) Page-64

Indian Penal Code, 1860- Section 498-A, 306 and 201 read with Section 34- Deceased was married to the accused A - accused started maltreating her for being less educated and for not giving clothes to her Jethani- she told her brother that accused were maltreating her and they would not send her to her parents house during Diwali- she died subsequently by consuming poison – accused were tried and acquitted by the trial Court- held, in appeal that trial Court had discarded the testimonies of witnesses due to the fact that they were relatives of the deceased- however, deceased would have confided to her close relatives and not to strangers- testimonies of prosecution witnesses corroborated each other- presumption regarding abetment of the suicide was not rebuted- trial Court had not properly appreciated the evidence and had wrongly acquitted the accused- appeal allowed and accused convicted. Title: State of H.P. Vs. Akhilesh Kumar and others (D.B.) Page-1230

Indian Penal Code, 1860- Section 498-A, 323 and 307 read with Section 34- Prosecutrix was married to accused P- she was harassed by her husband, father-in-law and mother-in-law for bringing less dowry- accused P stated that prosecutrix was not good looking and he wanted to marry some other person- she was tortured physically and mentally- accused had given beating and a rope was tied around her neck with intention to kill her- matter was reported to police- accused were tried and convicted by the trial Court- aggrieved from the order, present appeal was preferred- held, in appeal that Medical Officer had specifically stated that abrasion on the back side of the neck is not possible if a person tries to strangulate herself with a rope, which corroborates the version of the prosecutrix that accused had tied a rope around her neck to kill her- prosecutrix admitted in cross-examination that she and her husband were present in the room at the time of incident, therefore, only husband is to be held liable for the same- further, prosecutrix had not mentioned date and time when she was subjected to harassment- matter was also not reported to police, panchayat or any other authorities - appeal partly allowed- mother-in-law and father-in-law acquitted while husband of the prosecutrix was convicted. Title: Desh Raj & others Vs. State of H.P. Page-167

Indian Penal Code, 860- Section 409, 420, 467, 468 and 471- Accused was working as Sub Inspector in Food and Civil Supply Office- charge was handed over to him on 8.6.1984- he had misappropriated 138 Qt. 67 K.G. wheat, worth Rs. 36,054.20/-- accused was tried and acquitted by the trial Court- held, in appeal that prosecution has failed to prove the entrustment and misappropriation of the wheat - preparation of forged record was also not proved- it was for the prosecution to prove the actual entrustment and distribution with the help of stock register- stock register was neither produced nor was taken into possession- trial Court had taken a reasonable view- appeal dismissed. Title: State of Himachal Pradesh Vs. Krishan Kumar (D.B.) Page-326

Indian Succession Act, 1925- Section 63- plaintiff filed a suit pleading that J was owner in possession of the land- he executed a Will in favour of N, T and H- N executed a Will in favour of the plaintiff No. 6- Assistant Collector had wrongly attested mutation in favour of defendants No. 2 to 4 on the basis of illegal and invalid will- defendants pleaded that J had not executed any Will

in favour of N, T and H- he had executed a Will in favour of defendants No. 2 to 4 on 15.10.1993- mutation was rightly attested on the basis of Will- suit was decreed by the trial Court- an appeal was preferred, which was dismissed- held in second appeal, Will set up by the plaintiff was duly proved by examining the attesting witnesses- marginal witnesses of the Will set up by the defendants did not prove that the deceased had put his signatures in their presence- thus, they had failed to prove the valid execution of the Will- mere registration will not make the Will valid- appeal dismissed. Title: Hari Nand and others Vs. Rama Nand and others Page-549

Indian Succession Act, 1925- Section 63- Plaintiff filed a civil suit for declaration that Will stated to be executed by late S was fraudulent, fictitious, fabricated and was an act of undue influence, coercion and misrepresentation- parties were governed by agricultural customs- there was prohibition regarding alienation of ancestral property without consent of the near reversioner- suit was dismissed by the trial Court- an appeal was preferred, which was dismissed- held, that signatures of the testator were identified by his son- attesting witness was also examined to prove the Will- plaintiff had failed to prove that Will was not valid but was a result of fraud, misrepresentation and undue influence- Will was rightly upheld by the Courts- appeal dismissed. Title: Onkar Singh (since dead) through LRs. Vs. Malka Devi & Others Page-930

Indian Succession Act, 1925- Section 63- Plaintiff filed a Civil Suit for declaration with injunction pleading that they are owners in possession of the suit land - Will stated to have been executed by 'C' was a forged document – suit was decreed by the Trial Court- an appeal was preferred which was dismissed- held in second appeal, the Will was attested by two witnesses L & K - L had supported the Will but K had not appeared in the witness box although she was arrayed as defendant no. 3- she asserted in written statement that her signatures and signatures of testators were procured by way of misrepresentation - 'M" had appended his signatures as identifier; therefore, he cannot be treated to be a attesting witnesses- the Courts had rightly held that no valid Will was executed by the deceased- appeal dismissed. Title: Narotam Vs. Smt. Laxmi Devi & Ors. Page-753

Indian Succession Act, 1925- Section 63- Plaintiff filed a suit pleading that mutation has been attested on the basis of Will- Will is wrong, illegal and result of fraud and undue influence- suit was decreed by the trial Court- an appeal was preferred, which was dismissed- held, in second appeal that plaintiff had not stepped into the witness box to prove the suspicious circumstances surrounding the execution of the Will- Will was registered on the date of attestation- mere fact that DW-2 did not belong the Village of testator is no ground to doubt the validity of the Will - execution of the Will was duly proved- trial Court and Appellate Court had not appreciated the evidence properly- appeal allowed and judgments of the courts below set aside- suit dismissed. Title: Bishan Dass & others Vs. Sardari Lal Page-850

Indian Succession Act, 1925- Section 63- Plaintiffs pleaded that B had died issueless – defendants claimed that B had executed a Will- Appellate Court had failed to take notice that plaintiffs had alleged fraud, undue influence, coercion etc. regarding the execution of the Will- the correct legal position was not noticed by the Appellate Court – Appeal allowed and case remanded to Appellate Court for decision afresh. Title: Munshi Ram (deceased) through his LRs:Dev Kumari and others Vs. Sher Singh and others Page-1088

Industrial Disputes Act, 1947- Section 25- Claimant was appointed as a Forest Guard by the respondent and he worked as such for years together and had put in 240 days in each calendar year- respondents terminated the services of the petitioner without any notice or without payment of any compensation- claim petition was dismissed by the Labour Court- held, that claim put by the claimant that he was engaged by the respondents as Forest Guard in the year 1974 and he continued to serve as such till his termination was not substantiated by him by producing any cogent material on record- petitioner has not proved his Mandays chart from which it can be

inferred that he had completed 240 days in preceding 12 months from the date of termination of his services- record produced by the respondents shows that claimant was engaged as a Guard for 30 days on a consolidated wage of Rs 1046.50/- Labour Court had gone into all the materials while dismissing the petition- the finding of fact recorded by the Labour Court should not be interfered unless the findings so returned by the learned Labour Court are perverse or not borne out from the material on record- petition dismissed. Title: Lachhmi Chand Vs. The Presiding Judge, Industrial Tribunal-cum-Labour Court, Shimla and another Page-1084

Industrial Dispute Act, 1947- Section 25- Petitioner was engaged as a driver on daily wage basis on 17.06.1983 - he worked with the respondents till 31.03.1985 and has completed more than 240 days in a calendar year- his services were terminated on 31.3.1985 without following due process of law- Civil suit was filed, in which an injunction was granted by the Court- suit was dismissed by the Civil court, however, appeal was allowed- termination of the petitioner was held to be illegal- an appeal was preferred, which was dismissed- services of the petitioner were again terminated on 20.10.1993- a civil suit was filed, in which order of status quo was granted but this order was vacated for want of jurisdiction – an original application was filed before the Tribunal, in which interim order was granted- original application was dismissed as withdrawn for want of jurisdiction after which services of the petitioner were again terminated- a reference was made to Labour Court, which awarded compensation of Rs. 2 lacs after holding that termination was illegal- held, that services of the petitioner were terminated w.e.f. 20.10.1993 after complying with the provision of Section 25(F), however, respondents have employed other persons without affording opportunity to the petitioner, which is in violation of Section 25(H) of Industrial Disputes Act- petitioner has attained age of superannuation and, therefore, only direction which can be issued to the respondents is payment of compensation only- compensation enhanced to Rs.5 lacs. Title: Dhanvir Singh Vs. State of Himachal Pradesh & others Page-667

Industrial Disputes Act, 1947- Section 25- L was appointed as Daily Rated Beldar in January, 1994- his services were terminated in December, 1994 without assigning any reasons- many new persons were engaged and juniors were retained- his termination was in violation of principle of last come first go- L died during the pendency of the proceedings- Labour Court passed the award in favour of the legal representatives directing that son of L be given service in place of L- aggrieved from the award, present writ petition has been filed- held, that L had died on 12.4.2008- he was born in 1944, he would have superannuated from services on attaining the age of 60 years - Tribunal was bound to answer and to grant appropriate relief claimed in the claim petition- there was no reference, "whether son of workman was to be given employment or not" - award modified and direction issued to pay back wages from the date of raising industrial dispute dill date of superannuation. Title: The Executive Engineer, HPPWD Division Arki, Distt. Solan, H.P. Vs. Rameshwari Devi and others Page-731

'L'

Limitation Act, 1963- Article 55- Plaintiff filed a civil suit for declaration pleading that he was Development Officer in LIC- defendant No. 3 was appointed as direct agent- according to the plaintiff, defendant no. 3 should have been placed under corporation and could not have been appointed as a direct agent- objection was taken that suit was barred by limitation- suit was dismissed by the trial Court- an appeal was preferred, which was allowed- held, in second appeal that defendant No. 3 was appointed as direct agent on 19.8.1999- suit was filed in March, 1999- plaintiff had issued notice regarding wrongful appointment, which was duly received- defendant no. 3 was appointed as direct agent in contravention of the circular of the Corporation- plaintiff suffered recurring loss by his appointment- in these circumstances, suit was not barred by limitation- appeal dismissed. Title: Life Insurance Corporation of India & Anr. Vs. Shakuntla Sharma & Ors. Page-417

Limitation Act, 1963- Section 5- An application for condonation of delay of one year, 6 months and 5 days has been filed pleading that applicant came to know that respondent No. 2 had sold

some portion of the suit land – an inquiry was made on which, he came to know about passing of the decree- application was contested- held, that applicant has not assigned sufficient reasons for the condonation of delay- Court should be liberal in condoning the delay but the valuable right accrued to the opposite party cannot be taken away - Court should adopt strict approach while considering the case of inordinate delay- sufficient cause for delay should not override substantial justice - application dismissed. Title: Kamal Dev Vs. Ram Prakash and others Page-295

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Motor Vehicles Act, 1988- Section 140- Tribunal allowed interim compensation and awarded Rs. 50,000/- under no fault liability in favour of the claimants - owner was directed to deposit the said amount- feeling aggrieved, present appeal has been preferred- held, that order passed by the Tribunal is illegal and wrong - interim award can be granted on the basis of *prima facie* proof that accident is outcome of rash and negligent driving of the driver of a motor vehicle- insurer directed to satisfy the award with a condition that in case it is proved at the conclusion of the case, that the vehicle was not insured or the owner had committed willful breach, the owner shall reimburse the amount to the insurer. Title: Mast Ram Vs. Pammi Devi Page- 751

Motor Vehicles Act, 1988- Section 140, 163 and 166- Claim petition was dismissed by the Tribunal by holding that deceased himself was at fault and the benefit of the Act could not be extended to a tortfeaser- claimants were held entitled to Rs. 50,000/- under no fault liability- held, that provision of Section 140 is meant to provide the benefit to the claimants and is not dependent upon the fault- no error was committed by the Tribunal- appeal dismissed. Title: Oriental Insurance Company Ltd. Vs. Chetna Devi and others Page-1091

Motor Vehicles Act, 1988- Section 149 - Deceased was traveling in a Jeep which met with an accident due to rash and negligent driving - deceased died on the spot- an FIR was registered against the driver under Sections 279 and 304A of the Indian Penal Code- Claimants, being the dependants of the deceased claimed compensation of Rs. 10.00 lacs - Tribunal allowed the claim petition and saddled the owner with liability - feeling aggrieved from the award, owner filed the appeal - held, that onus was upon owner and driver to prove that claim petition was not maintainable but they had failed to do so- police report has to be treated as Claim Petition by the Tribunal in terms of Section 166(4) of the Act- even filing of claim petition is not mandatory for grant of compensation - claimants had not pleaded in the amended claim petition that the deceased was traveling in the vehicle as labourer for loading/unloading of goods or had hired the vehicle for transportation of goods- offending vehicle was a goods carriage vehicle and not a passenger vehicle- deceased was traveling in the offending vehicle as gratuitous passenger- owner/insured has violated the terms and conditions of the insurance policy and therefore, the owner/insured was rightly held liable to pay the compensation - appeal dismissed. Title: Prasoon Sharma Vs. Bhimi Devi and others Page-792

Motor Vehicles Act, 1988- Section 149- Claimants pleaded that deceased was doing job of labourer in the offending vehicle- accident had taken place due to negligence of B- Tribunal held that B was driving the vehicle at the time of accident- insurer examined U who stated that driving licence was fake- however, he has not given reason for arriving at this conclusion- mere fact that licence is fake is no ground for absolving the insurer from liability, unless it is proved that insured had committed willful breach and had not taken precaution while engaging driver- insurer was rightly held liable to pay compensation- appeal dismissed. Title: National Insurance Company Ltd. Vs. Jagat Singh and others Page-764

Motor Vehicles Act, 1988- Section 149- Claimants pleaded that deceased was standing by the side of the road- he was hit by a tractor- this fact was not specifically denied by owner and driver- owner and driver had not questioned the award- a plea was taken by the insurer that deceased was travelling as gratuitous passenger- however, no evidence was led to prove this fact- report of the investigator also proved that driver had a valid driving licence at the time of accident- in these

circumstances, insurer was rightly held liable- appeal dismissed. Title: United India Insurance Co. Ltd. Vs. Gianti Gupta and others Page-1236

Motor Vehicles Act, 1988- Section 149- Claimants, being dependents of deceased filed the claim petition for grant of compensation – Tribunal awarded sum of Rs. 5,65,000/- along with interest at the rate of 7.5% per annum as compensation in favour of the claimants and insurer was saddled with the liability - feeling aggrieved, insurer preferred the present appeal- held, that owner and the driver had admitted in their reply that the deceased was traveling in the offending vehicle as owner of goods- hence, the deceased cannot be called to be a gratuitous passenger - amount awarded by the Tribunal is meager, since the claimants have not questioned the impugned award the same is reluctantly upheld- appeal dismissed. Title: Oriental Insurance Company Limited Vs. Sheela & others Page-770

Motor Vehicles Act, 1988- Section 149- Deceased was travelling in the vehicle along with vegetables- this fact was admitted by owner and driver- hence, she cannot be said to be an unauthorized passenger- insurer had not led any evidence to prove the breach of terms and conditions of the policy- thus, insurer is liable to pay the amount. Title: Chander Shekhar Vs. Lal Singh and others Page-740

Motor Vehicles Act, 1988- Section 149- Driver had a valid and effective driving licence to drive LMV (TPT) - offending vehicle was a jeep, and its un-laden weight was 1610 kg., thus, vehicle falls within definition of LMV- Tribunal had wrongly saddled the insured with liability- appeal allowed and the insurer directed to satisfy the award. Title: Sanjeev Kumar Vs. Manmohan Singh and another Page-244

Motor Vehicles Act, 1988- Section 149- Insurer contended that deceased was travelling as gratuitous passenger in the truck- deceased was a government official working as Assistant Development Officer (Agriculture) and had boarded the offending truck- he was accompanied by one R who appeared before the Tribunal as RW-1 and deposed that both of them had boarded the truck without any luggage- PW-2 also stated that no luggage/material was found on the spot- therefore, Tribunal had rightly recorded the findings that deceased was travelling in the truck as gratuitous passenger- appeal dismissed. Title: Ashwani Narula Vs. Anita Awasthi & others Page-1161

Motor Vehicles Act, 1988- Section 149- It was contended that deceased was travelling in the vehicle as a gratuitous passenger- his risk was not covered- claimants had specifically pleaded that the deceased had hired the vehicle for loading seasonal vegetables- no evidence was led to the contrary- person hiring the vehicle cannot be called a gratuitous passenger- appeal dismissed. Title: National Insurance Co. Ltd. Vs. Vinod Kumar and another Page-208

Motor Vehicles Act, 1988- Section 149- It was contended that driver did not have a valid licence- held, that burden lies upon the insurer to prove that vehicle was being driven without licence and no evidence was led- appeal dismissed. Title: Oriental Insurance Co. Ltd. vs. Rita Devi and others Page-212

Motor Vehicles Act, 1988- Section 149- It was contended that driver did not have a valid driving licence- held, that un-laden weight of the vehicle is 2560 Kgs., and the vehicle falls within definition of Light Motor Vehicle- driving licence authorized driver to drive LMV, therefore, it cannot be said that driving licence was not valid- appeal dismissed. Title: ICICI Lombard General Insurance Company Limited Vs. Soni Devi and others Page- 344

Motor Vehicles Act, 1988- Section 149- It was contended that driver did not have a valid driving licence- however, no evidence was led to prove this fact- insurer has to plead and prove that the owner of the offending vehicle has committed willful breach of the terms contained in the policy

and mere plea here and there cannot be a ground for seeking exoneration- insurer cannot be permitted to lead evidence at the belated stage to defeat the claim of the claimant- appeal dismissed. Title: Oriental Insurance Company Ltd. Vs. Maya Devi & others Page-772

Motor Vehicles Act, 1988- Section 149- It was contended that driving licence was fake and reliance was placed upon the report- held, that copy of driving licence shows that it was valid from 27.2.2007 till 26.2.2012- insurer has not proved the report- further, the mere the fact that licence was fake is not sufficient to absolve the owner from liability- it was for the insurer to plead and prove that the owner had not taken steps which he was required to take and the driver was not having a valid and effective driving licence – however, no such evidence was led and the insurer was rightly held liable. Title: National Insurance Company Ltd. Vs. Beant Kaur & others Page-761

Motor Vehicles Act, 1988- Section 149- It was contended that insured had committed breach of the terms and conditions of the policy- held, that driver possessed a valid and effective driving licence to drive the vehicle, which was LMV- carrying capacity of the vehicle is 9+1 - no evidence was led to prove that deceased was a gratuitous passenger, - in these circumstances, insurer was rightly held liable. Title: Oriental Insurance Company Limited Vs. Shishna Devi and others Page-214

Motor Vehicles Act, 1988- Section 149- It was contended that vehicle was not insured at the time of accident- owner had committed willful breach of the terms and conditions of the policy- held, that insurer had not pressed issues No. 3 and 4, burden of which was placed upon it- burden to prove the breach of the terms and conditions was upon the insurer but no evidence was led to discharge the burden- appeal dismissed. Title: United India Insurance Company Limited Vs. Kanta Rani alias Kanta Devi and others Page-277

Motor Vehicles Act, 1988- Section 149- It was contended that vehicle did not have valid permit and the insurer is not liable- held, that this issue was not pressed before the Tribunal and cannot be agitated in appeal- otherwise no evidence was led to prove that there was no valid permit- appeal dismissed. Title: The New India Assurance Co. Vs. Minakshi Sharma and others Page-275

Motor Vehicles Act, 1988- Section 149- It was contended that vehicle was carrying the passengers more than the permissible capacity- only one claim petition was filed- held, that carrying more passengers than the permissible capacity does not amount to fundamental breach of the terms and conditions of the policy and the insurer has to satisfy the awards, which are on the higher side. Title: Oriental Insurance Co. Ltd. Vs. Gurmeet Rani and others Page-1221

Motor Vehicles Act, 1988- Section 149- Liability has been fastened upon the appellant on the ground that he was not holding valid and effective driving licence- insured contended that he had engaged a counsel to defend his case before the Tribunal- Counsel absented himself and he was proceeded exparte- held, that once a person engages a counsel, his botheration goes and it is the duty of the counsel to take care of the case - no client can be made to suffer for the fault of the counsel- applicant has filed an application for leading additional evidence, which prima facie shows that appellant had valid and effective driving licence and the vehicle was being driven with proper documents – appeal allowed and case remanded to the Tribunal with the direction to decide the liability to pay the award. Title: Shyam Lal Vs. Reeta Devi & ors Page-1111

Motor Vehicles Act, 1988- Section 149- Tribunal awarded compensation of Rs. 2,04,500/-, along with interest at the rate of 7.5% per annum – feeling aggrieved from the award, present appeal and cross-objection have been preferred- held, that Tribunal had rightly assessed and awarded compensation of Rs. 2,04,500/-, which cannot be said to be on the lower side- 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 at the time of accident, but no evidence was led to prove the same - appeal as well as the cross objections dismissed and the impugned award upheld. Title: Birbal and others Vs. Prabhu Chand and others Page-738

Motor Vehicles Act, 1988- Section 166 - Claim petition was dismissed by the Tribunal after holding that Claimant had failed to prove that accident was outcome of rash and negligent driving of the driver of the car- held, that there is no evidence to prove that accident was outcome of rash and negligent driving of the car- no FIR was registered regarding the accident – Tribunal had rightly recorded the findings regarding the lack of negligence of driver of the car- appeal dismissed. Title: Nagender Kumar Vs. Nitu and others Page-1213

Motor Vehicles Act, 1988- Section 166- Claim petition was dismissed on the ground that deceased was negligent while driving scooter- Investigating Officer also stated that accident is outcome of rash and negligent driving of the deceased- in these circumstances, petition was rightly dismissed- appeal dismissed. Title: Nirmala Devi Vs. Daya Ram & others Page-211

Motor Vehicles Act, 1988- Section 166- Claimant has tendered in evidence copies of cash memos, which disclose that the claimant has incurred the expenditure of Rs. 1,00,233/- on treatment- thus, claimant is entitled to Rs. 1,00,233/- under the head 'medical expenses'- claimant has suffered 20% permanent disability – he has undergone pain and suffering and is entitled to Rs. 50,000/- under the head 'pain and sufferings' and Rs. 50,000/- under the head 'loss of amenities of life'- claimant remained admitted in the hospital and services of attendant were required- hence, expenses of Rs. 25,000/- under the head 'attendant charges and other charges' awarded- thus, claimant is entitled to Rs. 1,00,233 + 50,000/- + 50,000/- + 25,000/- = Rs. 2,25,233/- along with interest @ 7.5% per annum from the date of filing of the claim petition till realization. Title: Rajesh Kumar Vs. Kamlesh Kumari & others Page-794

Motor Vehicles Act, 1988- Section 166- Claimant was student of 9th standard- he met with an accident caused by the driver while driving the bus- he will have to suffer throughout his life- he remained admitted and under treatment for the period of one year- he has suffered trauma, pain and sufferings, and must have spent huge amount on his treatment and other medical expenses- amount of Rs. 1,43,948/- was awarded, which cannot be said to be excessive in any manner- appeal dismissed. Title: National Insurance Company Limited Vs. Ravinder Kumar and others Page-1219

Motor Vehicles Act, 1988- Section 166- Claimant/driver had sustained 55% disability qua his left upper limb – earning capacity of the claimant was Rs. 6,000/- per month- Tribunal had erred in holding that disability had affected the income to the extent of 55%- Medical Officer stated that claimant had sustained 100% disability regarding the profession of driver- thus, loss of income is to be taken as Rs. 6,000/- per month- multiplier of 10 is applicable- claimant is entitled to Rs. 6,000/- x 12 x 10 = Rs. 7,20,000/- under the head 'loss of earning capacity'. Title: Ram Krishan Vs. M/s Associates Bulk Transport Company and others Page-229

Motor Vehicles Act, 1988- Section 166- Deceased was an employee and was drawing salary of Rs. 11,500/- his one half income is to be deducted towards personal expenses- multiplier of '15' is to be applied- claimants are entitled to Rs. 5500x12x15= Rs. 9,90,000/- and Rs. 10,000/- each under the heads 'loss of estate' and 'loss of funeral expenses'- thus, claimants are entitled to total compensation of Rs. 10,10,000/- along with interest @ 7.5% per annum. Title: Neelam Jha and another Vs. Abha Food Industries and others Page-768

Motor Vehicles Act, 1988- Section 166- Deceased was a bachelor and was a student of Engineering- Tribunal has fallen into an error in assessing his income as Rs. 4,500/- per month- by guess work, it can be safely held that he would have been earning not less than Rs. 6,000/- per month -claimants have lost source of dependency to the tune of Rs. 3,000/- per month-

deceased was 22 years of age at the time of death- multiplier of '16' is applicable- claimants are entitled to Rs. 3,000 x 12 x 16 = Rs. 5,76,000/- under the head loss of source of dependency- claimants are also entitled to Rs. 10,000/- each under the heads 'loss of love and affection', 'loss of estate' and 'funeral expenses'- thus, total compensation of Rs. 5,76,000/- + Rs. 30,000/- = Rs. 6,06,000/- awarded in favour of the claimants- Tribunal had rightly saddled the insurer with the liability– appeal allowed. Title: ICICI Lombard Motor Insurance Vs. Balak Ram Chauhan and others Page-747

Motor Vehicles Act, 1988- Section 166- Deceased was a government servant- he was earning Rs. 9,921/- per month, or say Rs. 10,000/- per month- claimants are 4 in number- 1/4th amount is to be deducted towards personal expenses – thus, loss of dependency is Rs. 7,500/- per month- age of the deceased was 40 years- multiplier of '14' is applicable- claimants are entitled to compensation of Rs. 7,500 x 12 x 14 = Rs.12,60,000/- 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. 12,60,000/- + Rs. 40,000/- = Rs. 13,00,000/- along with interest @ 7.5% per annum from the date of filing of the claim petition till its realization. Title: Veena Devi and others Vs. State of H.P. and others Page-279

Motor Vehicles Act, 1988- Section 166- Deceased was a student and was also working as a Supervisor with the Govt. Contractor who appeared in the witness box and stated that he was paying Rs. 8,000/- per month to the deceased as salary- deceased was a bachelor and 50 % amount was to be deducted towards his personal expenses—claimants had suffered loss of dependency of Rs. 4,000/- per month- deceased was 21 years of age- multiplier of '15' is applicable- claimants are entitled to Rs. 4,000/- x 12 x 15 = Rs. 7,20,000/- under the head 'loss of dependency'- Tribunal had awarded Rs. 25,000/- on account of 'love and affection' including funeral expenses, which are maintained- claimants are entitled for compensation of Rs. 7,20,000/- + Rs. 25,000/- = Rs. 7,45,000/- along with interest @ 7.5% per annum from the date of the claim petition till its realization. Title: ICICI Lombard General Insurance Co. Ltd. Vs. Bimla Devi and others Page-1206

Motor Vehicles Act, 1988- Section 166- Deceased was working as Patwari in the revenue department and was drawing salary of Rs. 13,747/- - claimants also pleaded that deceased was an agriculturists having dairy farm and he was earning Rs.6,000/- per month from agricultural vocations and dairy farm – thus, it can be safely said that deceased was earning not less than Rs.16,000/- per month- 1/4th amount was to be deducted towards personal expenses- multiplier of '15' is applicable and the claimants are entitled to Rs. 12,000/- x 12 x 15 = Rs. 21,60,000/- under the head 'loss of income/dependency' and Rs. 10,000/- each under the heads 'loss of consortium', 'loss of estate', 'loss of love and affection' and 'funeral expenses'- thus, claimants are entitled to total compensation of Rs. 22,00,000/- along with interest @ 7.5% per annum from the date of filing the claim petition till its realization. Title: Kamlesh Kaur and others Vs. Rajinder Kumar and others Page-750

Motor Vehicles Act, 1988- Section 166- Income of the deceased was Rs. 3,600/- per month- deceased was a bachelor- half of the amount is to be deducted towards personal expenses- thus, claimants have lost source of dependency to the tune of Rs. 1,800/- per month- deceased was '18' years of age at the time of death- multiplier of '18' is applicable- thus, claimants are entitled to Rs. 1,800x12x18= Rs. 3,88,800/- towards loss of dependency. Title: The New India Assurance Company Vs. Rafikan & others Page-816

Motor Vehicles Act, 1988- Section 166- It was contended that challan was presented against respondents No. 2 and 3 and not against respondent No. 6 and the Tribunal had erred in holding that accident was outcome of contributory negligence of respondents No. 2 and 6- held, that proof by preponderance of probabilities is required in a criminal case but prima facie proof is required

in a claim petition- simply because accused/driver has been acquitted, claim petition cannot be dismissed - drivers had parked their trucks illegally on wrong sides without switching on parking light – this led to the accident- accident was outcome of contributory negligence of both the drivers. Title: National Insurance Co. Ltd. Vs. Prem Singh and others Page-1214

Motor Vehicles Act, 1988- Section 166- It was pleaded by claimants that deceased was unloading the marble slabs- marble slab slipped and hit the deceased - vehicle was stationary for unloading - held that the accident had taken place due to use of the motor vehicle and the claim petition is maintainable- deceased was driver by profession and his income cannot be less than Rs. 6,000/-- 1/3rd amount was to be deducted towards personal expenses- multiplier of '15' is applicable- claimants are entitled to Rs. 4,000/- x 12 x 15 = Rs. 7,20,000/- under the head 'loss of dependency'- claimants are also entitled to Rs. 10,000/- each under the heads 'loss of consortium', 'loss of love and affection', 'loss of estate' and 'funeral expenses'- thus, claimants are entitled to total compensation of Rs. 7,20,000/- + Rs. 10,000/- + Rs. 10,000/- + Rs. 10,000/- + Rs. 10,000/- = Rs. 7,60,000/- with interest @ 7.5% per annum from the date of the claim petition till its realization. Title: Sharestha Devi and others Vs. Kishori Lal and others – Page-246

Motor Vehicles Act, 1988- Section 166- Monthly income of the deceased was Rs. 6,000/- per month- deceased was bachelor and 50% of the amount is to be deducted towards personal expenses- claimants have lost source of dependency of Rs. 3,000/- per month- multiplier of '17' is applicable and claimants are entitled to Rs. 3,000 x 12 x 17= Rs. 6,12,000/- under the head 'loss of dependency- a sum of Rs. 10,000/- each also awarded under the heads 'loss of love and affection', 'loss of estate' and 'funeral expenses'- thus, claimants are entitled to Rs. 6,12,000/- + Rs. 30,000/- = Rs. 6,42,000/- along with interest at the rate of 7.5% per annum from the date of filing of the claim petition till its realization. Title: Sudesh Kumari & another Vs. Kapil Gautam & others Page-1233

Motor Vehicles Act, 1988- Section 166- Monthly income of the deceased was taken as Rs. 3,000/-, which is on lower side- even a labourer would not be earning less than Rs. 6,000/- hence income of the deceased is to be taken as Rs. 6,000/-- there are four claimants and 1/4th amount is to be deducted towards personal expenses - claimants have lost source of dependency to the extent of Rs. 4,500/-- age of the deceased was 31 years- multiplier of '15' is applicable- thus, claimants are entitled to Rs. 4500/- x 12 x 15= Rs. 8,10,000/- under the head 'loss of dependency'- they are also entitled to Rs. 10,000/- each under the heads 'loss of love and affection' , 'loss of consortium', 'loss of estate' and 'funeral expenses'- thus, claimants are entitled to Rs. 8,10,000/- + Rs. 40,000/- = Rs. 8,50,000/- with interest @ 7.5% per annum from the date of filing of the claim petition till realization- award modified. Title: Poonam Sharma & others Vs. Vijay Singh & another Page-217

Motor Vehicles Act, 1988- Section 166- Tribunal had awarded Rs. 30,000/- under the head 'pain and suffering'- claimant had suffered pain and will have to undergo the same throughout his life- thus, he is entitled to Rs. 50,000/- in addition to the amount awarded by the Tribunal. Title: Chaman Lal Vs. Santosh Kumar Rattan & another Page-166

Motor Vehicles Act, 1988- Section 166- Tribunal had discussed all the aspects as to how compensation is to be awarded in an injury case- amount awarded by Tribunal cannot be said to be excessive but is meager- claimant has also not questioned the award, hence the same is reluctantly upheld. Title: Oriental Insurance Company Ltd. Vs. Master Pritiyush Kant and another Page-1224

Motor Vehicles Act, 1988- Section 166- Tribunal held that claimant had failed to prove that driver of offending truck had driven the same rashly and negligently and dismissed the petition- held, that Tribunal must not succumb to the niceties and hyper technicalities of law- negligence is to be determined on the preponderance of probabilities and not on the basis of proof beyond

reasonable doubt- claimants had specifically stated that accident had taken place due to negligence of the driver- mere denial of the accident is not sufficient- witnesses of the claimant prima facie established that accident was outcome of rash and negligent driving of the driver- deceased was 24 years of age- his income cannot be less than Rs. 5,000/- per month- 50% of the amount is to be deducted towards personal expenses and the loss of dependency will be Rs. 2500- multiplier of 15 is applicable- claimant is entitled to Rs. 2500x12x15 = Rs. 4,50,000/- as compensation along with interest @ 7.5% per annum from the date of filing of the claim petition till deposit. Title: Lal Singh Vs. Kamal Devi and others Page-1208

Motor Vehicles Act, 1988- Section 166- Tribunal held that vehicle was being driven by R and the insured had violated terms and conditions of the policy- held, that mandate of Motor Vehicles Act provides for grant of compensation to the victims without succumbing to the niceties and technicalities of procedure- claimant had also arrayed D as respondent who admitted that he was driving the vehicle at the relevant time- FIR was also lodged against D- challan was also filed against D- there is prima facie proof that D was driving the vehicle at the time of accident- findings recorded by Tribunal that R was driving the vehicle set aside - D had valid driving licence at the time of accident- therefore, insurer directed to satisfy the award. Title: Ratinder Garg and another Vs. Kamla and others Page-806

Motor Vehicles Act, 1988- Section 171- Tribunal had awarded interest @ 9% per annum- held, that interest is to be awarded on the prevailing rate- thus, rate of interest reduced to 7.5% per annum from the date of filing of the claim petition till realization of the amount. Title: Oriental Insurance Company Limited Vs. Shishna Devi and others Page-214

Motor Vehicles Act, 1988- Section 171- Tribunal had awarded interest @ 9% per annum- held, that interest is to be awarded as per prevailing rate- thus, rate of interest reduced to 7.5% per annum. Title: Himachal Road Transport Corporation and another Vs. Sarvitari Devi and another Page-188

Motor Vehicles Act, 1988- Section 171- Tribunal had awarded interest @ 9% per annum but the interest was to be awarded as per the prevailing rates- hence, rate of interest reduced from 9% to 7.5% per annum. Title: ICICI Lombard Motor Insurance Vs. Balak Ram Chauhan and others Page-747

Motor Vehicles Act, 1988- Section 173- It was contended that issue involved in the appeal relates only to issue No. 2 so far it relates to 'from whom' and issue No. 7 – findings recorded by the Tribunal on Issues No. 2 and 7 set aside as regards the liability with a direction to decide the issues within 12 weeks. Title: M/s. Shanti Flats & Foundations Private Limited Vs. Mitto Devi and others Page-1212

Motor Vehicles Act, 1988- Section 190- Appellate Tribunal had disposed of the appeal finally and it has no jurisdiction to revise its own order- proceedings before Appellate Authority quashed and a direction issued to convene the meeting at an early date not beyond 31st August, 2016. (Para-3 to 10) Title: M/s New Prem Bus Service Vs. State of H.P. & Others Page-142

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N.D.P.S. Act, 1985- Section 15- Police party received a secret information that accused was selling poppy straw in his tea-stall/Khokha- information was sent to S.P.- search of the Khokha was conducted during which 2.250 Kgs poppy straw was recovered- accused was tried and acquitted by the trial Court- held, in appeal that independent witness had not supported the prosecution version- PW-4 admitted that he had not entered inside the khokha- it was also not proved that poppy straw belonged to the accused- no independent witness was associated, although, there are many shops around the place of recovery- accused was rightly acquitted by the trial Court- appeal dismissed. Title: State of H.P. Vs. Makhan Singh alias Kalia Page-322

N.D.P.S. Act, 1985- Section 15- Police received a secret information that accused was dealing in poppy straw/husk in his house and huge quantity of poppy straw/husk could be recovered on search- information was reduced into writing and was sent to police station for registration of FIR- search of the house of the accused was conducted in presence of independent witnesses during which 7 plastic bags containing poppy straw/husk were recovered- accused was tried and acquitted by the trial Court- held, in appeal that accused was also previously booked for the commission of offence punishable under Section 15 of N.D.P.S. Act in which SHO had appeared as PW-16- it was asserted in that case that house belonged to accused and his brother- it was not proved that partition had taken place between accused and his brother - accused is residing with his wife and children in the house- independent witnesses were not examined as having been won over – no neighbour was associated at the time of recovery- prosecution has failed to prove its case beyond reasonable doubt and accused was rightly acquitted by the trial Court. Title: State of Himachal Pradesh Vs. Satnam Singh @ Satta (D.B.) Page-843

N.D.P.S. Act, 1985- Section 18 and 20- Accused tried to run away on seeing the police- he was apprehended- search of his bag was conducted during which 5 kg charas and 1.5 kg opium were recovered – accused was tried and acquitted by the trial Court- held, in appeal that codal formalities were completed on the spot- case property was produced before SHO who re-sealed it and handed it over to MHC- Trial Court had acquitted the accused on the ground that no independent witness was associated by the police, whereas, prosecution witnesses had specifically stated that accused was apprehended at a secluded place- requests were made to the driver and occupants of the vehicle to become witnesses but nobody had agreed- this shows that police had made efforts to associate independent witness but had not succeeded- testimonies of police officials are creditworthy and inspire confidence- minor contradictions are not sufficient to make prosecution case doubtful- appeal allowed- judgment passed by the trial Court set aside and accused convicted of the commission of offences punishable under Sections 18 and 20 of N.D.P.S. Act. Title: State of Himachal Pradesh Vs. Budh Ram (D.B.) Page-265

N.D.P.S. Act, 1985- Section 18, 20, 29 and 60- The accused were the occupants of the Indica car which was found parked – the car was searched during which 2.1 kg of charas and 1.5 kg opium were recovered – the accused were tried and acquitted by the Trial Court – held in appeal, the Trial Court had acquitted the accused on the ground that driver was not examined and independent witnesses were not associated – there are contradictions in the testimonies of prosecution witnesses- it was specifically stated by the police officials that place was isolated- one police official was sent to bring the independent witnesses- he met two witnesses but they refused to join - police officials deposed consistently - the accused were apprised of their legal right to be searched- charas and opium were sealed in different parcels- there is no requirement of law that the case property is to be seized vide one memo- the prosecution witnesses are not supposed to make statements in a parrot like manner and there are bound to be some contradictions with the passage of time- Statements of official witnesses inspire confidence –the prosecution case was proved beyond reasonable doubt – appeal accepted - accused convicted of the commission of offences punishable under Section 18 Sections 18(c), 20(b)(ii)(C) read with Section 29 of the NDPS Act and the vehicle ordered to be confiscated to the State of H.P. Title: State of H.P. Vs. Ramesh & ors. Page-520

N.D.P.S. Act, 1985- Section 20- A bus was stopped by the police for checking- accused was travelling in the bus on seat No. 23- he had kept a bag between his legs- bag was checked and was found to be containing 3.3 kg charas- accused was tried and acquitted by the trial Court- held in appeal, that driver and conductor had not supported the prosecution version- however, it was admitted that they had put signatures on the memo- statements of official witnesses inspire confidence- all the formalities were completed at the spot- case property remained intact- it was proved that contraband was recovered from the conscious and exclusive possession of the accused- appeal allowed and accused convicted of the commission of offence punishable under Section 20 of N.D.P.S. Act. Title: State of Himachal Pradesh Vs. Gian Chand (D.B.) Page-270

N.D.P.S. Act, 1985- Section 20- A telephonic information was received that accused, owner of tea shop, was indulging in trade of charas- a raid was conducted during which a plastic bag containing 1 kg. 500 grams charas was found- accused was tried and acquitted by the trial Court- held, in appeal that normal discrepancies are bound to occur due to errors of memory, lapse of time and mental disposition- insignificant matters do not affect core of prosecution case - evidence of police officials cannot be discarded merely on the ground that they are police officials and interested in the prosecution-seals were found intact and they were tallied with the seal impression - prosecution has proved that the charas was recovered from the shop of the accused - judgment of the trial Court set aside and accused convicted under Section 20 of N.D.P.S. Act. Title: State of H.P. Vs. Dile Ram (D.B.) Page-638

N.D.P.S. Act, 1985- Section 20- Accused tried to run away on seeing the police- he was apprehended- he was apprised of his right to be searched in the presence of Gazetted Officer or Magistrate- accused consented to be searched by the police- 250 grams charas was recovered during search of the accused- accused was tried and convicted by the trial Court- held, in appeal that accused was apprehended and was apprised of his right to be searched in the presence of Gazetted Officer or Magistrate- all the codal formalities were completed at the spot- testimonies of police officials inspire confidence- minor contradictions are bound to come with the passage of time and cannot be used to discard the prosecution version- accused was rightly convicted by the trial Court- appeal dismissed. Title: Chhinda Ram alias Shinda Ram Vs. State of H.P. Page-400

N.D.P.S. Act, 1985- Section 20- Accused was carrying a pithu bag on his shoulder- he was apprehended on suspicion – his search was conducted during which 2.6 kgs. charas was recovered- he was tried and convicted by the trial court- held, in appeal that police officials consistently stated that accused was stopped and searched - contraband was re-sealed and deposited with MHC who sent it to FSL for analysis- seals were found intact in the laboratory- prosecution version was proved beyond reasonable doubt and the accused was rightly convicted by the trial Court- appeal dismissed. Title: Darshan Singh Vs. State of Himachal Pradesh (D.B.) Page-1014

N.D.P.S. Act, 1985- Section 20- Accused was carrying a rucksack on his left shoulder – he became perplexed on seeing the police party- he was apprehended and his search was conducted during which 222 grams charas was recovered- accused was tried and acquitted by the trial Court- held, in appeal that an option to be searched before Magistrate, Gazetted Officer or police was given to the accused- only option to be searched before Magistrate or Gazetted Officer is to be given - consent memo was not in accordance with law- there are contradictions in the testimonies of officials witnesses- prosecution case was not proved beyond reasonable doubt- accused was rightly acquitted by the trial Court. Title: State of H.P. Vs. Aman Dhama Page-1007

N.D.P.S. Act, 1985- Section 20- Accused was coming from Manikaran carrying a rucksack- he stopped and turned on seeing the police, he threw rucksack on a hedge and tried to run away- he was apprehended- search of the bag was conducted during which 10.496 kgs. Charas was recovered- accused was tried and convicted by the trial Court- held in appeal that accused was apprehended at an isolated and deserted place- PW-2 was sent to call independent witness but no independent witness was available- prosecution witnesses had supported the prosecution version- recovery was effected from the bag- there was no requirement of complying with Section 50 of N.D.P.S. Act- prosecution version was proved beyond reasonable doubt- he was rightly convicted by the trial Court- appeal dismissed. Title: Shyam Prashad Vs. State of H.P. (D.B.) Page-980

N.D.P.S. Act, 1985- Section 20- Accused was found coming through forest path holding a bag on his right shoulder- he became nervous on seeing the police party- he was apprehended – his search was conducted during which 3.5 kgs charas was recovered- accused was tried and acquitted by the trial Court due to non-joining of independent witnesses, contradictions in the

testimonies of the prosecution witnesses - aggrieved from the judgment, present appeal was filed - held in appeal, that accused was found at a lonely place- no independent witness was available, therefore, non-association of independent witness is not fatal to the prosecution version- conviction can be based on the testimonies of official witnesses, if they inspire confidence- police officials had consistently stated that accused had tried to run away on seeing the police- he was apprehended and his search was conducted during which 3.5 kgs. Charas was recovered- they consistently deposed about taking of sample- non-production of seal will not make the prosecution version doubtful – contradictions in the testimonies of official witnesses are not significant and are bound to come with the passage of time - they should not be used to discard the prosecution version- link evidence was complete- seals were intact when the case property was produced before the Court- prosecution version was proved beyond reasonable doubt- trial Court had wrongly acquitted the accused- appeal allowed- accused convicted of the commission of offence punishable under Section 20 of N.D.P.S. Act. Title: State of Himachal Pradesh Vs. Virender Singh (D.B.) Page- 381

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 750 grams charas- he was tried and acquitted by the trial court- held, in appeal that accused was wearing a black jacket and sweater beneath it- it was bulging out- police asked the accused to take out the same- accused took out a yellow coloured bag, which was containing charas – contraband was recovered from the accused but the mandatory provisions of Section 50 of the Act were not complied with as the accused was not asked whether he wanted to give search either before a Magistrate or a Gazetted Officer - the accused was rightly acquitted by the trial Court- appeal dismissed. Title: State of H.P. Vs. Manoj Kumar (D.B.) Page-827

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 450 grams charas, resin content wherein was 136 grams- sentence of two years was imposed by the trial Court- State filed an appeal for enhancing the sentence- held, that accused was found in possession of less than commercial quantity – maximum sentence has been prescribed but it is open for the Court to award lesser sentence- accused was merely a carrier, Investigating Officer had not unearthed the source of the charas seized from the accused- there are no reasons to enhance the sentence- directions issued to Investigating Officers to trace the source of contraband. Title: State of H.P. Vs. Suresh Pratap (D.B.) Page-1010

N.D.P.S. Ac, 1985- Section 20- Accused was found walking ahead of the police party- he was signaled to stop but he tried to run away- he was apprehended and his search was conducted after giving option under Section 50 to him- 1.3 kg charas was found tied to his legs with cello tape – accused was tried and convicted by the trial Court- aggrieved from the order, present appeal has been preferred- held, that drivers of the vehicles had not stopped their vehicles despite the signal of the police- therefore, non-association of independent witness will not be material in the present case- testimonies of police officials inspire confidence- police officials supported the prosecution version regarding the recovery and weighing- minor contradictions are bound to come due to fading of the memory of the witnesses- prosecution version was proved beyond reasonable doubt- link evidence is complete- seals were intact on the parcel –appeal dismissed- directions issued to the courts to put their seals after opening case property in the court. Title: Joga Singh Vs. State of Himachal Pradesh (D.B.) Page-403

N.D.P.S. Act, 1985- Section 20- Accused was occupying seat No. 22 in the bus- he was carrying a black coloured bag on his lap – search of the bag was conducted during which 2.5 kg charas was recovered- accused was tried and convicted by the trial Court- held, in appeal that prosecution version was proved by the official witnesses and the conductor of the bus - all the codal formalities were completed on the spot- case property was produced before PW-7 who re-sealed the same and handed it over to MHC- it was found to be charas on analysis- minor contradictions are not sufficient to make the prosecution case doubtful- prosecution case was

proved beyond reasonable doubt and the accused was rightly convicted by the trial Court- appeal dismissed. Title: Hari Narayan Jaat Vs. State of H.P. (D.B.) Page-179

N.D.P.S. Act. 1985- Section 20- Car was signaled to stop- accused were sitting the car- search of the car was conducted during which one bag containing 830 grams charas was recovered- accused were tried and convicted by the trial Court- held, in appeal that testimonies of official witnesses corroborated each other – independent witnesses had not supported the prosecution version but had admitted their signatures on the memos - they were estopped to depose in variation to the contents of the memo in view of section 91 and 92 of Indian Evidence Act- however, link evidence was not established- case property and sample were sealed with seal 'I', whereas they were bearing seal impression 'I' and 'M' when they were opened in the Court- case property was not connected to the contraband recovered at the spot- malkhana register shows that case property was carried in wooden box, however, no wooden box was produced in the Court - CFSL refused to accept the sample but no entry was made regarding this fact in the malkhana register- trial Court had wrongly convicted the accused- appeal accepted and accused acquitted. Title: Munish Verma & another Vs. State of H.P. Page-79

N.D.P.S. Act, 1985- Section 20- Information was received that one person wearing blue coloured sweater and having thin beard was coming on foot towards Ramshila- information was reduced into writing and was given to superior officer- accused was apprehended and his search was conducted during which 1.10 kg charas was recovered- accused was tried and acquitted by the trial Court – held, in appeal that independent witness has not supported the prosecution version, however, he had admitted his signatures on the seizure memo – hence, he is estopped by the provisions of Sections 91 and 92 of Indian Evidence Act from deposing in variance to the contents of the seizure memo- further, an option was given to the accused to be searched before the police, Gazetted Officer or Executive Magistrate, which is not in accordance with Section 50 of N.D.P.S. Act- there are contradictions relating to date, time and place of seizure in the column No. 3 of NCB Form, which makes the prosecution version doubtful - the accused was rightly acquitted by the trial Court- appeal dismissed. Title: State of H.P. Vs. Dharam Chand (D.B.) Page-989

N.D.P.S. Act, 1985- Section 20- Police party received a secret information that accused were standing in front of Punjabi Dhaba and on their search some contraband can be recovered- accused were found standing outside the Dhaba- search of the bag was conducted during which 1.1 kg charas was recovered- accused were tried and acquitted by the trial court- held, in appeal that independent witnesses have not supported the prosecution version- there were major contradictions in the testimonies of eye-witnesses, which make the prosecution case doubtful- trial Court had rightly held that prosecution version was not proved beyond reasonable doubt- appeal dismissed. Title: State of Himachal Pradesh Vs. Mukesh Mohan Page-809

N.D.P.S. Act, 1985- Section 20- Police party received an information that accused was indulging in the business of selling brown sugar and Charas to the public- information under Section 42 was sent - search of the house of the accused was conducted during which a bag was found, which was containing 900 grams charas and 2 grams brown sugar – accused was tried and acquitted by the trial Court on the ground that ownership of the house was not proved- however, PW-1 admitted that accused was married to J and was residing with her- police officials had also stated this fact- accused was found in verandah of the house- recovery was effected from the house- case property was sent to FSL, Junga for analysis, where it was found to be charas – it was duly proved that accused was in conscious and exclusive possession of the contraband- loss of 50 grams weight is minimal and can be due to weather conditions prevailing in the area- prosecution version was proved beyond reasonable doubt- accused convicted of the commission of offences punishable under Sections 20 (b)(ii)(B) and 20(I)(a) of N.D.P.S. Act. Title: State of Himachal Pradesh Vs. Mehar Chand (D.B.) Page-445

N.D.P.S. Act, 1985- Section 20- Police party was present near Garagushaini to Khauli road - accused came from Khauli on foot - he was carrying a backpack - he tried to run away on seeing the police- he was apprehended – bag was searched and was found to be containing 15 kgs. charas- accused was tried and acquitted by the trial Court- held, in appeal that trial Court had discarded the site plan on flimsy grounds – I.O. had shown general directions of the road- independent witnesses were not available- statements of official witnesses inspire confidence and are trustworthy- minor contradictions about the place from where accused was apprehended and whether buildings were existing and shops were at a short distance were not sufficient to acquit the accused- it was not necessary to produce the logbook – prosecution case was proved beyond reasonable doubt- appeal accepted and accused convicted of the commission of offence punishable under Section 20b) (ii)((C) of N.D.P.S. Act. Title: State of Himachal Pradesh Vs. Roop Singh (D.B.) Page-998

N.D.P.S. Act, 1985- Section 20, 25 and 29- Police party was standing at D for patrolling- Motorcycle came which was being driven by respondent No. 1- respondent No. 2 had thrown a bag in khad which was seen by the police- motorcycle was stopped- driver disclosed his name as R and pillion rider disclosed his name as S – on inquiry pillion rider revealed that bag contained liquor and was thrown on seeing the police- bag was floating in the water- bag was taken out and checked – it was found to be containing 15.30 grams charas- accused were tried and acquitted by the trial court- held, in appeal that PW-1 and PW-2 corroborated the prosecution version regarding the presence of the accused on the spot, inquiry made from the accused, recovery of bag from khad, recovery of charas from the bag and other formalities- police officials also supported the version of the prosecution- no reason was assigned as to why the police would be deposing falsely- difference in time in the testimonies of the witnesses is minor and will not affect the prosecution case adversely- non production of original seal is not material - every procedural error or defect is not fatal to prosecution story unless it causes serious prejudice to accused- seals were found intact and non-production of original seal will not cause any prejudice- there are no major contradictions in the statements of official witnesses- they had no motive to depose falsely against the accused- it was duly proved that accused were in possession of charas, which was being transported by them on a motorcycle- accused convicted and motorcycle ordered to be confiscated to the State. Title: State of Himachal Pradesh Vs. Rakesh Kumar and another (D.B.) Page-1142

N.D.P.S. Act, 1985- Section 20 and 29- A car was intercepted by the police – accused 'T' was driving the car, accused 'S' was sitting on the front seat, while accused 'M' was sitting on the rear seat- Accused 'S' tried to hide the bag on seeing the police- search of the bag was conducted during which 4.5 kgs charas was recovered- accused were tried and acquitted by the trial Court- held, in appeal that vehicle was intercepted at 3:00 A.M- police had no prior information that charas was being transported, thus, it was a case of a chance recovery- no independent witnesses could have been present at 3:00 A.M- non association of independent witness is not material in such circumstances - some additional information was supplied in new NCB form but that is not sufficient to doubt the prosecution version- codal formalities were completed at the spot- accused were travelling in the same vehicle- prosecution case was proved beyond reasonable doubt- appeal accepted and accused S convicted of the commission of offence punishable under Section 20 of N.D.P.S. Act and accused T and M convicted of the commission of offence punishable under Section 29 of N.D.P.S. Act. Title: State of H.P. Vs. Surender Kumar & ors. (D.B.) Page-441

N.D.P.S. Act, 1985- Section 20 and 29- A car was signaled to stop by the police, which was checked and was found to be containing 540 grams charas- accused were tried and convicted by the trial Court- held, in appeal that all the codal formalities were completed at the spot- case property was produced before PW-6 for resealing who re-sealed the same and handed it over to MHC- minor contradictions in the statements of witnesses are not sufficient to doubt the prosecution version- all the witnesses stated unanimously that charas was recovered from the backseat of the car- recovery was effected from the car- there was no requirement of complying

with Section 50 of N.D.P.S. Act- car was stopped at an isolated place- therefore, independent witnesses could not have been associated- prosecution version was proved beyond reasonable doubt- accused were rightly convicted- appeal dismissed. Title: Govind Kumar and another Vs. State of Himachal Pradesh Page-96

N.D.P.S. Act, 1985- Section 20 and 29**-** A Maruti Alto Car occupied by accused was checked - a white coloured bag was found lying near the gear- 2.5 kg charas was recovered from the bag- the accused was tried and convicted by the Trial Court – held in appeal, car was intercepted at 1:10 p.m. at an isolated place – PW-5 was sent to procure witnesses but none could be found- statements of official witnesses inspire confidence- recovery was effected from the bag kept in the car- provision of Section 50 was not required to be complied with - the prosecution case was proved beyond reasonable doubt and the accused was rightly convicted by the Trial Court- appeal dismissed. Title: Deen Mohammad & another Vs. State of H.P. Page-742

N.D.P.S. Act, 1985- Section 20 and 29- A Maruti car was signaled to stop- accused sitting on the seat beside the driver threw an orange coloured bag on the rear seat and tried to run away- driver and accused were apprehended- vehicle was searched and 1.4 kg charas was recovered from the bag- accused were tried and convicted by the trial Court- held, in appeal that prosecution witnesses duly proved that accused were apprehended in Maruti car- vehicle was intercepted at 1.30 AM- there was no possibility of associating independent witnesses- minor contradictions in the statements are bound to come with the passage of time - recovery was effected from the Car and there was no requirement of complying with Section 50 of N.D.P.S. Act- minor variation in the weight of the contraband is not significant- prosecution had proved its case beyond reasonable doubt and the accused were rightly convicted by the trial Court- appeal dismissed. Title: Varun Kumar Malhotra and another Vs. State of Himachal Pradesh Page-817

N.D.P.S. Act, 1985- Section 20 and 29- Accused were sitting in the rain shelter – they tried to run away on seeing the police- they were apprehended- accused P was found to be in possession of 2.750 kgs. charas- he was charged under Section 20 of N.D.P.S. Act while accused B was charged under Section 29 of N.D.P.S. Act- accused were tried and acquitted by the trial Court- held, in appeal that personal search of the accused was carried out- accused were required to be asked independently whether they wanted to be searched before the gazetted officer or before the Magistrate- they were asked by one consent memo- thus, there was non-compliance of Section 50 of N.D.P.S. Act- case property was also not produced before SHO- prosecution version was not proved and accused were rightly acquitted- appeal dismissed. Title: State of H.P. Vs. Puran Bahadur & another (D.B.) Page-437

N.D.P.S. Act, 1985- Section 20 and 29- Scorpio Jeep was signaled to stop- police asked for the documents of the jeep on which occupants of the jeep became perplexed making police suspicious – one blanket bag and a carry bag were found in the boot compartment of the jeep- person sitting in the rear seat was carrying a bag in his lap- bags were checked and 4.5 kg charas was recovered – accused were tried and acquitted by the trial Court- held, in appeal that accused were apprehended at 6:30 A.M at a secluded place- police waited for independent witness but when no one came, search was conducted in the presence of official witnesses- statements of official witnesses are trustworthy and inspire confidence- accused were travelling in the jeep from which contraband was recovered- they knew each other – prosecution had proved beyond reasonable doubt that contraband was recovered from the conscious and exclusive possession of the accused- appeal allowed and accused convicted of the commission of offences punishable under Sections 20 and 29 of N.D.P.S. Act. Title: State of Himachal Pradesh Vs. Raj Kapoor alias Raj and others (D.B.) Page-533

N.D.P.S. Act, 1985- Section 22- A vehicle being driven by the accused was stopped and checked – a bag containing vials of Rexcof cough syrup was found in the car- the accused was tried and convicted by the Trial Court- held, in appeal the testimonies of Police Officials prove the recovery

– there are no contradictions or improvements in their testimonies- independent witness has also supported the prosecution version- merely because other witnesses were not associated is not sufficient to doubt the prosecution version- Trial Court had rightly convicted the accused- appeal dismissed. Title: Vinod Kumar Vs. State of H.P. Page-139

N.D.P.S. Act, 1985- Section 22- Accused was found in possession of 28 capsules of Spasmo Proxyvon and 25 vials of Rexcof cough syrup without any permit/licence- accused was tried and convicted by the trial Court- held, in appeal that testimonies of prosecution witnesses corroborated each other- minor contradictions are bound to come with the passage of time- police officials had no inimical relation with the accused to falsely implicate him- personal search was not conducted- Section 50 of N.D.P.S. Act was not complied with- it was a chance recovery, which cannot be doubted due to non-examination of independent witnesses- link evidence was not completed and there was no tempering with the case property - testimonies of witnesses were corroborated by abstract of malkhana register, road certificate, special report, rukka, resealing of sample, NCB form, resealing certificate, seal impression, seizure memo etc.- trial Court had rightly convicted the accused- appeal dismissed. Title: Amzad Khan son of Sh. Azam Khan Vs. State of Himachal Pradesh Page-334

N.D.P.S. Act, 1985- Section 37- Petitioner was apprehended with one kg. charas- it was contended that one kg. is below commercial quantity and rigours of Section 37 of the Act, are not applicable- held, that offence was committed by the accused not only against the individuals but against the society-prima facie case has been made out against the petitioner and he is not entitled to bail- petition dismissed. Title: Gurdass Singh Vs. State of H.P. Page-548

Negotiable Instruments Act, 1881- Section 138- Accused had borrowed money from the complainant and had issued a cheque for the repayment of the amount- cheque was dishonoured with an endorsement 'insufficient funds'- accused failed to make payment despite valid notice of demand- he was tried and convicted by the trial Court- an appeal was preferred, which was dismissed- held, in revision that revisional jurisdiction should normally be exercised in exceptional cases when there is a glaring defect in the proceedings or there is a manifest error of law resulting in flagrant miscarriage of justice- Revisional Court will interfere when findings recorded by the Court are perverse, based on no evidence or contrary to the evidence on record- accused had failed to rebut the statutory presumptions attached to the cheque- accused was wrongly convicted by the trial Court- revision petition dismissed. Title: Hira Nand Shastri Vs. Ram Rattan Thakur and another Page-190

Negotiable Instruments Act, 1881- Section 138- Accused had issued a cheque of Rs. 50,000/- for discharging his existing debt/liability- cheque was dishonoured with the endorsment "Insufficient funds" - amount was not paid despite the receipt of valid notice of demand- accused was tried and convicted by the trial Court- an appeal was preferred, which was dismissed- held, that it is duly proved that accused had borrowed Rs. 50,000/- from the complainant - accused had issued a cheque, which was dishonoured- accused had failed to make the payment, even after the receipt of the legal notice- accused was rightly convicted by the trial Court - appeal dismissed. Title: Sardar Singh Kapoor Vs. Chander Kanta & anr. Page-1023

Negotiable Instruments Act, 1881- Section 138- Accused issued a cheque in favour of the complainant in discharge of his legal liability, which was dishonoured for want of 'sufficient funds'- amount was not paid despite receipt of notice of demand- accused was convicted by the trial Court- an appeal was preferred, which was dismissed- held in revision that accused had admitted the issuance of cheque- this fact was also proved by the testimony of the complainant- cheque was dishonoured due to insufficient funds- accused had issued a reply to the notice admitting that cheque was issued by him but the payment was stopped as the complainant had failed to supply apple- however, no evidence was adduced in support of this fact- accused was under obligation to pay the amount to the complainant- presumption under Section 139 was also

not rebutted- in these circumstances, accused was rightly convicted – revision dismissed. Title: Paras Ram Vs. Rakesh Kumar & anr. Page-683

Negotiable Instruments Act, 1881- Section 138- Accused issued a post dated cheque for a sum of Rs.1,18,000/- in favour of the complainat, which was dishonoured with the endorsment 'insufficient funds'- accused did not pay the amount to the complainant despite receipt of valid notice of demand – accused was tried and convicted by the trial Court- an appeal was preferred, which was dismissed- it was contended in the revision that trial Court did not have territorial jurisdiction as incident had taken place within the jurisdiction of Judicial Magistrate 1st Class, Theog- mere issuance of demand notice from Shimla will not confer the jurisdiction upon the Court at Shimla- held, that cheque was payable at Kotkhai and was dishonoured at Kotkhai- mere issuance of demand notice at Shimla will not confer the jurisdiction upon the Court at Shimla- no objection regarding lack of jurisdiction was raised by the accused before the trial Court and the judgment cannot be set aside on the ground of lack of territorial jurisdiction since no failure of justice had taken place - even otherwise Judicial Magistrate 1st Class exercises jurisdiction within a particular district where he is appointed, therefore, Magistrate at Shimla had jurisdiction to entertain the complaint- revision dismissed. Title: Padam Singh Thakur Vs. Madan Chauhan Page-1094

'P'

Prevention of Food Adulteration Act, 1954- Section 16 (1) (a) (ii)- Accused failed to produce licence for selling food articles on demand by Food Inspector- he was tried and convicted by the trial Court- an appeal was preferred, which was dismissed- held, in revision that accused was found selling food articles- he had failed to produce any licence for the same- he claimed that licence was given for renewal but he produced a licence which was valid from 1.4.2005 till 31.3.2005- inspection was made on 4.6.2004 and thus, there was no valid licence on the date of inspection- accused was selling food articles without valid licence- he was rightly convicted by the Court- appeal dismissed. Title: Ashwani Sood Vs. State of Himachal Pradesh Page-159

Prevention of Food Adulteration Act, 1954- Section 16(1)(a)(ii) read with Section 7(i)(iii)- **Code of Criminal Procedure, 1973-** Section 319- Food Inspector lifted sample of Pineapple ice-cream, which was found to be adulterated- an application for impleadment was filed, which was allowed- aggrieved from the order, present revision has been filed- held, that company has committed an offence and is a necessary party – permission was granted to launch prosecution against Managing Director/all the directors/ partners but it was due to inadvertence on the part of Food Inspector that company was not arrayed as an accused - there was no delay in filing the application- purpose of Section 319 is that the real culprit should not escape – there was no perversity or illegality in the order- revision dismissed. Title: M/s Devyani Food Industries Limited Vs. State Himachal Pradesh and another Page-467

Protection of Women from Domestic Violence Act, 2005- Section 12- Complainant filed a complaint stating that she is legally wedded wife of the respondent- S and his family members taunted her for bringing insufficient dowry- she was asked to bring money for purchase of car- S was a government servant drawing Rs. 27,500/- as salary- complainant sought a direction to prohibit the respondent to commit the acts of domestic violence, to provide alternative accommodation and maintenance and to pay compensation **-** the complaint was allowed by the trial Court- an appeal was preferred, which was dismissed- held, that version of the complainant was supported by PW-1 and PW-2- there are no major contradictions in the testimonies of witnesses- pleas taken by the respondent were not established – a married woman has a legal right to reside in her matrimonial home or in the alternative to receive rent in lieu of residence- Court had rightly allowed the complaint- appeal dismissed. Title: Sanjeev Attri s/o Sh. Karam Chand & Others Vs. Ruchi Attri w/o Sh. Sanjeev Attri Page-975

'S'

Specific Relief Act, 1963- Section 5 and 34- Plaintiff filed a civil suit for declaration pleading that suit land was jointly owned and possessed by the plaintiff and D with their father as coparceners – father of the plaintiff died and plaintiff has got half share in the suit land- part of the suit land was purchased by the plaintiff from his earnings in the name of his father and it was thrown in the common pool- plaintiff has raised construction without any objection- sale deed was got executed without any consideration- suit was opposed by the defendants- suit was decreed by the trial Court- an appeal was preferred, which was dismissed- held, in second appeal that land was shown to be in the name of 'A', who was shown as the common ancestor- sufficient evidence was led to prove that property was coparcenery – property was thrown by 'S' in common stock- doctrine of blending is applicable- S had permitted plaintiff to raise construction over the property- property will devolve according to Section 6 of Hindu Succession Act by survivorship- defendant had failed to prove that S intended to keep the property purchased by him and acquired by him by way of pre-emption decrees as separate- suit was rightly decreed- appeal dismissed. Title: Sarabjeet Singh & ors. Vs. Rajesh Prashad & anr. Page-315

Specific Relief Act, 1963- Section 6- Plaintiff filed a civil suit pleading that defendant had created a lease for 99 years in favour of the plaintiff and possession was delivered to him - defendant forcibly took possession in absence of the plaintiff- suit was opposed by the defendant – counter-claim was also filed by the defendant- trial Court dismissed the suit and partly allowed the counter-claim- held, in revision that remedy of revision is available in suit under Section 6 of Specific Relief Act by way of an exception- Court will not interfere with the order except where a case for interference has been made for the exercise of revisional jurisdiction- witnesses of the plaintiff were not able to prove the possession of the plaintiff- name of the person who had delivered the possession to the plaintiff was not mentioned- neighbours were not examined- an adverse inference is to be drawn- suit was rightly dismissed by the trial Court- revision dismissed. Title: Shamsher Singh Thakur Vs. Baba Jagtar Dass (deceased) through LRS Bibi Karam Dass Chelli Page-512

Specific Relief Act, 1963- Section 20- Plaintiff entered into an agreement with the defendants for purchase of the land- defendants failed to execute the sale deed despite repeated requests- hence, suit was filed for seeking specific performance- suit was dismissed by the trial Court- an appeal was preferred, which was partly allowed - plaintiff was held entitled to refund of Rs. 20,000/- along with interest @ 6% per annum- aggrieved from the judgment, present appeal has been preferred- held, that execution of the agreement was proved- however, witnesses produced by the plaintiff did not establish that plaintiff was ready and willing to perform his part of the agreement- on the other hand, defendants were ready and willing to get sale deed executed in terms of the agreement- plaintiff had not offered to pay remaining amount due to which sale deed could not be executed – agreement was vague as detail of the property to be sold was not mentioned- continuous readiness and willingness is essential for specific performance- specific performance was rightly declined - appeal dismissed. Title: Ram Lal and Anr. Vs. Sudesh Kumar and Ors. Page- 16

Specific Relief Act, 1963- Section 24- Plaintiff filed a civil suit for declaration pleading that he is exclusive owner in possession of the suit land- defendants had moved an application for correction of dimension, which was allowed without affording any opportunity of being heard to the plaintiff - defendants pleaded that dimensions were changed at the instance of the plaintiff – order was passed after affording an opportunity to the plaintiff- suit was decreed by the trial Court- an appeal was preferred, which was allowed- it was held that Civil Court had no jurisdiction to try the suit- held, in appeal that once court had come to the conclusion that it lacked inherent jurisdiction, it should have passed an order of return of the plaint for presentation before appropriate forum- appeal allowed and plaint ordered to be returned for presentation before appropriate Court. Title: Sheela Devi & ors. Vs. Harbhajan Lal Page- 517

Specific Relief Act, 1963- Section 24- Plaintiffs filed a civil suit for declaration pleading that suit land is recorded in joint ownership in possession of the plaintiffs and 'D'- suit land was earlier owned and possessed by one 'P', grand-father of plaintiffs no. 1 and 2 and great grand-father- after the death of 'P', suit land was inherited by his two sons T and M- nature of the suit land was ancestral- defendants had got mutation attested in their favour on the basis of Will stated to have been executed by 'D'- 'D' was not competent to execute the Will- defendant pleaded that land was rightly mutated on the basis of Will- suit was decreed by the trial Court- an appeal was preferred, which was dismissed- aggrieved from the judgment, present appeal has been preferred- held, in appeal that the fact that Will was not valid was not challenged in the second appeal, only nature of the property was questioned- D had inherited the property after the death of her husband- she had no child, therefore, property was to devolve in accordance with Section 15 of Hindu Succession Act on the heirs of her husband- plaintiffs are heirs of the deceased and property vested in the plaintiffs- Courts had rightly passed the judgment- appeal dismissed. Title: Tilak Ram Vs. Dhani Ram and others Page- 459

Specific Relief Act, 1963- Section 28- A decree for specific performance of agreement was passed by the Court on the payment of Rs. 8 lakh in the Court- an appeal was preferred against the decree which was dismissed- the balance consideration was not deposited within one month but was deposited after the further lapse of 84 days - an application for rescission of contract was filed which was allowed- held in revision, Section 28 empowers the Court to extend the time for deposit of sale consideration- the Court should condone the delay liberally especially when there was sufficient cause for non deposit of the amount earlier- the decree was stayed by High Court and period of limitation will start running from the date of the judgment of the High Court- further the High Court had requisitioned the amount deposited before the Trial Court which would legalize the deposit- the application was wrongly allowed by the Trial Court- petition accepted. Title: Renu Sharma Vs. Brig. C.K. Maitra. Page-303

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit for declaration pleading that suit property is Hindu ancestral property- plaintiff, being grandson of defendant No. 2, had right in it by birth- defendant No. 2 had wrongly entered into an agreement to sell the same- defendant No. 1 had wrongly obtained ex-parte decree for specific performance - suit was dismissed by trial Court- an appeal was preferred, which was also dismissed- held, in second appeal that defendant No. 2 had got some land as Nautor- there was no proof that he had sold the ancestral land- sale deed cannot be said to be invalid- onus was upon plaintiff to prove nature of the property, which was not discharged- appeal dismissed. Title: Rajan Sharma Vs. Chaudhary & Others Page- 371

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit pleading that one M started living with plaintiff's sister N - M purchased land and constructed a house- son of M left village and never returned- plaintiff started residing with M- defendant No. 1 had never married the son of M and was not in possession of the house- she filed a civil suit, which was decreed ex-parte in her favour – plaintiff had become owner by way of adverse possession- suit was decreed by the trial Court- an appeal was filed, which was partly allowed- held, in second appeal that plaintiff was not served with any notice when the Civil suit was instituted by defendant No. 1- he was also not summoned when the mutation was attested- it cannot be believed that defendant No. 1 started residing in the house of B as servant- there is plethora of evidence that she was married with B and she was recorded as wife of B in the Pariwar Register and voter list – it was duly proved that defendant No. 1 was never married to son of M and she had concocted a false story regarding the marriage- appeal dismissed. Title: Baldev Singh and others Vs. Kalan Devi and others Page-593

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit for declaration that he was coming in possession of suit land as non-occupancy tenant and had become owner- registered gift deed made by defendant No. 1 in favour of defendants No. 2 to 4 was wrong- suit was decreed by the trial Court- an appeal was preferred, which was dismissed- held, that plaintiff was recorded as tenant at Will on the payment of rent- defendant had more than 8 acres of land and

was not entitled to resume the land- rights of defendants stood extinguished on the date of commencement of H.P. Tenancy and Land Reforms Act- defendants filed an application for resumption, which was dismissed- defendant No. 1 was not competent to execute the gift deed in favour of the defendants No. 2 to 4- suit was rightly decreed by the trial Court- appeal dismissed. Title: Seeta Devi and others Vs. Dev Raj and another Page-939

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit for declaration pleading that suit land was recorded in the ownership of defendant No. 4- predecessor-in-interest of the plaintiff and proforma defendant No. 5 remained owner in possession of their share- mutation was wrongly sanctioned without following proper procedure- suit was decreed by the trial Court- an appeal was preferred, which was allowed- held, that mutation was attested by AC 2nd Grade, whereas, conferment of the proprietary rights could have been made by LRO/AC 1st Grade- mutation is bad in law void-ab-initio- AC 2nd Grade is not competent to attest the mutation or to settle the dispute between the landlord and tenant- Appellate Court had not noticed this fact- appeal allowed- judgment passed by the Trial Court set aside. Title: Nand Lal Vs. Uttam Chand & others Page-925

Specific Relief Act, 1963- Section 34- Plaintiff filed a Civil Suit for declaration, injunction and confirmation of possession pleading that they are owners in possession of the suit land and defendant had wrongly recorded himself in the column of possession – the suit was opposed by the defendant by taking a plea of adverse possession - the suit was dismissed by the trial court - an appeal was preferred which was also dismissed- held, in second appeal predecessor-in-interest of the plaintiffs was recorded as owner- an entry was made in the copy of Jamabandi in the year 1993-94 that defendant was in possession with the consent of the plaintiffs- mere possession of the defendant in such circumstances is not sufficient to establish adverse possession of the defendant - appeal partly allowed. Title: Chajju Ram Vs. Shamma (deceased) through LRs. Page-541

Specific Relief Act, 1988- Section 34- Plaintiff filed a civil suit for declaration pleading that late S was owner of the suit land, who was real brother of the plaintiff- he had not taken any loan from agricultural society and bank – his land was wrongly auctioned and mutation was wrongly attested in favour of the defendant- suit was dismissed by the trial Court- an appeal was preferred, which was also dismissed- held, in second appeal that revenue record shows that suit land was owned by S but his share was attached for Rs. 1451.82/- in favour of the society- share of S was auctioned on 17.1.1976 for 1451.82/-- it has been proved that plaintiff had obtained loan from agricultural society, which was not repaid and land was auctioned- land was ordered to be sold as per order of the Collector, who has not been arrayed as party- defendant is shown to be in possession since 1975-76- Court had correctly appreciated the evidence- appeal dismissed. Title: Mohan Lal Vs. Sarv Dayal Page-609

Specific Relief Act, 1963- Section 34- Plaintiffs are owners in possession of the suit land and khokha constructed thereon- they claimed that suit land was acquired by their father by way of oral sale- mother of plaintiffs No. 1 and 2 had sold the land in favour of the plaintiff No. 3- they had raised construction of Khokha on the suit land, which was replaced by three pucca shops of brick, masonry - they were in continuous, peaceful and exclusive possession of the suit property without any interference- defendant No. 1 had acquired suit property vide award No. 60/72 and the land was transferred to defendant No. 2- eviction proceedings were initiated against the plaintiffs- plaintiffs cannot be evicted from the suit land as they are owners in possession of the same- mutation on the basis of award is illegal and wrong- declaration and injunction were sought – suit was decreed by the trial Court- an appeal was preferred, which was dismissed- held, that suit land was acquired by the defendant No. 1 for being used by defendant No. 2- it is situated within the acquired width of the road- compensation was paid and received by A and F- land was entered in the name of A and F- one biswa of the land belong to predecessor-in-interest of the plaintiffs- compensation of Rs. 46/- was deposited in the bank- no declaration should have

been sought against acquisition of the suit land - remedy was available under the Act itself- declaration should not have been granted- plaintiffs were being evicted by the Competent Authority under due process of Law- no injunction can be granted- appeal allowed- judgment and decree passed by the trial Court set aside. Title: Himachal Pradesh State Electricity Board Vs. Yash Pal & ors. Page-718

Specific Relief Act, 1963- Section 34- Plaintiffs filed a civil suit seeking declaration that they have become owners by way of adverse possession- suit was dismissed by the trial Court- counter-claim filed by the defendant was allowed and the plaintiffs were directed to hand over the possession of the suit land to the defendants- appeal filed by the plaintiffs was dismissed- it was found during the pendency of the second appeal that respondent No. 5 had died during the pendency of the suit – respondent No. 4 had also died during the pendency of the appeal in the Appellate Court- question of abatement and substitution of the legal representatives can be decided by the Court where death had taken place- judgment and decree passed by the Courts set aside- suit remanded to the trial Court to determine the question of substitution and thereafter to send the file to the Appellate Court. Title: Sarjan & ors. Vs. Bimla & ors. Page-423

Specific Relief Act, 1963- Section 34 and 38- Plaintiff filed a civil suit for declaration and permanent prohibitory injunction pleading that plaintiff is Director of Private Limited Company- she is owner in possession of the suit land- land was transferred by T in favour of the company- defendant was appointed as Manager by D to look after the affairs of the company- plaintiff inducted one of her sons as Director- she came to know that defendant was posing himself as Director of Company and was going to alienate the suit land to some other persons- suit was decreed by the trial Court- an appeal was preferred, which was dismissed- held, in second appeal that according to the meeting 50% share worth Rs. 10/- of the husband of the plaintiff were transferred in favour of the defendant, his father and his brother- no notice of intention to transfer share was given to Registrar of the Company –no intimation of his appointment was given- defendant had not led any evidence to prove that suit was time barred- appeal dismissed. (Para- 10 to 15) Title: Des Deepak Khanna Vs. Sharda Devi Kanwar Page-93

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit seeking permanent prohibitory injunction for restraining the defendant from changing the nature of the suit land, from raising construction on the same and encroaching upon the path, from removing chajja and the iron stairs raised over the suit path- it was pleaded that suit land is jointly owned and possessed by the parties- abadies have been constructed there on- path is being used for ingress and egress- defendant threatened to build his stair case on the path, which would constrict the path- defendant stated that plaintiff had re-constructed the house by exceeding his share- suit was dismissed by the trial Court- an appeal was preferred, which was allowed and suit was decreed – held, that land is jointly owned by the parties- Local Commissioner found that path was not blocked by any person and no deodi was found at the spot- defendant extended the chajja of his house towards the path during the pendency of the suit- stair case is causing obstruction to the use of path by co-owners- Appellate Court had considered all material aspects of the case documentary as well as oral evidence – construction was raised during the pendency of the suit and therefore, mandatory injunction was rightly granted- appeal dismissed. Title: Ved Prakash Vs. Jagdish Ram Page-1153

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit for permanent prohibitory and mandatory injunction for restraining the defendant No. 1 from handing over the possession of stall cum shop and restraining defendnat No. 2 from taking the possession of stall-cum-shop- it was pleaded that plaintiff was a tenant over the suit land on monthly rent of Rs. 220/-- defendant No. 2 was allowed to carry on business by the plaintiff- defendant No. 1 had decided to demolish the wooden stalls and convert them into pucca building- plaintiff had a right to occupy the stall and defendant No. 2 had no right- defendant No. 1 stated that possession was delivered by the plaintiff in favour of defendant No. 2- matter is pending before Municipal Council- defendant No.

2 pleaded that plaintiff and defendant No. 2 constituted a joint family- stall was allotted to defendant No. 2- suit was dismissed by the trial court- an appeal was preferred, which was dismissed- held, in appeal that even if the building is destroyed or demolished, the lease is not determined as long as the land beneath it continues to exist- therefore, tenancy will not come to an end on the demolition of the stall- plaintiff had not appeared in the witness box- his son admitted that plaintiff and defendant no. 2 formed one family and they used to do business jointly- he admitted that a family settlement had taken place between the plaintiff and defendant no. 2 after which defendant no. 2 started business in the suit land - plaintiff shifted to Lower Bazaar, Solan and started his work in the shop of Sanatan Dharam Sabha- settlement was never challenged by the plaintiff- an adverse inference has to be drawn against the plaintiff for non-appearance in the witness box - suit was rightly dismissed by the trial Court- further, findings recorded by the appellate court regarding tenancy reversed. Title: Sardar Thakur Singh Vs. Municipal Council, Solan & Another Page-1102

Specific Relief Act, 1963- Section 38- Suit for fixation of boundaries by way of demarcation of the land and permanent prohibitory injunction for restraining the defendant from interfering in possession of the land was filed pleading that plaintiff is owner in possession of the suit land and defendant is interfering with the suit land without any right to do so- defendant opposed the suit by pleading that suit land had already been demarcated by Local Commissioner- no interference was being caused by the defendant- suit was decreed by the trial court- an appeal was preferred, which was allowed and the suit was dismissed- held, in appeal that plaintiff had not stated in his statement that defendant was interfering with the suit land and he intended to raise construction upon the same- Tehsildar who conducted the demarcation was not examined by any of the parties and his report was also not accepted- Local Commissioner admitted in his statement that plaintiff wanted the demarcation to be conducted on the basis of old record and not on the basis of new record- report shows that there is discrepancy in Aks Shajra for the year, 1891-92 and Aks Shajra for the year 1961-62 regarding khasra No.194 - Local Commissioner was appointed to demarcate the land- plaintiff claimed himself to be owner of the aforesaid bamboo grove on the basis of the report- plaintiff had filed a suit for demarcation and permanent prohibitory injunction but he had failed to prove that there was boundary dispute- therefore, trial Court had wrongly decreed the suit- decree was rightly reversed by the Appellate Court- appeal dismissed. Title: Rajinder Kumar & another Vs. Hira Lal Page-219

Specific Relief Act, 1963- Section 39- Plaintiff filed a civil suit pleading that he is owner in possession of the suit land- defendant had constructed a house over the portion of abadi deh- defendant proposed to raise additional structure over abadi deh, which was likely to erode the suit land– suit was opposed by the defendant- trial Court granted the decree of mandatory injunction- an appeal was preferred, which was allowed - held, in second appeal that plaintiff had not sought the decree of mandatory injunction, which was granted by the trial Court- demarcation report does not show any encroachment on the land of the plaintiff- it was not permissible to grant the relief without any prayer, without amending the pleadings- appellate Court had rightly reversed the decree- appeal dismissed. Title: Johli (since deceased) through his legal representatives. Shri Khub Raj Vs. Tullu Page-410

'W'

Workmen Compensation Act, 1923- Section 4- Commissioner omitted to levy penalty upon the employer on the compensation awarded by him - matter remanded to Commissioner to determine the loss of earning capacity and disability and thereafter to assess the compensation and the penalty. Bishan Singh Vs. State of H.P. and others Page-895

Workmen Compensation Act, 1923- Section 4- Deceased was employed as a driver on monthly wages of Rs. 4,000/-- a sum of Rs. 100/- was being paid to him towards the daily allowance- he was coming from Orissa to Paonta Sahib- when truck reached within the territory of State of

Bihar, some miscreants pelted stones on the truck as a result of which windscreen of the truck got damaged- deceased reported the matter to the husband of the owner of the truck who advised the truck driver to drive the truck in that condition and assured that truck will be repaired at Nalagarh- deceased went to his village after the delivery of the consignment- he was suffering from high fever and died- Workmen Compensation Commissioner held that it cannot be said without postmortem that deceased died during the course of employment- held in appeal that it was not disputed that instruction was given to drive the truck in same condition- it was not disputed that deceased had died due to high fever – incident had taken place in the month of December, when winter season had commenced, which caused exposure as a result of which deceased suffered high fever- there was direct nexus between the death and discharge of the duties- deceased was 31 years of age at the time of death- taking the income of the deceased as Rs.4,000/- per month, applying the relevant factor of 205.95/- and taking 50% of the wages into consideration; an amount of Rs. 4,11,900/- (205.95 x 4000 x 50 /100) awarded along with interest @ 12% per annum, which shall be paid by the insurer. Title: Nirmala and Others Vs. Kaushalaya Devi & Another Page-555

Workmen Compensation Act, 1923- Section 4- Son of the petitioner was employed as driver of the truck - tractor met with an accident- driver died at the spot- petitioner claimed compensation for the death- petition was allowed and compensation of Rs. 2,85,973/- was awarded- however, Commissioner declined the interest- it was contended by insurer that driver did not have a valid driving licence and the tractor was not being used for agricultural purposes- hence, it is not liable- held, that son of the petitioner was being carried in the tractor at the time of accident- driving licence was not produced as tractor fell into a muddy and slushy rivulet due to which R.C. and D.L. could not be recovered- it was specifically stated that licence was issued from Delhi- no inquiry was made from Delhi about the issuance of the license to the driver - it was not proved that tractor was being used for non-agricultural purpose- therefore, breach of terms and conditions of the policy was not proved- appeal dismissed. Title: United India Insurance Company Ltd. Vs. Prakasho Devi & Others Page-84

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'Z'

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

State of Himachal Pradesh ....Appellant

Versus

Negi Ram son of Sh. Lal Chand ......Respondent.

Cr. Appeal No. 481 of 2009
Decided on: 27th May, 2016

Indian Penal Code, 1860- Section 363, 366 and 376- Prosecutrix was subjected to sexual intercourse without her consent and against her will- parents of the prosecutrix reported the matter to the police- accused was tried and acquitted by the trial Court- aggrieved from the judgment, present appeal has been preferred- held, that date of birth of the prosecutrix was stated to be 1.5.1994- incident had taken place on 3.8.2008- however, date of birth was not proved satisfactorily- the person at whose instance the prosecutrix was admitted in the school was not examined and no reliance can be placed on the certificate - prosecutrix was not proved to be less than 16 years of age on the date of incident- she had voluntarily accompanied the accused- prosecution case was not proved beyond reasonable doubt- appeal dismissed.
(Para-7 to 25)

Cases referred:

Sunil Kumar Vs. State of Haryana, AIR 2010 SC 392
State of Chhatisgarh Vs. Lekhram, AIR 2006 SC 1746
Ravinder Singh Gorkhi Vs. State of U.P. AIR 2006 SC 2157
Madan Mohan Singh and others Vs. Rajni Kant and another, AIR 2010 SC 2933
Sharad Birdhichand Sarda Vs. State of Maharashtra, AIR 1984 SC 1622

For the appellant: Mr. D.S. Nainta and Mr. Virender Verma, Additional Advocates General.
For the respondent: Mr. Ramesh Sharma, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral).

The prosecution, aggrieved by the judgment dated 12.05.2009, passed by learned Sessions Judge, Chamba, District Chamba in Sessions Trial No. 1 of 2009, whereby the respondent (hereinafter referred to as the accused) has been acquitted of the charge under Sections 363, 366 and 376 of the Indian Penal Code, has filed this appeal, with a prayer to quash the impugned judgment and after holding him guilty for the commission of the offence, he allegedly committed.

2. The case, as disclosed from the statement of the prosecutrix recorded under Section 161 of the Code of Criminal Procedure shortly stated is that the accused is resident of village Cheeh Tehsil Churah, District Chamba. The prosecutrix (name withheld) is also resident of the same village. The accused was running a shop in the village. The prosecutrix as and when happens to cross through the path adjoining to his shop he always conduct himself with her in a romantic mood. She fell prey to such romantic attitude of the accused. On 3.08.2008, he allured her and taken to a lonely place in the field. There he subjected her to sexual intercourse without her consent and against her will. Thereafter, she was not allowed to come to her home. Accused told that he will solemnize marriage with her. She was taken to a cave (Kud) and made to sit there. In the evening, he brought apples from the nearby orchard to eat. They stayed in the Kud from 3.8.2008 to 5.8.2008. On 6.8.2008, she was brought out from the Kud to have meal in the canteen of Baira Siul Project. She was asked not to disclose anything about the incident to anyone and threatened to do away with her life in case she divulged anything qua the incident to

anyone. Around 12.00 noon, while on the way to canteen, police party comprising her father PW-1 and uncle PW-4 nabbed them.

3. On finding the prosecutrix missing from the house, her mother PW-2 searched her here and there, but of no avail. Her father PW-1 is a carpenter by profession and was away to District Kinnaur in connection with his work. He reached in the house on 4.08.2008 at 10.00 a.m. On coming to know about his daughter, the prosecutrix missing from his wife PW-2, he searched her here and there, in his relations and neighborhood, but of no avail. Since the accused was also found missing from the village, therefore, it is he, who was suspected to have enticed away the prosecutrix, allegedly minor from her guardianship. The report of missing of the prosecutrix was, therefore, lodged in Police Station, Tissa, District Chamba on the next day, i.e. 5.8.2008, at about 4.00 p.m. by PW-1. The FIR Ext. PW-1/A was registered under Section 363 and 366 of the Indian Penal Code.

4. The Police accompanied by the complainant and others searched the prosecutrix, who on the next day was found sitting in the company of accused on the bank of the dam of Baira Siul Project. The accused was arrested there and then. The statement of prosecutrix under Section 161 of the Code of Criminal Procedure mark 'A' was recorded. She disclosed to the police that during the period she remained in the company of the accused, he subjected her to sexual intercourse. On the basis of the statement so made by her, a case under Section 376 of the Indian Penal Code was also registered against the accused. The custody of the prosecutrix was entrusted to her father PW-1 vide Ext. PW-1/B. On the next day, application, Ext. PW-5/A was made to the Chief Medical Officer, Regional Hospital, Chamba for conducting medical examination of the prosecutrix. PW-5 has conducted her medical examination and issued Medico Legal Certificate Ext. PW-5/B. In the opinion recorded on the reverse side of the Medico Legal Certificate and on perusal of the report of chemical analyst, PW-5 did not rule-out the possibility of the commission of rape with the prosecutrix. The date of birth certificate Ext. PW-6/A and the extract of parivar register Ext. PW-7/A were collected from Government Primary School and Gram Panchayat, Cheeh, District Chamba. During the investigation, the accused was also got medically examined vide Ext. P-A. The clothes/under garments of the accused were recovered and taken into possession vide seizure memo Ext. PW1/B. The clothes and under garments of the prosecutrix were sealed in the hospital and handed over to the police. The same were got chemically analyzed and the chemical report is Ext. P-X.

5. On the completion of the investigation, report under Section 173 of the Code of Criminal Procedure was filed against the accused in the trial Court.

6. Learned trial Judge on going through the report and the documents annexed therewith and finding a case under Sections 363, 366 and 376 of the Indian Penal Code prima-facie made out against the accused framed charge accordingly. He, however, pleaded not guilty to the charge. Therefore, the prosecution in order to sustain the charge against the accused has produced the evidence.

7. PW-1 is the father of the prosecutrix. It is at his instance FIR Ext. PW-1/A was registered by the police. According to him, the custody of the prosecutrix was entrusted to him vide memo Ext. PW-1/B. PW-2 Shanto Devi is the mother of the prosecutrix, whereas Tej Singh, PW-4 is her uncle. The prosecutrix has stepped into the witness box as PW-3. PW-5 Dr. Arti is the Medical Officer, who has medically examined the prosecutrix in Regional Hospital, Chamba, whereas, PW-6 Saleem, Assistant Teacher in Government Primary School, Cheeh has proved the certificate Ext. PW-6/A and PW-7 Tek Chand, Secretary, Gram Panchayat, Cheeh copy of parivar register Ext. PW-7/A. The remaining witnesses are police officials who any how or other remained associated with the investigation of the case. The Investigating Officer is PW-12 ASI Maan Singh.

8. The accused, on the other hand, in his statement recorded under Section 313 Cr.P.C., has denied each and every incriminating circumstance appeared in prosecution evidence against him either being wrong or for want of knowledge. In his defence, while answering second

last question in his statement it has been submitted that due to business rivalry, family of prosecutrix was inimical with him and her family members allegedly quarreled with his family members over a land dispute. Therefore, her parents and uncle Tej Singh have fabricated the case against him falsely.

9. Learned trial Judge on appreciation of the evidence comprising oral as well as documentary has arrived at a conclusion that the present is not a case of commission of sexual intercourse with the prosecutrix forcibly or against her will and without her consent and that she rather was a consenting party to the commission of such act with her by the accused. She was also not found to be minor below 16 years of age and as such, the accused was acquitted of the charge framed against him under Sections 363, 366 and 376 of the Indian Penal Code.

10. The judgment under challenge has been assailed on the grounds *inter-alia* that the Court below has erroneously discarded the cogent and reliable evidence as has come on record by way of the testimony of prosecution witnesses. There being no evidence of enmity of the parents of the prosecutrix with the accused, the prosecution evidence should have not been ignored. The prosecution evidence as has come on record by way of her own testimony and also that of her father PW-1 and mother PW-2 duly corroborated by the medical evidence should have not been ignored.

11. On behalf of the appellant-State, it is strenuously contended that irrespective of overwhelming cogent and reliable evidence available on record suggesting that the prosecutrix, a minor has been subjected to sexual intercourse by the accused, he has erroneously been acquitted of the charge.

12. On the other hand, Mr. Ramesh Sharma, learned defence counsel has vehemently argued that there being no iota of evidence that the prosecutrix was below 16 years of age on the day of occurrence, her conduct that she voluntarily accompanied the accused and did not make any effort to return to her house, amply demonstrate that she was a consenting party to her elopement with the accused.

13. The nature of the offence, the accused allegedly committed is not only heinous but grievous also because as per the allegations, he has not only removed the prosecutrix, a minor from her lawful guardianship, but also subjected her to sexual intercourse.

14. The apex Court while taking into consideration the gravity and seriousness of the offence, in a catena of judgments including ***State of Punjab*** Vs. ***Gurmeet Singh and others, AIR 1996 SC 1393*** has held that the own statement of the prosecutrix if inspires confidence is sufficient to bring the guilt home to the accused. The apex Court in order to ensure that an innocent person is not implicated in the commission of an offence of this nature, while taking note of the judgment in ***Gurmeet Singh's*** case supra has however diluted the ratio thereof in ***Ranjit Hazarika*** Vs. ***State of Assam, (1998) 8 SCC 635*** and held that the prosecutrix cannot be universally and mechanically applied to the facts of every case of sexual assault, as in its opinion, the possibility of false implication can't also be ruled-out. Similar was the view of the matter taken again by the apex Court in V***imal Suresh Kamble*** Vs. ***Chaluverapinake Apal S.P. and another, (2003) 3 SCC 175***.

15. Therefore, the legal position as discussed supra makes it crystal clear that irrespective of an offence of this nature not only grievous but heinous also, the Court should not got swayed merely by passion and influence only on account of the offence has been committed against a woman and rather keep in mind the cardinal principle of criminal administration of justice, that an offender has to be believed to be innocent unless and until held guilty by the Court after satisfying its judicial conscience on the basis of given facts and circumstances of each case as well as proper appreciation of the evidence available on record.

16. The prosecutrix has been claimed to be a minor below 16 years of age on the date of occurrence i.e. 3.8.2008. In case as per evidence available on record, she proves to be below

16 years of age on the date of occurrence, the findings of conviction can be recoded against the accused in that eventuality alone, because otherwise the present seems to be not a case of commission of sexual intercourse against her will or without her consent and she rather was a consenting party to such act committed with her by the accused. Therefore, it is that aspect of this case, which deals with her age assume significance. Her date of birth has been claimed to be 1.5.1994. Since the occurrence pertains to 3.8.2008, therefore, if 1.5.1994 establishes to be her date of birth as per evidence available on record, she was minor on the day of occurrence. The evidence in support of her date of birth relied upon by the prosecution is her Primary School certificate Ext. PW-6/A and extract of parivar register Ext. PW-7/A. PW-6 is the Primary Assistant Teacher in Government Primary School, Cheeh. He has issued the certificate Ext. PW-6/A, which according to him is true and correct as per original record produced by him in the Court on the date of his examination. In his cross-examination at one stage, he expressed his ignorance as to who had got the prosecutrix admitted in the school, however, voluntarily stated that she was admitted in the school by her uncle Bansi Lal. He was neither employed as a Teacher in the school at the time of admission of the prosecutrix nor entries in the record are in his hand. The other piece of evidence relied upon by the prosecution to substantiate this part of its case is the extract of parivar register Ext. PW-7/A. This document has been proved by PW-7 Tek Chand, Secretary, Gram Panchayat, Cheeh. He has also said that Ext. PW-7/A is true and correct as per original record he produced. He, however, had not produced the birth and death register in the Court.

17. If coming to the testimony of her father PW-1, he in his cross-examination, tells us that he was married about 16 years back with Shanto and that it is not known as to when the prosecutrix was born to them. He, however, stated voluntarily that she was born to them after 1½ years of their marriage. The prosecutrix was admitted by him in the school. Shanto Devi while in the witness box as PW-2 tells us that at the time of her marriage, she was 18 years of age and the prosecutrix was born to her when she was 19 years old. This alone is the evidence produced by the prosecution in order to substantiate its case that the prosecutrix was minor below 16 years of age at the time of occurrence.

18. It is well settled at this stage that primary evidence to prove the date of birth of a person is the entries in the register at the time of his/her admission in the primary school. The record qua declaration of date of birth of the child made by his/her parents or guardian at the time of admission in primary school should also be there to substantiate the entries in the register. The name of parent/guardian at whose instance the child was admitted in the school should also be disclosed. It is only on the basis of such material on record, the date of birth as find mentioned in the record produced in evidence can be believed as true and correct. In the case in hand, it is the certificate Ext. PW-6/A issued by the Headmaster, Primary School, Cheeh has been relied upon. As a matter of fact, the extract from the admission register should have been obtained and produced in evidence. The admission register along with form/declaration made by a person at whose instance the prosecutrix was admitted in the school should have been produced during the course of recording prosecution evidence, in order to prove the extract of parivar register. The certificate Ext. PW-6/A no doubt is stated to be issued on the basis of entries in the admission register, however, for want of declaration and also as to who has disclosed the date of birth of the prosecutrix as 1.5.1994 at the time of her admission in the school, the certificate Ext. PW-6/A cannot be termed to be primary evidence and rather secondary. The apex Court in ***Sunil Kumar*** Vs. ***State of Haryana, AIR 2010 SC 392*** has held as under:

> "30. The prosecution also failed to produce any Admission Form of the school which would have been primary evidence regarding the age of the prosecutrix."

19. Hon'ble Apex Court in ***State of Chhatisgarh*** Vs. ***Lekhram, AIR 2006 SC 1746,*** has held that the register maintained in a school is admissible in evidence to prove the date of birth of the person concerned, if it is proved that the same has been maintained by the

authorities in the discharge of their public duty and there is evidence to show as to who had disclosed the date of birth of such person at the time of his/her admission in the school.

20. Mr. Bansi Lal, the uncle of prosecutrix, who allegedly admitted her in the school, has not been examined. In the absence of the admission form/ declaration qua her date of birth, Ext. PW-6/A cannot be believed to be true and correct to arrive at a conclusion that the prosecutrix was born on 1.5.1994. If coming to the extract of parivar register Ext. PW-7/A, the same has no evidentiary value nor on the basis thereof, it can be said that the date of birth of the prosecutrix is 1.5.1994. As a matter of fact, it is the entries made in the birth and death register maintained by the Municipalities /Gram Panchayats can be treated to be primary evidence qua the date of birth of a person, however, in a case of this nature, the extract of such register with supporting evidence as to who has disclosed the date of birth at the time of making birth entries in the register is required to be produced in evidence. Mere production of the register and abstract is not sufficient and rather the examination of such person at whose instance the entries were made in the register is relevant. It is held so by the Apex Court in ***Ravinder Singh Gorkhi*** Vs. ***State of U.P. AIR 2006 SC 2157.*** This judgment reads as follows:

> "17. ………… The said school leaving certificate was not issued in ordinary course of business of the school There is nothing on record to show that the said date of birth was recorded in a register maintained by the school in terms of the requirements of law as contained in Section 35 of the Indian Evidence Act. No statement has further been made by the said Head Master that either of the parents of the appellant who accompanied him to the school at the time of his admission therein made any statement or submitted any proof in regard thereto. ………….
>
> 21. Determination of the date of birth of a person before a court of law, whether in a civil proceeding or a criminal proceeding, would depend upon the facts and circumstances of each case. Such a date of birth has to be determined on the basis of the materials on records. It will be a matter of appreciation of evidence adduced by the parties. Different standards having regard to the provision of Section 35 of the Evidence Act cannot be applied in a civil case or a criminal case.
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> 25. ………… ……… ……..
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> 26. In Birad Mal Singhvi v. Anand Purohit [(1988 Supp. SCC 604], this Court held:
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> "To render a document admissible under Section 35, three conditions must be satisfied, firstly, entry that is relied on must be one in a public or other official book, register or record; secondly, it must be an entry stating a fact in issue or relevant fact; and thirdly, it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by law. An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the 21 Act but the entry regarding the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded."

21. Similar is the ratio of the judgment again that of Hon'ble Apex Court ***Madan Mohan Singh and others*** *Vs*. ***Rajni Kant and another, AIR 2010 SC 2933***, which reads as follows:

> "18. Therefore, a document may be admissible, but as to whether the entry contained therein has any probative value may still be required to be examined in the facts and circumstances of a particular case. The aforesaid legal proposition stands fortified by the judgments of this Court in Ram Prasad Sharma Vs. State of Bihar AIR 1970 SC 326; Ram Murti Vs. State of Haryana AIR 1970 SC 1029; Dayaram & Ors. Vs. Dawalatshah & Anr. AIR 1971 SC 681; Harpal Singh & Anr.

Vs. State of Himachal Pradesh AIR 1981 SC 361; Ravinder Singh Gorkhi Vs. State of U.P. (2006) 5 SCC 584; Babloo Pasi Vs. State of Jharkhand & Anr. (2008) 13 SCC 133; Desh Raj Vs. Bodh Raj AIR 2008 SC 632; and Ram Suresh Singh Vs. Prabhat Singh @Chhotu Singh & Anr. (2009) 6 SCC 681. In these cases, it has been held that even if the entry was made in an official record by the concerned official in the discharge of his official duty, it may have weight but still may require corroboration by the person on whose information the entry has been made and as to whether the entry so made has been exhibited and proved. The standard of proof required herein is the same as in other civil and criminal cases.

19. ....

20. So far as the entries made in the official record by an official or person authorized in performance of official duties are concerned, they may be admissible under Section 35 of the Evidence Act but the court has a right to examine their probative value. The authenticity of the entries would depend on whose information such entries stood recorded and what was his source of information. The entries in School Register/ School Leaving Certificate require to be proved in accordance with law and the standard of proof required in such cases remained the same as in any other civil or criminal cases."

22. Therefore, when in the case in hand, neither Bansi Lal, the so called uncle of the prosecutrix at whose instance she was admitted in the school has been examined nor the birth and death register produced and also the person who has disclosed the date of birth of the prosecutrix at the time of recording entries qua date of birth in the said register has also not been examined, it cannot be believed by any stretch of imagination that she was born on 1.5.1994. The prosecution has also not made an effort to find out the radiological age of the prosecutrix. Therefore, it cannot be believed by any stretch of imagination that she was minor below 16 years of age on the day of occurrence.

23. Significantly, no question was put to the accused in his statement recorded under Section 313 of the Code of Criminal Procedure that he has subjected the prosecutrix, a minor below 16 years of age to sexual intercourse. Therefore, the age aspect a vital incriminating circumstance against the accused having not been put to him in his statement recorded under Section 313 of the Code of Criminal Procedure, the same cannot be used against him. It is held so by the Apex Court in ***Sharad Birdhichand Sarda*** Vs. ***State of Maharashtra, AIR 1984 SC 1622.*** The text of this judgment reads as follows:

"142. Apart from the aforesaid comments there is one vital defect in some of the circumstances mentioned above and relied upon by the High Court, viz., circumstances Nos. 4, 5, 6, 8, 9, 11, 12, 13, 16 and 17. As these circumstances were not put to the appellant in his statement under Section 313 of the Criminal Procedure Code they must be completely excluded from consideration because the appellant did not have any chance to explain them. This has been consistently held by this Court as far back as 1953 where in the case of Hate Singh Bhagat Singh v. State of Madhya Bharat AIR 1953 SC 468 this Court held that any circumstance in respect of which an accused was not examined under Section 342 of the Criminal Procedure Code cannot be used against him. Ever since this decision, there is a catena of authorities of this Court uniformly taking the view that unless the circumstance appearing against an accused is put to him in his examination under Section 342 or Section 313 of the Criminal Procedure Code, the same cannot be used against him. In Shamu Balu Chaugule v. State of Maharashtra, (1976) 1 SCC 438 this Court held thus:

> "The fact that the appellant was said to be absconding, not having been put to him under Section 342, Criminal Procedure Code, could not be used against him.

> 144. It is not necessary for us to multiply authorities on this point as this question now stands concluded by several decisions of this Court. In this view of the matter, the circumstances which were not put to the appellant in his examination under Section 313 of the Criminal Procedure Code have to be completely excluded from consideration."

24. If coming to the ocular version, the complainant who is the father of the prosecutrix has failed to disclose her date of birth while in the witness box as PW-1. His testimony that the prosecutrix was born to him after 1½ years of his marriage is vague and absurd, hence cannot be taken to conclude that she was born on 1.5.1994. Similarly, the mother of the prosecutrix tells us that she was married at the age of 18 years and the prosecutrix was born when she was 19 years of age. Her testimony is also not specific nor on the basis of same, it can be said that the prosecutrix is born on 1.5.1994.

25. On critical analysis of the age aspect of the prosecutrix, it is not at all proved that she is born on 1.5.1994 and as such was below 16 years of age on the day of occurrence i.e. 3.8.2008. It is not the prosecution case that she was allured or enticed away by the accused and rather as per her version on asking by the accused, she went with him to nearby field where she was subjected to sexual intercourse. However, while in the witness box she has not stated that she was taken to nearby field and subjected there to sexual intercourse and rather to the Kud, where she lived with him during the period 3.8.2008 to 6.8.2008 and she was subjected to sexual intercourse there on four occasions. She, therefore, was not enticed away by the accused or removed from her lawful custody and rather she had voluntarily accompanied the accused and was a consenting party to the sexual act he committed with her. Therefore, no case under Sections 363 and 366 and for that matter under Section 376 of the Indian Penal Code is made out against the accused. He, therefore, has rightly been acquitted from the charge so framed against him.

26. In view of the reappraisal of the evidence and also the law applicable, we find no illegality or irregularity with the judgment under challenge in this appeal. The same, as such, is affirmed and the appeal dismissed. Personal bonds furnished by the accused shall stand cancelled and surety bonds discharged.

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

Rajesh Kumar @ Raju ….Petitioner.
Versus
State of H.P. …Respondent.

Criminal Revision No.110 of 2008
Date of Decision: 31.5.2016

Code of Criminal Procedure, 1973- Section 482- Petitioner was convicted for the commission of offence punishable under Section 354 of I.P.C- application was filed for quashing the proceedings on the ground that matter had been compromised between the parties- held, that power to quash the proceedings can be exercised in cases having pre-dominantly civil character, particularly arising out of commercial transactions, matrimonial relationship or family disputes - in the present case, accused had been convicted and it will not be proper to quash the proceedings- petition dismissed. (Para-1 to 12)

Indian Penal Code, 1860- Section 354- Informant was returning to her house - petitioner came on a scooter and gave lift to the informant- when she alighted from the scooter, accused caught hold of her arm and asked her as to when he should visit her house- he caught hold of the string of her salwar- this was heard by V- matter was reported to the police – accused was tried and convicted by the trial Court- an appeal was preferred, which was dismissed but the sentence was modified- held, in revision that informant had specifically stated that accused had caught hold of her arm and had asked her to oblige him with sexual favours - it was not asserted that there was any enmity between the parties- version of prosecutrix was corroborated by her husband- delay was properly explained- defence version is not probable- prosecution version was proved beyond reasonable doubt- accused was rightly convicted by the trial Court – however, benefit of Section 4 of the Probation of Offender Act granted. (Para-21 to 36)

Cases referred:

Narinder Singh and others versus State of Punjab and another (2014)6 Supreme Court Cases 466
Krishnan and another Versus Krishnaveni and another, (1997) 4 Supreme Court Case241

For the Petitioner : Mr. Bhuvnesh Sharma & Mr. Ramakant Sharma, Advocates.
For the Respondent : Mr. Rupinder Singh Thakur, Additional Advocate General for respondent/-State.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (Oral)

Present Criminal Revision Petition filed under Section 397 read with Section 401 of the Code of Criminal Procedure, is directed against the judgment dated 2.6.2008, passed by learned Sessions Judge, Hamirpur, HP, in Criminal Appeal No. 15 of 2007, affirming the judgment dated 6.3.2007, passed by learned Judicial Magistrate 1st Class, Barsar in criminal Complaint No. 59-I-2006/ RBT No.46-II-2006, whereby the present petitioner is convicted under Section 354 of Indian Penal Code and sentenced to undergo rigorous imprisonment for a period of one year and to pay fine of Rs. 1000/-, which was lateron modified to three months by the Court of learned Sessions Judge, in appeal.

2. On 4.7.2008, this Court while admitting the instant Criminal Revision petition for hearing, suspended the sentence imposed by the Courts below against the petitioner subject to his furnishing bail bonds in the sum of Rs. 10,000/- with one surety in the like amount to the satisfaction of learned trial Court. However on 6.5.2016, when the matter came up for final hearing before this Court, petitioner-accused moved an application under Section 321 read with Section 482 Cr.P.C placing therewith a compromise entered between the petitioner-accused as well as complainant.

3. After careful reading of the averments contained in the application, time was granted to the respondent-State to file reply, if any, to the application and parties were directed to remain present in the Court on 31.5.2016. Respondent-State filed reply to the application, wherein most of the averments have been denied for want of knowledge. In para-6 of the reply, it is submitted that the allegations leveled against the petitioner-accused stands proved before the court of learned Judicial Magistrate Ist Class, Barsar and his conviction has been further upheld by the learned Sessions Judge, Hamirpur and, as such, no public interest would be served, if the parties are allowed to compromise the matter at hand. Both the parties are present in person in the Court.

4. Careful reading of the application filed under Section 482 Cr.P.C, suggest that on the complaint of the complainant, an FIR No. 6 of 2006, dated 24.3.2006 was registered against the petitioner-accused at the Police Station, Barsar, District Hamirpur, HP and thereafter subsequent of filing of the aforesaid FIR, challan was presented before the Judicial Magistrate Ist

Class Barsar, wherein learned trial Court after satisfying itself that a prima-facie case exist against the accused, framed charge under Section 354 IPC, to which accused pleaded not guilty and claimed trial. Learned trial Court below after appreciating evidence on record convicted the accused for having committed the offence punishable under Section 354 IPC and sentenced him to undergo rigorous imprisonment for one year and to pay fine of Rs.1000/-. Aforesaid conviction and sentence imposed by the learned trial Court was further upheld by the learned Lower Appellate Court vide impugned judgment dated 2.6.2008. Hence, the present revision petition.

5. Para-4 of the application, which is duly supported by an affidavit of the complainant as well as by the petitioner-accused suggest that during the pendency of the present revision petition on the intervention of the respectable persons of the society, complainant and the petitioner-accused have compromised the matter in order to maintain cordial relations in future, copy of compromise dated 25.4.2016 is also placed on record. It has been stated in para-5 of the application that compromise has been entered at their own sweet will and without any pressure from anybody in order to maintain good relations.

6. Since joint application on behalf of the petitioner-accused as well as complainant has been filed in the present case enclosing therein that compromise entered between the parties, this Court with a view to ascertain correctness and genuineness of the averments contained in the application as well as compromise, asked the complainant in the open Court whether she has entered into the compromise with her own free will or there was any external pressure upon her to compromise the matter. Smt. Roshani Devi (complainant), who was present in the Court, stated on oath that she has entered into the compromise of her own free will and there is no external pressure on her to enter into the compromise. She stated that she has no objection, whatsoever; in case the accused is acquitted of the charge framed against him. Aforesaid statement of the complainant is placed on record.

7. Since the application has been filed under Section 321 read with section 482 Cr.P.C, this Court deems it fit case to consider the present application in the light of the judgment passed by Hon'ble Apex Court in ***Narinder Singh and others versus State of Punjab and another (*****2014)6 Supreme Court Cases 466,** whereby Hon'ble Apex Court has formulated guidelines for accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings. Perusal of judgment referred above clearly depicts that in para 29.1, Hon'ble Apex Court has returned the findings that power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under section 320 of the Code. No doubt, under section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with great caution. Para Nos. 29 to 29.7 of the judgment are reproduced as under:-

> "29. In view of the aforesaid discussion, we sum up and lay down the following principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercising its power under Section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings:
>
> 29.1Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.

29.2. When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure:

(i) ends of justice, or

(ii) to prevent abuse of the process of any Court.

While exercising the power the High Court is to form an opinion on either of the aforesaid two objectives.

29.3. Such a power is not be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.

29.4. On the other, those criminal cases having overwhelmingly and pre-dominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.

29.5. While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.

29.6. Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore is to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the later case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.

29.7. While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but

> after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime".

8. Para 29.2 of the judgment of the Hon'ble Apex Court suggest that guiding factor for quashing the criminal proceedings in terms of settlement arrived between the parties would be to secure:

(i) ends of justice, or

(ii) to prevent abuse of the process of any Court.

While exercising the power the High Court is to form an opinion on either of the aforesaid two objectives.

9. Careful perusal of para 29.3 of the judgment suggest that such a power is not be exercised in the cases which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Apart from this, offences committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender. On the other hand, those criminal cases having overwhelmingly and predominantly civil character, particularly arising out of commercial transactions or arising out of matrimonial relationship or family disputes may be quashed when the parties have resolved their entire disputes among themselves.

10. Admittedly, in the present case accused has been convicted under Section 354 of Indian Penal Code, which is non-compoundable offence and could not be ordered to be compounded in terms of Section 320 IPC. Since, in the instant case application has been moved under Section 321 read with Section 482 Cr.P.C, this Court is empowered to quash the criminal proceedings in the case which are not compoundable. But perusal of para 29.7 of judgment passed by Hon'ble Apex Court provides that while deciding whether to exercise jurisdiction under Section 482 Cr.P.C or not, timings of settlement play crucial role. The Hon'ble Apex Court has specifically observed that when conviction is already recorded by the learned trial Court and matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same.

11. Admittedly in the present case, application for compounding the offence in question on the basis of compromise has been filed at the appellate stage, when accused has been already convicted by the learned trial Court. Hence, this Court is of the view that it is not a fit case, and a stage, where inherent power under Section 482 Cr.P.C can be invoked to order for compounding the offence. Accordingly, application moved by the petitioner for compounding the offence on the basis of compromise having been entered into the parties is rejected at this stage.

12. Since for the reasons stated hereinabove, application bearing No. Cr.M.P. No. 373 of 2016 filed on behalf of the accused for compounding the offence stands rejected, this Court proceeds to decide case at hand on merits.

13. Mr. Bhuvnesh Sharma, learned counsel representing the petitioner vehemently argued that the judgments passed by both the Courts below are not sustainable as the same are not based upon correct appreciation of the evidence available on record. He contended that both the Courts below while recording the conviction against the petitioner-accused have failed to notice major and substantive contradictions in the statements of the prosecution witnesses and, as such, great injustice has been caused to the petitioner-accused. Mr. Bhuvenesh Sharma, learned counsel forcibly contended that both the Courts below have fallen in great error inasmuch as not acknowledging the arguments having been made by the petitioner with regard to delay in lodging the FIR. During his arguments, he invited the attention of the Court to the statements made by the various prosecution witnesses to demonstrate the major contradictions in the statements of the prosecution witnesses and wherein no explanation worth the name was rendered for delay in lodging the FIR. He contended that the petitioner-accused has been falsely implicated in the present case due to personal enmity and litigation between the family of the petitioner- accused and the complainant and, as such, Courts have committed material irregularity and illegality while convicting the petitioner-accused for having committed an offence punishable and under Section 354 of the Indian Penal Code. He prayed that the judgments passed by both the Courts below deserve to be quashed and set-aside. He also contended that the prosecution has miserably failed to prove its case within the parameters of basic ingredients of Section 354 of the Indian Penal Code and sentence of three months, as has been recorded by the first Appellate Court is harsh and cannot be allowed to be sustained. It is also contended on behalf of the petitioner that in case the Court comes to conclusion that the judgments passed by both the courts below are based on correct appreciation of the evidence available on record, then petitioner-accused being first offender, deserves to be given benefit of Section 4 of the Probation of Offenders Act. Mr. Sharma, learned counsel submitted that more than 10 years have passed after recording the conviction against the petitioner-accused by the learned trial Court and petitioner suffered great mental agony during the pendency of the case. Mr. Bhuvnesh Sharma, learned counsel also stated that the petitioner-accused is respectable person of the society and there is no other case pending against him in any court of law in the country.

14. Mr. Rupinder Singh Thakur, learned Additional Advocate General, representing the respondent-State, supported the judgments passed by both the Courts below and stated that no interference, whatsoever, of this Court is warranted in the present facts and circumstances of the case as judgments passed by both the Courts below are based on correct appreciation of the evidence available on record.

15. I have heard the learned counsel representing the parties and have carefully gone through the record made available.

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

17. As far as scope of power of this Court while exercising revisionary jurisdiction under Section 397 is concerned, the Hon' ble Apex Court in ***Krishnan and another Versus Krishnaveni and another*****, (1997) 4 Supreme Court Case241**; has held that in case Court notices that there is a failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities/incorrectness committed by inferior criminal court in its judicial process or illegality or sentence or order. The relevant para of the judgment is reproduced as under:-

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

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

18. Perusal of the material available on record suggest that on 23rd March, 2006, at about 1:00 PM, complainant was returning to her house after delivering meals at the shop of her husband, the petitioner-accused came on a scooter and gave lift to the complainant. Since complainant had prior acquaintance with the accused, she took a lift on the scooter of the petitioner- accused but when she alighted from the scooter near her house, petitioner-accused caught hold of her arm and asked her as to when he should visit her house. On being asked by the complainant, accused told her that his wife generally remains ill and, as such, she should oblige him. Complainant further alleged in the complaint that the petitioner-accused in order to outrage her modesty caught hold of the string of her salwar. However, she escaped with great difficulty and thereafter she started walking towards her house. It is averred in the complainant that at some distance, petitioner-accused started calling out to her that she should give him time as when he should come to her house. It is also averred that above talk was heard by Veena Devi, who was collecting grass from nearby field. As per story of the prosecution, complainant narrated the story to her husband, who on the next day accompanied the complainant to the police station, Barsar for lodging the FIR Ex.PW1/A. On the basis of complaint lodged by the complainant, matter was investigated by PW-5, ASI Parkash Chand, who during the investigation prepared the site plan Ex.PW5/A and took into possession Scooter bearing registration No. HP-21-0352 of the accused along with its documents vide memo Ex.PW3/A. Statement of the witnesses were recorded under Section 161 Cr.P.C and after collecting the material evidence on record, police prepared the challan and presented the same in the Competent Court of law against the petitioner-accused for having committed the offence punishable under Section 354 of the Indian Penal Code.

19. Since accused was convicted by the learned trial Court for having committing the offence punishable under Section 354 IPC, he filed an appeal under Section 374 of the Code of Criminal Procedure in the Court of learned Sessions Judge, Hamirpur, who while dismissing the appeal modified the sentence to three months from one year, as was awarded by the learned trial court below.

20. In the present case, prosecution with a view to prove its case examined as many as five witnesses. PW-1, Smt. Roshani Devi(complainant), PW-2, Dharam Chand, PW-3, Sandeep Kumar, PW-4, SI Sohan Lal and PW-5, ASI Parkash Chand. Statement of accused under Section 313 Cr.P.C was also recorded, wherein he denied the incident and stated that parents of the complainant Roshani Devi(PW-1) and his in-laws are of same village and since cases between them are pending in the Court, he has been falsely implicated in the present case. Accused also examined DW-1, Jitender Kumar in his defence.

21. PW-1, Smt. Roshani Devi stated that accused offered lift to her on his scooter and since she had prior acquaintance, she took the lift. However, at some distance, when she asked the accused to drop her, the accused stopped the scooter and caught hold of her arm. The complainant objected to the same but accused told her that his wife generally has stomach-ache and she should oblige him with sexual favour. Complainant also stated that accused asked her as to when he should visit her house and later he put his hands on the string of her salwar but she escaped from the clutches of the accused with great difficulty. She also stated that when she was

going back to her house, accused asked her from behind as to when he should visit her house. She went to her house and in the evening informed her husband about the incident. It has also come in her statement that Veena Devi was collecting grass nearby and she also asked her as to why the later was running. On the next day, she lodged the FIR Ex.PW1/A at the police station. It has come in her cross-examination that Veena Devi was cutting grass at a distance of 20-25 metres. She categorically denied that she never took a lift on the scooter of the accused-petitioner. She also denied that she had not gone with meals to the shop of her husband. She also stated in her cross-examination that police Station is about 2 KMs from her house and she did not narrate the incident to anyone except her husband, Dharam Chand.

22. Careful perusal of the statement given by PW-1 in his examination-in-chief and cross-examination suggest that complainant has been very specific and consistent while stating that accused caught hold of her arm and asked to oblige him with sexual favour. She has been very very candid in stating that accused put his hands on the string of her salwar. Even in the cross-examination conducted on behalf of the petitioner-accused, complainant stuck to stands which she took in the examination-in-chief and defence was unable to extract anything contrary from her in the cross-examination.

23. Interestingly, no suggestion worth the name with regard to enmity and animosity was put to the complainant by the accused and, as such, stand taken by the accused that he has been falsely implicated due to pending litigation between his in-laws and parents of the complainant cannot be accepted on its face value. If the statement given by PW-1 is read in its entirety, it leaves no doubt in the mind of the Court that testimony of PW-1 is confidence inspiring and defence has miserably failed to prove that she had motive to falsely implicate the accused.

24. PW-2, Dharam Chand, husband of the complainant (PW-1) also stated that when he reached home on that day at about 9:00 PM from his shop, complainant narrated the entire incident to him. So, accordingly on the next day, he took his wife to the Police Station, Where FIR Ex.PW1/A was lodged. In cross-examination, he admitted that he did not tell the incident to any villager. He also denied the suggestion that his wife had not gone to the shop on the relevant day with meals to him.

25. PW-3, Sandeep Kumar and PW-4, SI Sohan Lal are formal witnesses, who have only proved the documents on record.

26. PW-5, ASI Parkash Chand, Investigating officer stated that he visited the spot and prepared the site plan Ex.PW5/A and took into possession Scooter bearing registration No. HP-21-0352 of the accused. Thereafter, he recorded the statements of the witnesses. In cross-examination, he also stated that as per the police record, the incident had not been witnessed by Amar Nath and Lekh Ram. He also denied the suggestion that earlier a report was made about this very incident by the complainant to the police.

27. Careful analysis of the statement made by PW-2, husband of the complainant also suggest that the same is trustworthy as he in his statement has fully supported the version put forth by the complainant (PW-1). He also explained that why FIR could not be lodged at the same time, because he admitted that since he came at 9:00 PM in the evening on the date of occurrence, he along with his wife could only report the matter to the police on the next morning. Since it has specifically stated by PW-1 in her statement that Police Station is 2 KM away from her house, explanation rendered by PW-1 and PW-2 for alleged delay in lodging FIR Ex.PW1/A seems to be plausible and deserves to be accepted in the facts and circumstances of the case. As far as not narrating the incident to other villager are concerned, such omission, if any, cannot be termed as detrimental to the case of the prosecution because admittedly in cases where personal pride of lady is involved, she cannot be expected to narrate the incident to each and everyone but fact remains that at first instance/ opportunity she narrated the incident to her husband and thereafter matter was reported to the police. Moreover, as has been discussed above, that no suggestion worth the name was put to PW-1 as well as PW-2 by the defence that they had some

motive to falsely implicate the accused. Even no suggestion with regard to prior enmity and animosity between in-laws of the petitioner- accused and parents of the complainant was put to PW-1 as well as PW-2 and, as such, version put forth by the accused that he has been falsely implicated due to ongoing litigation between his in-laws and parents of the complainant cannot be accepted at all. Moreover, no evidence be it ocular or documentary was ever led by the accused to prove the aforesaid assertion made by the accused in his statement under Section 313 Cr.P.C. Hence, defence taken by the accused does not appear to be trustworthy.

28. DW-1, Jitender Kumar stated that on 23rd March, 2006, he met the complainant on the way while he was returning from the shop of chemist to his house and both of them came to their village together. He also stated that he noticed Veena Devi cutting grass in fields. In his cross-examination, it has come that he did not note the date of occurrence. The houses of Lekh Ram and Dev Raj are adjacent to the shop of the chemist. He also admitted that he knows the petitioner-accused since he purchases tailoring material from the shop of his brother.

29. Close reading of the statement given by DW-1 in his examination-in-chief as well as cross-examination, nowhere supports the version put forth by the petitioner-accused in his statement under Section 313 Cr.P.C. This defence witness DW-1 except deposing that he met the complainant on the way while he was returning from the shop of chemist and thereafter they both returned together to the village did not state anything which could be of any help to the defence taken by the accused. Rather, careful reading of the statement given by DW-1 suggest that on the date of occurrence complainant had gone to the shop of her husband and thereafter she returned to his house along with DW-1. But interestingly, no suggestion worth the name was put to the complainant in the cross-examination to the effect that on the date of occurrence when she was coming from the shop of her husband she was accompanied by DW-1, who also in his statement stated that he met the complainant on the way but he has not stated the place, where the complainant allegedly met him and, as such, in the absence of specific statement with regard to the place where DW-1 had allegedly met the complainant, statement given by DW-1 cannot be relied upon, especially in the teeth of the fact that accused was known to DW-1.

30. In totality of facts and circumstances of the case, as discussed hereinabove, defence put forth by the petitioner-accused deserves out right rejection that he has been falsely implicated by the complainant because as per evidence available on record, there is nothing on record from where it can be inferred that the complainant was inimical to the accused and she had some motive to falsely depose against the accused, rather accused miserably failed to prove by leading cogent evidence on record that there is/was pending litigation between his in-laws as well as parents of the complainant. Had there been any litigation pending between in-laws of accused and parents of petitioner, accused would have definitely made available on record proceedings, if any, allegedly pending in the Court of law.

31. Another arguments having been advanced by the learned counsel representing the petitioner-accused that the complainant herself took the lift from the accused suggest that she is consenting party, deserves to be rejected out rightly, rather needs to be condemned in the given facts and circumstances of the case. It stands specifically proved on record that the complainant and accused had prior acquaintance, which fact gets substantiated from the statement given by the accused under Section 313 Cr.P.C, where he himself stated that his in-laws and parents of the complainant had some litigation, meaning thereby statement given by PW-1 is correct that she knew the petitioner-accused since in-laws of accused and her parents are of same village. Rather careful perusal of the evidence available on record compels this Court to presume that the complainant took lift on the scooter of the accused under bona-fide belief that no harm would be caused to her by the accused, since her parents and in laws of the accused are of same village.

32. Another arguments put forth by the learned counsel for the petitioner-accused that both the Courts below have miserably failed to appreciate that there was no intention whatsoever on the part of the accused to outrage the modesty of the complainant appears to be

far away from the factual aspect available on the record. PW-1 has candidly stated that petitioner-accused caught hold of her arm and asked to visit her house and oblige him with sexual favour. Moreover, complainant specifically stated that the petitioner-accused in order to outrage her modesty put his hands on the string of her salwar, however she managed to escape. Aforesaid specific and candid statement, which the defence has not been able to shatter during cross-examination, is sufficient enough to conclude that the accused only with a view to outrage the modesty of the complainant gave her lift and later asked for sexual favour.

33. In totality of facts and circumstances as emerges from the record, this Court has no hesitation to conclude that the prosecution has been able to prove its case beyond reasonable doubt against the accused, who has been rightly held guilty for having committed the offence punishable under Section 354 of Indian Penal Code by the learned court below and, as such, this Court sees no reason to interfere with the judgments passed by both the courts below as the same are based on correct appreciation of the evidence available on record.

34. Accordingly, the present criminal revision petition is dismissed being devoid of any merit.

35. Now, adverting to the prayer made by learned counsel for the petitioner-accused that the petitioner-accused being first offender is entitled to the benefit of Section 4 of the Probation of Offenders Act. This Court considering all the aspects of the matter, especially pendency of the present petition, where admittedly petitioner suffered mental agony for almost 10 years, deems it to be fit case where prayer for granting benefit under Section 4 of the Probation of Offenders Act, can be considered. Moreover, while considering the application for compounding of offence moved jointly by both the parties, this Court had an occasion to peruse the averments contained in the application as well as compromise deed, wherein parties resorted to compromise the matter solely with a view to have cordial relation in future. Even complainant, who was present in the Court, stated on oath that she intends to compromise the matter and she does not have any objection in case the accused is acquitted of the charge having been framed against him under Section 354 IPC. However, aforesaid application could not be accepted at this stage, since conviction already was recorded by the trial Court but certainly this Court while examining the case of accused for extending the benefit of Section 4 of the Act can take note of the averments contained in the application as well as compromise entered between the parties, wherein it has specifically come on record that the parties have amicably resolved the matter in order to maintain good relations in the locality.

36. Accordingly, in view of the aforesaid submission made by learned counsel for the petitioner-accused and taking into consideration the peculiar facts and circumstances of the present case, wherein parties have compromised the matter at hand, I am of the considered opinion that the present petitioner-accused can be granted benefit of Section 4 of the Probation of Offender Act. Accordingly, Registry is directed to call for the report of the Probation Officer, Hamirpur, District Hamirpur, HP on or before **5.7.2016.**

Registry to list this matter on **30th June, 2016.**

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BEFORE HON'BLE MR. JUSTICE SANDEEP SHARMA, J

Ram Lal and Anr. ....Appellants.

Versus

Sudesh Kumar and Ors. ....Respondents.

RSA No. 8 of 2005
Judgment reserved on 31.5.2016
Date of Decision: 14.6.2016.

Specific Relief Act, 1963- Section 20- Plaintiff entered into an agreement with the defendants for purchase of the land- defendants failed to execute the sale deed despite repeated requests- hence, suit was filed for seeking specific performance- suit was dismissed by the trial Court- an appeal was preferred, which was partly allowed - plaintiff was held entitled to refund of Rs. 20,000/- along with interest @ 6% per annum- aggrieved from the judgment, present appeal has been preferred- held, that execution of the agreement was proved- however, witnesses produced by the plaintiff did not establish that plaintiff was ready and willing to perform his part of the agreement- on the other hand, defendants were ready and willing to get sale deed executed in terms of the agreement- plaintiff had not offered to pay remaining amount due to which sale deed could not be executed – agreement was vague as detail of the property to be sold was not mentioned- continuous readiness and willingness is essential for specific performance- specific performance was rightly declined - appeal dismissed. (Para-12 to 28)

Cases referred:
Kirpal Singh v. Mst. Kartaro and others. AIR 1980 Rajasthan 212
J.P. Builders and another v. A. Ramadas Rao and Anr., 2011 (1) SCC 429
P.D.'Souza v. Shondrilo Naidu 2004 (6) Supreme Court Cases 649

For the appellants: Mr. N.K. Thakur, Senior Advocate with Ms. Jamuna, Advocate.
For the respondents: Mr. Satya Vrat Sharma, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

Present second appeal filed under Section 100 CPC is directed against the judgment dated 3.11.2004, passed by the learned District Judge, Una, HP, in Civil Appeal No. 30 of 2003, titled *"Shankar Das deceased now represented by L.Rs. (a) Ram Lal (b) Sham Lal v. Sudesh Kumar and Ors.,"*, whereby the appeal filed by the present appellants was partly allowed and they were held entitled to refund of Rs.20,000/- with interest @6% p.a. from the date of filing of the suit till its payment.

2. The briefly stated facts necessary for the adjudication of the case are that appellants-plaintiffs filed a suit for specific performance of contract/agreement dated 7.12.1992, executed by the defendants through their father Shri Kishori Lal, General Attorney, for the sale of suit land measuring 39 Kanals 1 Marlas being 1/4th share out of the total land measuring 147 Kanals 6 Marlas, bearing Khewat Nos. 34,36,42,44,45, 46 Khatauni Nos. 41, 44, 66, 69,71, 72, 73 Khasra Kitas 52 as entered in Misal Hakiat Bandobast Jadid Sani for the Year, 1988-89, situated in Up Mahal Chabba Nagar, Mahal Santoshgarh District. Una, H.P. Apart from above, an alternative prayer was made for recovery of Rs.20,000/-.

3. Perusal of the agreement to sell Ext.PW1/A suggests that sale deed was to be executed by or on 15.6.1993. As per averments contained in the plaint, defendants despite several requests, failed to execute the sale deed and as such, plaintiff was compelled to file the suit for specific performance. Defendants by way of written statement refuted the claim of the plaintiff and specifically stated that since plaintiff failed to make payment of balance amount in terms of agreement dated 15.6.1993, they were not under any obligation to get the sale deed executed. However, the fact remains that vide written statement, defendants admitted the execution of the agreement as well as receipt of Rs.10,000/- as earnest money from the plaintiff at the time of entering into aforesaid agreement to sell.

4. Careful perusal of averments contained in the plaint suggests that plaintiff was always ready and willing to get the sale deed executed on or before 15.6.1993 after payment of balance sale consideration but defendants on one pretext or other kept on deferring the execution of the sale deed. As per plaintiff, since defendants were under obligation to get the sale deed

executed on or before 15.6.1993, balance payment, if any, in terms of agreement dated 15.6.19993, was to be made at the time of execution of sale deed. Plaintiff also averred that he was handed over the possession of the suit land immediately on 7.12.1992. In the aforesaid pleadings, plaintiff prayed for decree of specific performance of contract/agreement to sell for the execution of sale deed for the land, detail whereof has been given above, and in the alternative decree for recovery of Rs.20,000/- with further interest @12% p.a. The plaintiff also prayed that he may be granted every relief for which he may be found entitled in the instant case. Since defendants failed to get the sale deed executed within stipulated time, plaintiff got the legal notice dated 28.8.1993, served upon him on the address mentioned in the agreement to sell dated 7.12.1992. Though, defendants in their written statement admitted the factum with regard to entering into agreement to sell on 7.12.1992 and receipt of Rs.10,000/-, but specifically denied that plaintiff was ready and willing to perform his part in terms of agreement. It is contended in written statement that failure on the part of the plaintiff to make the payment of balance consideration on or before 15.6.1993 rendered the agreement to sell dated 7.12.1992 null and void and as per the terms of the said agreement, amount of Rs.10,000/- paid as advance also stands forfeited since plaintiff never performed his part of the contract by 15.6.1993. Refusal on the part of the defendants was duly conveyed to the plaintiff in his house complex in presence of the respectable persons of the locality. In his written statement, defendants stated that alleged willingness of the plaintiff after due date after 15.5.1990, carries no meaning and it is denied that plaintiff made repeated requests to defendants to execute the sale deed. Rather on many occasions, defendants requested the plaintiff to make the balance of the consideration so that sale deed is executed on or before 15.6.1993. It is also stated in the written statement that notice dated 28.8.1993, if any, allegedly got served by the plaintiff on the defendants after due date has no bearing or binding on the rights and interests as well as title of the defendants in and over the suit land.

5. Learned trial Court on the basis of pleadings available on record framed following issues:-

> *"1. Whether the plaintiff is entitled for relief of specific performance of contract on the basis of agreement dated 7.12.1992 and in the alternative for recovery of Rs. 20,000/- as alleged? OPP.*
>
> *2. Whether plaintiff has no locus standi to file the suit as alleged ? OPD.*
>
> *3. Whether plaintiff has no cause of action as alleged? OPD.*
>
> *4. Relief."*

6. Learned trial Court after appreciating material available on record, dismissed the suit of the plaintiff with costs vide judgment dated 27.2.2003.

7. Feeling aggrieved and dissatisfied with the judgment dated 27.2.2003 passed by learned Senior Sub-Judge, District Una, present appellants filed an appeal in the court of learned District Judge, Una, i.e. Civil Appeal No. 30 of 2003. Learned first appellate Court vide judgment dated 3.11.2004 partly allowed the appeal preferred by present appellants, whereby plaintiff(s) was held entitled to refund of Rs.20,000/- with interest @6%p.a. from the date of filing of suit till its payment by Shri Kishori Lal, General attorney to the defendants with costs. Being dissatisfied with the judgment dated 3.11.2004 passed by learned District Judge, Una, as referred above, appellants-plaintiffs filed instant regular second appeal under Section 100 CPC before this Court.

8. This Court vide order dated 7.1.2005 admitted the appeal at hand on following substantial questions of law:-

> *"1. Whether the Courts below are legally justified to make out a case for the defendants beyond their pleadings to non-suit the plaintiffs/appellants?*
>
> *2. Where the agreement to sell and receipt of earnest money is admitted, the refusal to grant the decree for specific performance is illegal?*

3. Whether the impugned judgments are the result of misconstruction and misinterpretation of law and facts and deserve to be quashed and set-aside?

4. The specific performance of the contract is a rule and refusal is an exception and on this principle of law the contrary judgments of the Courts below are erroneous judgments of the Courts below are erroneous and deserve to be quashed and set aside?

9. Mr. N.K. Thakur, Senior Advocate, duly assisted by Ms. Jamuna, Advocate, representing the appellants, vehemently argued that the judgment passed by the court below, whereby relief of specific performance by way of direction to execute the sale deed has been declined, deserves to be quashed and set aside as the same are against the law and facts available on record. He contended that courts below has not appreciated the evidence available on record in its right perspective, rather, judgment is passed on conjectures and surmises and, as such, deserves to be quashed and set aside. It is contended on behalf of the appellants that both the courts below failed to appreciate the candid admissions made by respondents-defendants in the written statement, whereby factum with regard to execution of the agreement dated 7.12.1992 as well as receipt of Rs.10,000/-, as advance, has been admitted. As per Mr. Thakur, since execution of agreement and receipt of earnest money was admitted by the defendants, courts below had no option but to decree the suit of specific performance of the contract by issuing directions to defendants to execute the sale deed after receipt of balance consideration. He forcefully contended that as per agreement dated 7.12.1992, defendants were bound to get the sale deed executed on or before15.6.1993, after receipt of balance amount of consideration, which was payable at the time of registration of the sale deed. Mr. Thakur, contended that case set up by the defendants in the written statement could not be accepted at all by the courts below because averments contained in the same has not been appreciated by the courts below in light of terms and conditions of the agreement dated 7.12.1992, whereby it was specifically stipulated that balance amount of consideration would be payable by the plaintiff at the time of execution of the sale deed. Since defendant failed to get the sale deed executed well within stipulated time, plaintiff had no occasion, whatsoever to make balance payment of Rs.47,000/-, which was admittedly to be made at the time of execution of sale deed. Mr. Thakur, contended that judgment of lower appellate Court ordering the refund of the earnest money is totally illegal, especially, when it stood proved on record that plaintiffs were ready and willing to perform their part of the agreement on or before stipulated date and in the facts and circumstances as well as evidence led on record, courts below should have directed the respondents to execute the sale deed in terms of agreement. He stated that specific performance is a rule and refusal is an exception. It is contended that when courts below had come to conclusion after appreciating the evidence on record that defendant-respondent cannot be allowed to retain the benefit of the agreement as it would amount to unjust enrichment to the defendants, natural consequence thereof was to pass decree of specific performance against the defendants. During arguments having been made by him, he invited attention of this Court to the judgments passed by the courts below as well as statements made by the witnesses adduced by the parties to demonstrate that courts below misconstrued, mis-read and misinterpreted the facts and law applicable to the facts of the case. He submitted that careful perusal of the judgments passed by the courts blow suggests that court below have gone above the board to set up new case for the defendants. He stated that perusal of the written statement filed by the defendants nowhere suggests that any plea with regard to vagueness, ambiguity and uncertainties in the terms and conditions of agreement were taken by the defendants but both the courts below despite there being no such pleas as referred above, declined the relief of specific performance terming the agreement in question to be vague and evasive. He prayed that in the facts and circumstances as well as discrepancies having been pointed out during the arguments, judgments passed by courts below deserve to be set aside in as much as prayer for grant of relief of specific performance has been declined/ denied by the courts below.

10. Per contra, Shri S.V. Sharma, Advocate, appearing on behalf of the defendants supported the judgments passed by both the courts below. He strenuously argued that material

available on record clearly suggests that plaintiff failed to perform its part of the agreement, whereby plaintiff was under obligation to make balance amount of consideration on or before 15.6.1993. Since balance amount of consideration was not paid to the defendants within a stipulated time, defendants were not under obligation to get the sale deed executed in terms of agreement dated 2.12.1992. He forcefully contended that plaintiff has miserably failed to prove that he was ready and willing to perform his part in terms of agreement because none of the witnesses led by the plaintiff has supported the averments contained in the plaint. He contended that though plaintiff has stated that repeated requests were made to the plaintiff to get the sale deed executed but there is nothing on record to conclude that such requests were ever made by the plaintiff. To the contrary, defendants have been able to prove that after a stipulated date 15.6.1993, he in the presence of respectable persons of locality went to the house of Shri Kishori lLal, General Attorney of plaintiff to inform that now after expiry of stipulated date, defendants are not ready and willing to get the sale deed executed as was agreed vide agreement to sale. He further stated that no interference, whatsoever, of this Court is called for in the facts and circumstances of the case, where both the courts below after examining the evidence available on record have rejected the prayer of the plaintiff to issue decree for specific performance against the defendants. He contended that now in view of the judgment passed by the first appellate Court, where the defendants were directed to refund amount of Rs.20,000/- along with 6% interest, prayer made by plaintiff in alternate has been accepted and as such, present appeal is not maintainable.

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

12. Though, while admitting the instant appeal for hearing, this Court formulated four substantial questions of law, as have been reproduced above, this Court intends to take substantial question No. 2 at the first instance, for its consideration because while critically examining the evidence available on record to answer the question No. 2, question No. 3 would be answered automatically.

13. Careful perusal of the pleadings on record, as have been discussed above, clearly suggests that parties to lis had entered into an agreement to sell for the sale of suit land for total consideration of Rs.57,000/- and a sum of Rs.10,000/- was received by Shri Kishori Lal , General Attorney of defendants as earnest money. It is also not disputed that sale deed was to be executed by or on 15.6.1993 in terms of agreement dated 7.12.1992. As per the case set up by the plaintiff, since defendants failed to get the sale deed executed by 15.6.1993, despite several requests, he was compelled to file suit for specific performance in the court of learned Senior Sub-Judge, Una, whereas defendants while admitting the execution of the agreement as well as receipt of earnest money, denied that despite several requests, defendants failed to get the sale deed executed. To the contrary, defendants set up a case that since plaintiff failed to make balance payment of Rs.47,000/- on or before 15.6.1993, defendants could not get the sale deed executed within stipulated period in terms of contract or agreement to sale dated 7.12.1992. Since factum with regard to execution of the agreement to sell as well as receipt of earnest money is not denied by the defendants, moot question which requires consideration of this Court is that *"whether the plaintiff was ready and willing to perform his part on or before 15.6.1993 or not in terms of agreement to sell Ext.PW1/A?* Another question, which requires consideration of this Court is that *"whether defendants took any steps whatsoever, in terms of agreement dated 7.12.1992 Ext.PW1/A to get the sale deed executed on or before 15.6.1993 as was stipulated in the agreement Ext.PW1/A."*

14. Plaintiff with a view to substantiate the averments contained in the plaint examined himself as PW1 and by way of oral deposition reiterated the contents of the plaint. Perusal of the statement made by the plaintiff suggests that agreement Ext.PW1/A was written at the house of Kishori Lal, General Attorney of defendants, who himself scribed the document. It has come in his statement that in year, 1992, defendant agreed to sell the suit land (as discussed above), in favour of plaintiff of the total consideration of Rs.57,000 and Rs.10,000/- was received

by defendant in advance as an earnest money. It has also come in his statement that neither he saw the power of attorney executed in favour of attorney namely Kishori Lal nor he perused the revenue papers pertaining to the land at the time of scribing of agreement Ext.PW1/A. He also admitted in the cross-examination that there is no mention in the agreement with regard to extent of land, which was to be sold in terms of agreement Ext.PW1/A. He also stated in his cross-examination that since he has not read the contents of power of attorney, he cannot say whether Kishori lal had any right to execute the agreement to sell. However, in his cross-examination, he stated that he along with Shankar visited the house of Kishori Lal but he was not at home. It has also come in his statement that as per agreement Ext.PW1/A defendants had agreed to sell the whole land situated in Santoshghar, Chabba Nagar, Takhatpur and Jatpur for the total consideration of Rs.57,000/- and earnest money amounting to Rs.10,000/- was paid to the defendant on the spot and remaining balance consideration was to be paid at the time of execution of sale deed, which was to be executed on or before 15.6.1993. It has come in his statement that Kishori Lal was repeatedly asked to get the sale deed executed but Kishori Lal went to Chandigarh and did not execute the sale deed. Then he got the legal notice Ext.PW1/B issued to the defendants, postal receipt whereof is Ext.PW1/C. It has also come in his statement that notice was received back vide Ext.PW1/D along with Ext.PW1/E. He also stated that he is ready and willing to purchase the land after making payment of balance amount. He admitted that he had not seen the record at the time of scribing of agreement to sell i.e. Ext.PW1/A and he had not seen revenue record. He further stated that he did not know as to what extent Santosh Kumari, Naresh Kumar and Parveen Kumari are the owners of the suit land. However, he stated in cross-examination that agreement to sell was for 40-41 kanals. He denied in the cross-examination that agreement to sell was executed by Kishori Lal against the wishes of original owners of the land. It has come in his cross-examination that Kishori Lal had not come to village from 1992 -93 nor he met him in village and Santoshgarh. He also admitted that notices were sent on the address of village, though, he stated in his cross-examination that in the month of June, 1993, he along with Om Parkash had gone to Village Bharolian Kalan.

15. PW2 Shri N.K. Chabha, Advocate District Court proved the signatures of late Shri Om Parkash Kapila, who had signed as witness on the agreement to sell. He in his statement stated that he knew Om Parkash Kapila and he could decipher/was familiar/acquainted with the signatures of Om Parkash Kapila. He stated that signatures encircled with red circle Ext.PW1 is the signature of Sh. Om Parkash Kapila.

16. PW3 Kishori Lal s/o Shri Dheru Ram, supported the version put forth by PW1. He stated that signatures mark-X on the agreement are his signatures and he also supported the version of PW1 with regard to execution of the agreement, whereby suit land was agreed to be sold for the total consideration of Rs.57,000/- and Rs.10,000/- was received as advance by the defendants. He also stated in examination-in-chief that when he signed on that agreement, neither he saw the power of attorney executed in favour of the Kishori Lal nor he saw the revenue papers. He also stated in cross-examination that it is correct that there is no description with regard to land in agreement. He also admitted that there is no mention in the agreement qua the extent of land in a particular village. He also stated in cross-examination that as per agreement, if registry is not executed on or before 15.6.1993, agreement would be rendered meaningless. He also admitted that Kishori Lal had visited the house of Shankar but he did not know for what purpose he had gone to the house of Kishori Lal. He also admitted in his cross-examination that he and Shankar had gone to house of Kishori Lal but he was not at home. He categorically stated that aforesaid narration of facts given by him is of period prior to 15.6.1993. He also admitted that Kishori Lal kept on meeting him after 15.6.1993. He also admitted that "it is correct that Kishori Lal had stated that now Naresh Kumari and Santosh Kumari etc. do not want to sell the land."

17. Conjoint reading of the statements of plaintiff witnesses, as discussed above, suggests that parties entered into an agreement , wherein there is stipulation to get the sale deed executed for the sale of suit land on or before 15th June, 1993. It also emerges from the aforesaid

statements that admittedly sale deed was not got executed in terms of agreement Ext.PW1/A within stipulated period. But careful reading of aforesaid witnesses produced by plaintiff nowhere suggests that plaintiff was ready and willing to get the sale deed executed within the stipulated period because save and except bald statement that despite several requests made by plaintiff, defendants failed to execute the sale deed executed in terms of Ext.PW1/A, no material worth the name has been placed on record from where it could be inferred that after execution of agreement Ext.PW1/A, plaintiff made an effort to get the sale deed executed. True, it is that as per agreement, sale deed was to be executed by the defendant after payment of balance consideration amount i.e. Rs.47,000/- but there is nothing more in the statement of PW1 save and except that when defendant was asked to get the sale deed executed, he went to Chandigarh. Moreover, PW3 has nowhere stated that the plaintiff insisted upon the defendant to get the sale deed executed on or before 15.6.1993. Rather careful perusal of the cross-examination of PW3 suggests that defendant visited the house of plaintiff Shankar. It has also emerged from the statement of PW3 that defendant Kishori Lal Kept on meeting even after 15.6.1993, which suggests that defendant namely Kishori Lal was ready and willing to get the sale deed executed in terms of agreement. Conjoint reading of statements given by PWs 1 and PW3 nowhere suggests that any effort, whatsoever, was made by the plaintiff to persuade the defendant to get the sale deed executed in terms of agreement. Though balance amount of consideration was to be paid at the time of execution of sale deed but definitely, plaintiff was to express his willingness to purchase the land to the defendant by telling him that he is ready with the balance amount of consideration as agreed in terms of agreement so that defendant could get the sale deed executed. Since the very element of readiness and willingness is completely missing in the statements rendered by PW1 and PW3 as well as averments made in plaint, it cannot be accepted that plaintiff was actually ready and willing to perform his part. Admittedly, there is nothing on record suggestive of the fact that plaintiff ever expressed his readiness and willingness to the defendant with regard to the execution of the sale deed after payment of balance amount of consideration. Though, perusal of the agreement in question suggests that balance amount of consideration was to be paid at the time of registration of sale deed but for that plaintiff was expected to inform defendant either by words or by some written communication disclosing therein that he is ready with the balance amount of consideration and as such sale deed may be got executed in terms of agreement.

18. To the contrary, if the statement of DW1 Kishori Lal, General Attorney, of defendants is seen, who categorically denied that notice was ever received by him and plaintiff repeatedly asked him to execute the sale deed after getting balance amount of consideration. Careful perusal of cross-examination of DW2 clearly suggests defendant No. 1 stuck to his statement, which he made in examination-in-chief, wherein he categorically denied the suggestion that plaintiff had offered balance amount of consideration and he dilly-dallied. He also stated in his cross-examination that after his retirement, he sometimes resides in village and sometimes in Chandigarh.

19. DW2 Baldev Chand also stated that defendant Kishori Lal repeatedly asked the plaintiff to make payment of balance amount of consideration but plaintiff did not take any interest. He categorically stated that in 1993, he along with Kishori Lal went to the house of plaintiff and informed him that since date of agreement has expired, he may treat the agreement to sell cancelled. In his cross-examination, he stated that in the end of June, 1993, he along with defendant had gone to the house of plaintiff to refuse plaintiff. He denied that plaintiff ever stated that he is ready and willing to execute the sale deed after taking balance amount of consideration. He also denied that Kishori Lal defendant dilly-dallied.

20. From conjoint reading of statements given by defendants No. 1 and 2, it clearly emerges that defendant was ready and willing to perform his part but since no offer, whatsoever, with regard to payment of balance of consideration had come from plaintiff, sale deed could not be executed, rather factum with regard to informing the plaintiff by defendant that he was no more interested in execution of the sale deed after expiry of stipulated period duly stands proved

on record in view of the statement given by these two defendant witnesses. It has specifically come in the statement of these two defendant witnesses that defendants were ready and willing to perform their part for execution of the agreement in question in terms of agreement to sell Ext.PW1/A. As has been observed above that, in the given facts and circumstances, plaintiff was expected to express willingness by way of offering balance amount of consideration to the defendant that too before 15.6.1993 to enable defendant to execute the sale deed in terms of agreement but in the present case, there is no evidence worth the name available on record to suggest that plaintiff actually expressed any willingness by offering money to defendant before 15.6.1993 and, as such, it cannot be said that defendants failed to perform their part as far as execution of the agreement in question is concerned. Moreover, careful reading of the statement given by PWs1, PW3 and the agreement Ext.PW1/A suggests that admittedly there were no specific details with regard to land proposed to be sold in agreement in question. Rather, careful reading of the statements made by these plaintiff witnesses suggests that factum with regard to authority, if any, in favour of defendant to sell the land, which admittedly belonged to his children, was never ascertained by the plaintiff at the time of scribing of the agreement to sell. Undisputedly, there is no specific detail with regard to land proposed to be sold by defendant and, as such, finding returned by both the courts below that agreement in question is vague, uncertain, ambiguous and evasive cannot be faulted with because admittedly, no decree for specific performance could be granted by courts on the basis of vague agreement, wherein no detail whatsoever with regard to the suit land has been mentioned. No decree, as prayed for, by the plaintiff could be granted by the court below on the basis of agreement in question in the absence of specific details of the property. Plaintiff by way of suit prayed for decree of specific performance against the defendant to get the sale deed executed in terms of agreement or in alternative suit for recovery of Rs.20,000/-. In the present case on the basis of documents available on record as well as statements made by the plaintiff witnesses, certainly no decree for specific performance could be issued however alternative prayer as was made by the plaintiff has been granted by the learned first appellate Court, whereby direction has been issued to defendant to pay amount of Rs.20,000/- along with 6 % interest. In other words, in view of the decision rendered by the first appellate Court, alternative prayer made by plaintiff has been accepted by the first appellate Court.

21. In view of the aforesaid discussion, this Court has no hesitation to conclude that plaintiff has not been able to prove on record that he was ready and willing to perform his part in terms of agreement to sell Ext.PW 1/A. To the contrary, defendant by leading cogent, convincing and reliable evidence has established on record that they were ready and willing to perform their part in terms of agreement for execution of sale deed but since no amount in the shape of balance amount of consideration was offered, there was no occasion for defendant to get sale deed executed on or before stipulated date. Moreover, as has been discussed in detail above, plaintiff has not led any evidence on record to suggest that he had taken any steps to perform his part in terms of agreement to sell. Save and except bald statement that plaintiff repeatedly asked defendant to get the sale deed executed, there is no material on record, which could persuade this Court to accept the contention of the appellants that defendants dilly-dallied and purposely did not get the sale deed executed in terms of agreement Ext.PW1.

22. By now, it is well settled principle that in a suit for specific performance of contract, it the duty of the plaintiff to aver and prove that he was ready and willing to perform the essential terms of contract because specific performance of a contract cannot be enforced in the absence of specific averment with regard to readiness and willingness to perform his part in terms of contract but at the same time, onus is always upon the plaintiff to prove that he was or has always been ready and willing to perform his part in terms of the contract. Mere statement that he was always ready and willing to perform his part may not be sufficient to prove that he was ready and willing to perform his part in terms of agreement, rather, plaintiff to prove that he was /is ready and willing to perform his part is required to show from his conduct that he actually made an effort to perform his part in terms of the agreement/contract. Factum whether plaintiff was ready and willing to perform the essential terms of the contract is required to be determined

by taking into consideration the entirety of the circumstance, the conduct of parties as well as terms of the contract. In the present case, save and except, statement given by the plaintiff that he was ready and willing to perform his part of contract cannot be termed sufficient for granting decree of specific performance. In the present case, plaintiff has neither placed on record any document suggesting that he took some initiative to make balance amount of consideration to the defendant, which would have further compelled defendant to get the sale deed executed in terms of the agreement in question nor plaintiff led any oral evidence on record to suggest that he, before the expiry of stipulated date, went to defendant offering him balance amount of consideration to express readiness and willingness to perform his part of agreement rather, he stated in examination-in-chief that he repeatedly asked defendant to get the sale deed executed but he dilly-dallied. He nowhere stated that he informed the defendant that he is ready and willing with the balance amount of consideration and he nowhere stated that he asked the defendant to come before the Sub-Registrar for registration of sale deed in terms of agreement in question. Hence, this Court merely on the basis of statement of plaintiff that he was ready and willing to perform his part, cannot accept the plea of readiness and willingness put forth by the plaintiff. In this regard, reliance is placed upon the judgment rendered in **Kirpal Singh v. Mst. Kartaro and others. AIR 1980 Rajasthan 212.** The relevant paras of which read as under:-

> *9. It is well established that in a suit for specific performance of the contract it is the duty of the plaintiff to aver and prove that he was and is ready and willing to perform the essential terms of the contract. In this connection reference may be made to Section 16(c) of the Specific Relief Act, 1963 (which will hereinafter be referred to as 'the Act'), which provides that specific performance of a contract cannot be enforced in favour of a person who fails to aver and prove that he was or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant. An explanation has further been appended to Sub-section (c) which reads as under:--*
>
> *"Explanation. For the purposes of Clause (c):*
>
> *(i) Where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;*
>
> *(ii) The plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction."*
>
> *10. Clause (c) is a new one. It lays down a condition precedent to the enforcement of specific performance of a contract. It is based on the maxim 'he who seeks equity, must do equity' and more so in the cases of specific performance. We have, therefore, to see whether the plaintiff has complied with this essential requirement of law for seeking specific performance. In para No. 1 3 of the plaint it has been alleged that the plaintiff paid to the defendant Rupees 2000/- as earnest money or a part of the purchase price on 2-9-1967 and demanded the possession of a part of the land as stipulated on 13-1-1968, but the defendant did not hand over the possession of the same. It is also alleged that in accordance with the terms of the agreement the plaintiff was always ready and willing to get the sale deed registered on payment of Rs. 10,960/-, balance of the sale price and called upon the defendant several times to accept the money and execute the sale deed and get it registered but the defendant went on evading. It is further stated, that on 13-1-1968 he asked the defendant to execute the sale deed, but the defendant did not comply, nor got the sale deed registered on 15-1-1968 as agreed between the parties, and that on 15-1-1968 he went to the office of the Registrar or Sub-Registrar, Ganganagar, by whatever designation he may be called, with the sale money, but the defendant did not turn up, and thus the defendant neither executed the sale deed nor got it registered. He has also alleged that he has been always ready and will-ins to perform his part of the contract, and is even now ready and*

willing to do so, but the defendant has committed breach of agreement. In the written statement the defendant, in the first instance, took the plea that he had not received Rs. 2000/- at the time of execution of the document, a plea which was negatived by the trial court and not argued either before the learned Single Judge or before us and then while replying to para No. 3 it was pleaded as below:--

"Para No. 3 of the plaint is denied. The plaintiff did not pay any amount and hence no question arises of delivering possession of the land to him. The defendant is in possession of his land in dispute as usual. All the allegations contained in para No. 3 of the plaint are denied."

11. It may be noticed that the defendant has not specifically denied the various allegations made by the plaintiff in para No. 3 of the plaint. On the other hand a general denial has been made. Order 8, Rule 3, Code of Civil Procedure lays down that it shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff but the defendant must deal specifically with each allegation of fact of which he does not admit the truth except damages. Rule 5 further provides that every allegation of fact in the plaint if not denied specifically or by necessary implication or stated to be not admitted in the pleading of the defendant shall be taken to be admitted except as against a person under disability. Now, in the present case, no doubt, there is a general denial of the allegations contained in para 3 of the plaint. But there is a specific denial only with respect to receiving Rs. 2000/- at the time of execution of the document. A number of other material allegations contained in that para have not been specifically denied. It is also significant that no issue has been struck on the question whether the plaintiff was ready and willing to perform his part of the contract. However, since in the eye of law the plaintiff is bound to aver and prove the same we must look into the evidence to find out whether the allegation made by the plaintiff as to his readiness and willingness to perform hia part of the contract has been proved. But while doing so. we cannot lose sight of the fact that the defendant's denial in this respect is evasive. P. W. 2 plaintiff Kirpal Singh has stated that he was ready and willing to get the sale deed registered in accordance with the terms of the agreement but the defendant did not comply. He further states that he went to the Registrar's office on the appointed date for getting the sale deed registered, but the defendant did nol turn up. He also states that he took the money with him, but the defendant was trying to back out of the agreement as the prices of the land had gone up. However, he wants the land. In the course of cross-examination he has stated that he had not given any written notice to the defendant for getting the sale deed registered but he did go to the defendant's house many a times. On the other hand, D. W. 1 Gujar Singh defendant has not said a word in this respect.

12. Mr. Hastimal has strenuously urged that the plaintiff has not supported in his statement the various allegations contained in para 3 of the plaint, and that there is nothing to show that he had purchased the stamps for execution of the sale deed and had also got prepared a draft of the sale deed. His contention is that these are the essential terms of the contract which the plaintiff was required to perform, and since he did not do so, he is not entitled to enforce specific performance. We are, however, unable to accept this contention. In order to find out whether the plaintiff was ready and willing to perform the essential terms of the contract which he was required to perform, we have to take into consideration the entirety of circumstances, the conduct of the parties, and the essential terms of the contract.

14. Coming to the essential terms of the contract, Mr. Hastimal placed great reliance on two decisions of this Court: Mst. Suraj Bai v. Nawab Mohammad Mukarram Ali Khan, ILR (.1969) 19 Raj 508 and Dhanbai v. Pherozshah, 1970 Raj LW 594 in support of his contention that the defendant should have purchased the stamps for execution of the sale deed and should have also got prepared a draft of

sale deed. It is important to note that in the agreement Ex. 1 it is nowhere provided that the plaintiff would purchase the stamps and would also get prepared a draft of the sale deed. Thus these are not the essential terms of the contract. It is true that under the T. P. Act unless there is a contract to the contrary it is the duty of the buyer to pay for the stamps as well as to get a draft of the sale deed prepared. But in the facts and circumstances of the case, we are of the opinion that this was not the essential term of the contract. But apart from that the stage for purchasing the stamps and getting a draft prepared was not at all arrived at in this case, inasmuch as it is not the defendant's case that he wanted to execute the sale deed but was prevented from doing so on account of the omission on the part of the plaintiff to provide money for purchasing stamps and getting! a draft of the sale deed prepared. In this' view of the matter the rationale of the decision in Mst. Suraj Bai v. Nawab Mohammad Mukarram Ali Khan has no application to the facts of this case. So also in Dhanbai v. Pherozshah, there was no allegation contained in the plaint that the plaintiff was always ready and willing to perform his part of the contract. Learned counsel also relied upon Ardeshir v. Flora Sassoon, AIR 1928 PC 208; Gomathinayagam Pillai v. Palaniswami Nadar AIR 1967 SC 868, as also a few cases of other High Courts: Bishwanath v. Janki Devi, AIR 1978 Pat 190, G. Shivayya v. Shivappa Basappa, AIR 1978 Kant 98, Mahmood Khan v. Ayub Khan, AIR 1978 All 463 and Andhra Paper Mills v. State of Andhra, AIR 1961 Andh Pra 57. But we do not consider it necessary to discuss these cases, as, in our opinion, the law is well settled that the plaintiff must aver and prove that he was ready and willing to perform the essential terms of the contract which he was required to perform. However, it depends upon the facts and circumstances of each case whether the plaintiff has averred and proved this essential requirement of law. In this connection we may refer to Ramesh Chandra v. Chuni Lal, AIR 1971 SC 1238 wherein their Lordships were pleased to observe as follows :--

"Our attention has been invited to a statement in Halsbury's Laws of England, Vol. 34, Third Edn. at page 338 that in the absence of agreement to the contrary it is the purchaser who has to prepare the draft conveyance and submit it to the vendor for approval. No such point was raised at any prior stage and in any case we do not consider that after the cancellation of the agreement by the respondents it was necessary or incumbent on the appellants to send any draft conveyance. The very fact that they promptly filed the suit shows their keenness and readiness in the matter of acquiring the plot by purchase..... Readiness and willingness cannot be treated as a strait-jacket formula. These have to be determined from the entirety of facts and circumstances relevant to the intention and conduct of the party concerned. In our judgment there was nothing to indicate that the appellants at any stage were not ready and willing to perform their part of the contract."

23. Reliance is also placed upon the judgment rendered in **J.P. Builders and another v. A. Ramadas Rao and Anr., 2011 (1) SCC 429,** the paras are reproduced as below**:-**

"Readiness and Willingness

20. Section 16(c) of the Specific Relief Act, 1963 provides for personal bars to relief. This provision states that:

"16. Personal bars to relief.-Specific performance of a contract cannot be enforced in favour of a person--,

a) who would not be entitled to recover compensation for its breach; or

b) who has become incapable of performing, or violates any essential term of, the contract that on his part remains to be performed, or acts in fraud of the contract, or wilfully acts at variance with, or in subversion of, the relation intended to be established by the contract; or

c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.

***Explanation**.- For the purposes of clause (c),-*

(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;

(ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction."

22. The words "ready" and "willing" imply that the person was prepared to carry out the terms of the contact. The distinction between "readiness" and "willingness" is that the former refers to financial capacity and the latter to the conduct of the plaintiff wanting performance. Generally, readiness is backed by willingness.

23. In N.P. Thirugnanam vs. Dr. R. Jagan Mohan Rao & Ors., (1995) 5 SCC 115 at para 5, this Court held: (SCCpp. 117-18)

"5.....Section 16(c) of the Act envisages that plaintiff must plead and prove that he had performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit alongwith other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was always ready and willing to perform his part of the contract."

24. It is ample clear from the judgment (supra) that words “ready” and “willing” implies that person was prepared to carry out the terms of the contract and readiness refers to financial capacity whereas willingness refers to conduct of the plaintiff wanting performance. In the present case, as has been discussed above, plaintiff has failed to prove on record that he, at any point of time before expiry of stipulated period, informed the defendant that he was ready with the balance amount of consideration and, as such, sale deed may be got executed in terms of agreement.

25. As has been held in judgment referred herein above, the continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance and to adjudge the readiness and willingness on the part of the plaintiff, conduct of the plaintiff prior and subsequent to filing of the suit is very important. The amount of consideration, which the plaintiff was supposed to pay as balance amount of consideration was necessarily proved to be available, which could only be ascertained from the conduct of the plaintiff. In the present case, plaintiff, save and except making statement that he was ready and willing to perform his part, has not led any cogent and convincing material on record, which can compel this Court to infer that plaintiff was ready and willing to perform his part of the contract.

Rather, PW3 in his statement nowhere supported the version of PW1 with regard to repeated requests allegedly made by the plaintiff to the defendant for execution of the sale deed in terms of the agreement to sell, rather, he stated that plaintiff had visited the house of defendants but he did not know the purpose of the visit. Moreover, PW1 himself stated that when he tried to contact the defendant, he went to Chandigarh, meaning thereby, willingness and readiness was never conveyed to the defendant. It also remains fact that legal notice sent to the defendant by the plaintiff was received unserved by the plaintiff.

26. In the present case, learned first appellate Court while partly allowing the appeal preferred by present appellant ordered refund of Rs.20,000/- in terms of the agreement in question. Perusal of the agreement Ext.PW1/A suggests that amount of Rs. 10,000/- was required to be forfeited in the event of nonpayment of balance amount of consideration by the plaintiff on or before stipulated date. In the present case, as emerges from the evidence available on record that plaintiff has miserably failed to prove that he had performed his part of agreement by expressing his readiness and willingness but despite that alternative prayer of the plaintiff for decree for recovery of Rs. 20,000/- has been accepted by the Court and as such, this Court sees no reason to interfere with the judgments passed by the courts below. Hon'ble Apex Court while dealing with different types of agreements specifically held that "*Where the sum named is an amount the payment of which may be substituted for the performance of the act at the election of the person by whom the money is to be paid or the act done",* there is no ground for the Court to compel the performance of the other alternative of the contract. In the present case, where there is a specific stipulation in the agreement in question that in the event of not making balance amount of consideration within stipulated period, earnest money paid at the time of execution of agreement to sell would be forfeited and in the event of non registration of sale deed by defendant within stipulated period, plaintiff would be entitled to double the amount of earnest money. Learned first appellate Court has already ordered for payment of Rs.20,000/- in favour of the plaintiff and as such in view of the specific condition laid down in the agreement to sell, plaintiff is not entitled to specifically ask for decree specific performance calling upon the defendant to execute sale deed in favour of the plaintiff. In this regard, reliance is also placed upon the judgment rendered in ***P.D.'Souza v. Shondrilo Naidu 2004 (6) Supreme Court Cases 649.*** The paras are reproduced as below**:-**

> *29. Clause (7) of the Agreement of Sale would be attracted only in a case where the vendor is in breach of the term. It was for the plaintiff to file a suit for specific performance of contract despite having any option to invoke the said provision. It would not be correct to contend that only because such a clause exists, a suit for specific performance of contract would not be maintainable.*
>
> *30. Section 23 of the Specific Relief Act, 1968 read as under :*
>
> > *"23. (1) A contract, otherwise, proper to be specifically enforced, may be so enforced, though a sum be named in it as the amount to be paid in case of its breach and the party in default is willing to pay the same, if the court, having regard to the terms of the contract and other attending circumstances, is satisfied that the sum was named only for the purpose of securing performance of the contract and not for the purpose of giving to the party in default an option of paying money in lieu of specific performance.*
> >
> > *(2) When enforcing specific performance under this section, the court shall not also decree payment of the sum so named in the contract."*
>
> *31. In M.L. Devender Singh & Ors. v. Syed Khaja, [1974] l SCR 312, the following statement of law appears: (SCC p. 522, para 16)*
>
> > *"The question always is: What is the contract? is it that one certain act shall be done, with a sum annexed, whether by way of penalty or damages, to secure the performance of this very act? Or, is it that one of the two things shall be done at the election of the party who has to perform*

the contract, namely, the performance of the act or the payment of the sum of money? If the former, the fact of the penal or other like sum being annexed will not prevent the Court's enforcing performance of the very act, and thus carrying into execution the intention of the parties; if the latter, the contract is satisfied by the payment of a sum of money, and there is no ground for proceeding against the party having the election to compel the performance of the other alternative.

From what has been said it will be gathered that contracts of the kind now under discussion are divisible into three classes:

> *(i) Where the sum mentioned is strictly a penalty-a sum named by way of securing the performance of the contract, as the penalty is a bond;*
>
> *(ii) Where the sum named is to be paid liquidated damages for a breach of the contract;*
>
> *(iii) Where the sum named is an amount the payment of which may be substituted for the performance of the act at the election of the person by whom the money is to be paid or the act done.*

Where the stipulated payment comes under either of the two first - mentioned heads, the Court will enforce the contract, if in other respects it can and ought to be enforced just in the same way as a contract not to do a particular act, with a penalty added to secure its performance or a sum named as liquidated damages, may be specifically enforced by means of an injunction against breaking it. On the other hand, where the contract comes under the third head, it is satisfied by the payment of the money, and there is no ground for the Court to compel the specific performance of the other alternative of the contract."

This Court further stated: (SCC p. 523, paras 20-21)

> *"20. The fact that the parties themselves have provided a sum to be paid by the party breaking the contract does not, by itself, remove the strong presumption contemplated by the use of the words "unless and until the contrary is proved". The sufficiency or insufficiency of any evidence to remove such a presumption is a matter of evidence. The fact that the parties themselves specified a sum of money to be paid in the event of its breach is, no doubt, a piece of evidence to be considered in deciding whether the presumption has been repelled or not. But, in our opinion, it is nothing more than a piece of evidence. It is not conclusive or decisive.*
>
> *21. The second assumption underlying the contentions on behalf the Defendants-Appellants is that, once the presumption, contained in explanation to Section 12 of the old Act, is removed, the bar contained in Section 21 of the old Act, against the specific enforcement of a contract for which compensation in money is an adequate relief, automatically operates, overlooks that the condition for the imposition of the bar is actual proof that compensation in money is adequate on the facts and circumstances of a particular case before the Court. The effect of the presumption is that the party coming to Court for the specific performance of a contract for sale of immovable property need not prove anything until the other side has removed the presumption. After evidence is led to remove the presumption, the plaintiff may*

still be in a position to prove by other evidence in the case, that payment of money does not compensate him adequately."

41. Raju, J. in the fact and circumstance of the matter obtaining therein held that it would not only be unreasonable but too inequitable for courts to make the appellant the sole beneficiary of the escalation of real estate prices and the enhanced value of the flat in question preserved all along by the respondents No. l and 2 by keeping alive the issues pending with the authorities of the Government and the municipal body. It was in the facts and circumstances of the case held :

> "23...Specific performance being an equitable relief, balance of equities have also to be struck taking into account all these relevant aspects of the matter, including the lapses which occurred and parties respectively responsible therefor. Before decreeing specific performance, it is obligatory for courts to consider whether by doing so any unfair advantage would result for the plaintiff over the defendant, the extent of hardship that may be caused to the defendant and if it would render such enforcement inequitable, besides taking into (sic consideration) the totality of circumstances of each case...."

42. The Court for arriving at the said finding gave opportunities to the parties to settle the matter and the respondents No. l and 2 were prepared to pay upto Rs. 60 lakhs as against the demand of the appellant to the fine of rupees one and a half crores which was subsequently reduced upto Rs. 120 lakhs. In view of the respective stand taken by the parties, the Court inter alia directed the respondents No. l and 2 to pay a sum of Rs. 40 lakhs in addition to the sum already paid by them.

43. Bhan, J. however, while expressing his dissention in part observed: (SCCpp.506&507, paras 38 & 40)

> "38. It is well-settled that in case of contract for sale of immovable property the grant of relief of specific performance is a rule and its refusal an exception based on valid and cogent grounds. Further, the defendant cannot take advantage of his own wrong and then plead that decree for specific performance would be an unfair advantage to the plaintiff.
>
> 40. Escalation of price during the period may be a relevant consideration under certain circumstances for either refusing to grant the decree of specific performance or for decreeing the specific performance with a direction to the plaintiff to pay an additional amount to the defendant and compensate him. It would depend on the facts and circumstances of each case."

27. Consequently in view of the detail discussion made herein above, this Court is of the view no decree of specific performance, whatsoever can be granted merely on the basis of admission by defendant with regard to existence of agreement to sell as well as receipt of earnest money in the absence of cogent and specific evidence led on record by the plaintiff that he was ready and willing to perform his part in terms of agreement to sell, which is admitted by the defendant. In the present case, there is no material worth the name to suggest that the plaintiff performed his part by actually offering balance amount of consideration, which was condition precedent for execution of the sale deed in terms of agreement to sell. Mere plea that defendant was repeatedly asked by plaintiff to execute the sale deed may not be sufficient for plaintiff to discharge his onus, which was admittedly on plaintiff to prove that he had performed his part in terms of agreement. Accordingly, substantial question of law No. 2 is answered accordingly. Since this Court while answering substantial question of law No. 2 examined evidence on record in detail, it can be safely concluded that judgments passed by the courts below are based on

correct appreciation of material evidence available on record and there is no mis-construction and mis-interpretation of law as has been alleged by the plaintiff in the present appeal. Hence, question No. 3 is also answered accordingly. While examining the evidence on record, this court had also occasion to peruse the impugned judgments passed by the courts below and it cannot be said in any manner that courts below have gone above the board to make the case for the defendants, rather, careful perusal of the judgments passed by the both the courts below suggests that same are based upon the evidence available on record, which certainly suggests that agreement to sell which has been sought to be enforced is vague, uncertain, ambiguous and evasive because no description of land proposed to be sold, has been given and as such courts below have rightly refused to grant decree of specific performance as prayed by the plaintiff in the absence of specific details of the suit land.

28. There can be no quarrel with regard to the principle *“specific performance is a rule and refusal is an exception”* but as has emerged from the evidence available on record, plaintiff has failed to establish that he was ever ready and willing to perform his part in terms of agreement to sell dated 7.12.1992 and, as such, no decree for specific performance, as prayed for, by the plaintiff could be granted by the courts below. Rather, careful perusal of the evidence led by the defendants leaves no doubt in the mind of this court that defendants were ready and willing to execute the sale deed in terms of agreement to sell but since no readiness and willingness was expressed by PW1 and no steps whatsoever, in the shape of offering balance amount of consideration were taken by the plaintiff and as such, no fault can be found with the judgments passed by the both the Courts below. Rather, learned appellate court held plaintiff entitled to refund of Rs.20,000/- along with interest from the date of filing of the suit in terms of agreement to sell despite there being overwhelming evidence on record that defendant were ready and willing to perform their part in terms of agreement. Accordingly, this Court sees no illegality and infirmity in the judgments passed by both the courts below and same accordingly deserve to be upheld. Present appeal is dismissed being devoid of any merit.

****

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

State of Himachal Pradesh ……Petitioner.
Versus
Kamal Singh & another ……Respondent.

Criminal Revision No.163 of 2008
Date of Decision: 14th June, 2016

Indian Penal Code, 1860- Section 447, 354, 504, 506 read with Section 34- Informant had gone to toilet - accused put torch light on her, attacked and tore her clothes- informant raised hue and cry on which persons came at the spot- wife of the accused also arrived at the spot who was holding a danda and gave beatings to the informant- accused were tried and acquitted by the trial Court- an appeal was preferred before Sessions Judge, which was dismissed as not maintainable- held, that Section 506 of Indian Penal Code has been declared to be cognizance and non-bailable offence – appeal lies to the Court of Sessions from an order of acquittal passed by a Magistrate in respect of cognizable and non-bailable offence- some of the sections were cognizable and some of the sections were bailable- there are contradictions in the testimonies of eye-witnesses - prosecution version was not proved beyond reasonable doubt- accused was rightly acquitted by the trial Court- petition dismissed. (Para-12 to 32)

Case referred:

Krishnan and another Versus Krishnaveni and another, (1997) 4 Supreme Court Case241

For the Petitioner : Mr. Rupinder Singh Thakur, Additional Advocate General.
For the Respondents : Ms. Leena Guleria, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (Oral)

Present Criminal Revision Petition under Section 397, 401 read with Section 482 of the Code of Criminal Procedure, is directed against the judgment dated 1.7.2008, passed by learned Sessions Judge, Hamirpur, HP in Criminal Appeal No.31 of 2007, whereby appeal preferred by the present petitioner has been dismissed being not maintainable.

2. Briefly stated facts necessary for the adjudication of the present case are that the complainant Smt. Bimla Devi, filed a complaint Ex.PW1/A before the Deputy Commissioner, Hamirpur on 15th November, 1999 specifically alleging therein that despite there being specific complaint to the police, police did not take any action on the telephonic report of the complainant. The Deputy Commissioner, Hamirpur forwarded the complaint Ex.PW1/A to Sub-Divisional Magistrate, Nadaun, who further forwarded the same to SHO Police Station, Nadaun for taking action in accordance with law. Pursuant to direction issued by the Sub-Divisional Magistrate, SHO Police Station, Nadaun registered FIR Ex.PW6/A. As per story of the prosecution, on 14th November, 1999, at about 7.30 PM, when the complainant had gone to toilet on the back side of the kitchen of her house, accused namely Kamal Singh put torch light on the complainant and attacked her and torn her clothes. It is also alleged that when complainant raised hue and cry, Anjana, Sanjay Kumar as well as Bittu and the wife of accused Smt. Kaushalya Devi reached the spot. Smt. Kaushalya Devi, wife of the accused, who was holding danda in her hand started giving beatings to the complainant and hurled abuses to her.

3. As per the case set up by the prosecution when the daughter of the complainant raised hue and cry, the accused fled away from the spot, however, while leaving the spot they threatened the complainant to do away with her life. Complainant also reported to the police that after incident her daughter telephonically informed the police but police did not take any action and, as such, complainant was forced to file complaint Ex.PW1/A in the office of the Deputy Commissioner, Hamirpur. It also finds mention in the report that accused had a quarrel with them on 12.10.1999 about which separate complaint was registered with the police. Subsequently, on the direction having been issued by the Sub Divisional Magistrate, police registered FIR Ex.PW6/A, dated 16.11.1999. After registration of the FIR, police visited the spot and prepared spot map Ex.PW3/A. Police also took into possession shirt Ex.P1 and broken pieces of bangles Ex.P2, which were produced before the police by the complainant Smt. Bimla Devi. Aforesaid articles were taken into possession vide memo Ex.PW1/B in the presence of witnesses namely Smt. Sunita Kumari(PW-5) and Saroj Kumari(PW-2). Police recorded the statements of the witnesses under Section 161 Cr.P.C as per their version. Police after completion of the investigation, prepared the challan and submitted the same before the competent Court of law.

4. Learned trial Court after satisfying itself that a prima facie case exist against the accused persons, framed charges under Sections 447, 354, 504, 506 read with Section 34 of Indian Penal Code against them, to which they pleaded not guilty and claimed trial.

5. In the present case, prosecution with a view to prove its case beyond reasonable doubt examined as many as six witnesses. Statement of accused under Section 313 Cr.P.C was also recorded, wherein they denied whole story of the prosecution and stated that they have been falsely implicated in the case. However, they led no evidence in their defence.

6. Learned trial Court after appreciating the material evidence available on record held that the prosecution has miserably failed to prove its case beyond reasonable doubt against the accused persons under Sections 354, 447, 504, 506 read with Section 34 of Indian Penal Code and accordingly both the accused were acquitted of the charges.

7. Feeling aggrieved and dissatisfied with the impugned judgment of acquittal of learned trial Court, present petitioner filed an appeal under Section 374 Cr.P.C in the Court of learned Sessions Judge, Hamirpur, H.P, however, same was dismissed by learned Sessions Judge, as being not maintainable. Learned Sessions Judge, while dismissing the appeal preferred by the present petitioner has held as under:-

> "It will noted from the impugned judgment that the accused persons-appellants were facing trial in the court below for having committed offences punishable under Sections 447, 504 & 506 read with Section 34 IPC and Section 354 I.P.C. All such offences are either "non-cognizable" or " bailable". It is provided in Section 378, Cr.P.C that an appeal against the order of acquittal may be presented to the court of Sessions against the order passed by a Magistrate in respect of a "Cognizable" and "Non-bailable" offence, and in other cases, the appeal lies in Hon'ble High Court. But, in the case in hand, none of the offences, for which the accused persons-appellants were facing trial was " Non-bailable" and "Cognizable" All such offences are either " bailable" or Non-Cognizable" or " Non-bailable and " non-cognizable". Therefore, the present appeal is not maintainable in the court of Sessions".

8. Hence, the present criminal revision petition.

9. Mr. Rupinder Singh Thakur, learned Additional Advocate General appearing on behalf of the petitioner-State vehemently argued that the judgment passed by learned first Appellate Court is against facts as well as law and hence same deserves to be quashed and set-aside. He contended that learned First Appellate Court while dismissing the appeal on the ground of maintainability has fallen in grave error because learned first appellate Court has failed to take into consideration that in exercise of powers vested under Sub-Section 2 of Section 10 of Criminal Amendment Act, 1932, the Governor of H.P. vide notification No. Home-11(E)S-510/80, dated 6.9.1980, declared the Section 506 IPC committed within the territory of State of HP shall be " non-bailable" and " cognizable". In view of the amendment, Section 506 IPC is "non-bailable" and 'cognizable' offence. He further submitted that learned first appellate Court failed to take note of Section 155(4) Cr.P.C, which provides that if one of the offence is cognizable; the case shall be deemed to be a cognizance case, notwithstanding that the other offences are non-cognizable. He forcibly contended that once offence under Section 506 IPC has been held to be non-bailable and cognizable offence, dismissal of the appeal preferred by the present petitioner-State on the ground of maintainability is not tenable and, as such, same deserves to be quashed and set-aside . He further contended that learned Courts below have miserably failed to appreciate ample evidence on record which was sufficient to connect the accused with the commission of the offences and the accused have been discharged on flimsy ground and, as such, grave injustice has been caused to the petitioner and he prayed that the judgments passed by both the Courts below deserve to be quashed and set-aside.

10. Per contra, Ms. Leena Guleria, learned counsel representing the accused-respondents, supported the judgments passed by both the Courts below. She vehemently argued that no

Interference, whatsoever, of this Court is required in the present facts and circumstances of the case because judgments passed by both the Courts below are based on the correct appreciation of the evidence available on record. During arguments having been made by her, she invited the attention of the Court to the statements of various material prosecution witnesses to demonstrate the material contradictions and inconsistencies in the depositions made before the Court. She forcibly contended that learned first appellate Court has rightly dismissed the appeal of the petitioner-State being not maintainable because bare perusal of Sections 447, 354, 504 and 506 read with section 34 IPC suggest that some of them are cognizable and whereas some are non-cognizable offences. She further submitted that though petitioner- State had not taken specific plea of notification issued by the Government of H.P, declaring the Section 506 IPC non-

cognizable and cognizable offences but even then section 155(4) Cr.P.C is not attracted in the present case solely for the reason that the appeal under Section 378 Cr.P.C can only be filed in the Court of sessions from an order of acquittal passed by a Magistrate in respect of cognizable and non-bailable offence.

11. I have heard the learned counsel representing the parties and have carefully gone through the record made available.

12. Since Mr. Rupinder Singh Thakur, learned Additional Advocate General has specifically invited the attention of this Court to the notification No. Home-11(E)5-510/80,dated 6.9.1980, whereby Governor of Himachal Pradesh in exercise of powers vested under him under Sub-section 2 of Section 10 of Criminal Amendment Act, 1932 has declared that Section 506 IPC committed within territory of State of Himachal Pradesh shall be non-bailable and cognizable offence, it would be appropriate for this Court to deal with the issue of maintainability at first instance before adverting to the merits of the case.

13. It is apt to reproduce section 378 of Cr.P.C :-

"**378. Appeal in case of acquittal** (1) Save as otherwise provided in sub-section (2), and subject to the provisions of sub-section (3) and (5),-

(a) The District Magistrate may, in any case, direct the Public Prosecutor to present an appeal to the Court of Session from an order of acquittal passed by a Magistrate in respect of a cognizable and on-bailable offence;

(b) The State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of an acquittal passed by any Court other than a High Court { not being an order under clause (a)} or an order of acquittal passed by the Court of Session in revision.}

(2). If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under Delhi Special Police Establishment Act, 1946(25 of 1946) or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, { the Central Government may, subject to the provisions of sub-section (3), also direct the Public Prosecutor to present in appeal-

(a) to the Court of session, from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence;

(b)to the High Court from an original or appellate order of an acquittal passed by any Court other than a High Court{not being an order under clause (a)}or an order of acquittal passed by the Court of Session in revision}.

(3). No appeal to the High Court under sub- section (1) or sub- section (2) shall be entertained except with the leave of the High Court.

(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.

(5). No application under sub- section (4) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of six months, where the complainant is a public servant, and sixty days in every other case, computed from the date of that order of acquittal.

(6). If in any case, the application under sub- section (4) for the grant of special leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under sub- section (1) or under sub- section (2).

14. Bare perusal of Section 378(a) suggest that an appeal to the Court of Session would lie from an order of acquittal passed by a Magistrate in respect of cognizable and non-bailable offence.

15. In the present case, accused persons were/are charged under Sections 447, 504, 506 read with Section 34 of IPC and Section 354 IPC. It is apt to reproduce aforesaid sections:-

> **447. Punishment for criminal trespass**.—whoever commits criminal trespass shall be punished with imprisonment of either description for a term which may extend to three months, with fine or which may extend to five hundred rupees, or with both.(**Cognizable & bailable**).
>
> **506. Punishment for criminal intimidation**.—Whoever commits, the offence of criminal intimidation shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both; (**Non-cognizable and Bailable**).
>
> **If threat be to cause death or grievous hurt, etc**.—And if the threat be to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or [imprisonment for life], or with imprisonment for a term which may extend to seven years, or to impute, unchastity to a woman, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.
>
> **504. Intentional insult with intent to provoke breach of the peace.**—Whoever intentionally insults, and thereby gives provocation to any person, intending or knowing it to be likely that such provocation will cause him to break the public peace, or to commit any other offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both. (**Non-cognizable and Bailable**).
>
> **354. Assault or criminal force to woman with intent to outrage her modesty**.—Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both. (**Cognizable & Non-bailable).**

16. Admittedly, some of the Sections as referred hereinabove are either non-cognizable or non-bailable offences and, as such, no appeal would lie under Section 378 Cr.P.C before the Court of Session. However, at this stage, it would be apt to refer section 155(4) Cr.P.C:-

> "Where a case relates to two or more offences of which at least one is cognizable, the case shall be deemed to be a cognizable case, notwithstanding that the other offences are non-cognizable."

17. Plain reading of Section 155(4) Cr.P.C, clearly suggests that if a case relates to two or more offences, out of which if one is cognizable, the case would be deemed to be cognizable case, notwithstanding the other offences are non-cognizable, meaning thereby that" if accused is charged with two or more offences and out of which one is cognizable, the entire case could be deemed to be cognizable case despite their being other offences non-cognizable.

18. Now, if the present case is analyzed in the light of Section 378 and 155 Cr.P.C, it clearly emerges that once section 506 IPC, which is admittedly has been declared to be cognizable and non-bailable offence, learned first appellate Court or any other Court was bound to consider the case at hand to be cognizable case, notwithstanding that other offences are non-cognizable.

However, at this stage, if provision of Section 378 Cr.P.C is perused, which provides for two stipulation/condition for presenting the appeal before the Court of Session from an order passed by a Magistrate i.e. (i) offence should be cognizable and (ii) another is non-bailable offence, meaning thereby appeal would only lie to the Court of Session from an order of acquittal passed by a Magistrate, if the offence is cognizable and non-bailable. In the present case, accused persons are charged under Sections 447, 504, 506 read with section 34 IPC and Section 354 IPC but admittedly few of offences as mentioned above are either non-cognizable or bailable. Now at this stage, if provision of section 155(4) Cr.P.C are attracted/made applicable in the present case, admittedly, all the offences are required to be considered as cognizable offence because admittedly as has been discussed above, Section 506 IPC has been declared cognizable and non-bailable offence. But even then second stipulation, as laid down for filing appeal under Section 378 Cr.P.C remains unfulfilled. Condition precedent for filing appeal under Section 378 Cr.P.C is that offence should be cognizable and non-bailable. By invoking Section 155(4) Cr.P.C, certainly first condition of 378 Cr.P.C. gets satisfied but second condition remain unfulfilled hence appeal, if any, cannot be held maintainable in the given facts and circumstances of the case. If giving benefit of notification referred hereinabove, wherein Section 506 IPC has been declared to be cognizable and non-bailable offence, other offences with which the accused persons have been charged can only be treated as cognizable offence in terms of Section 155(4) Cr.P.C but in that event also two conditions as laid down under section 378 Cr.P.C, would remain unsatisfied because admittedly few of the offences, as have been referred hereinabove, are bailable and appeal under section 378 Cr.P.C can only lie in the court of Session from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence. In the present case, taking benefit of Section 155(4), all offences can be deemed to be cognizable offences in view of the notification referred hereinabove, wherein Section 506 IPC has been declared to be cognizable and non-bailable offence. But fact remains that second requirement of filing an appeal under section 378 i.e. non-bailable offence is not fulfilled in the present case, where admittedly few of the offences are bailable offences.

19. Accordingly, in view of the discussion made hereinabove, this Court does not see much force in the arguments having been made by learned Additional Advocate General with regard to the maintainability of the appeal accordingly same is rejected.

20. True, it is that this Court has very limited powers under Section 397 of Criminal Procedure Code while exercising its revisionary jurisdiction. It would be apt and in the interest of justice to critically examine the evidence available on record that too solely with a view to ascertain that judgments passed by learned Courts below are not perverse and same are based on correct appreciation of evidence on record.

21. As far as scope of power of this Court while exercising revisionary jurisdiction under Section 397 is concerned, the Hon' ble Apex Court in ***Krishnan and another Versus Krishnaveni and another*****, (1997) 4 Supreme Court Case241**; has held that in case Court notices that there is a failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities/incorrectness committed by inferior criminal court in its judicial process or illegality or sentence or order. The relevant para of the judgment is reproduced as under:-

> "8. The object of Section 483 and the purpose behind conferring the revisional power under Section 397 read with Section 401, upon the High Court is to invest continuous supervisory jurisdiction so as to prevent miscarriage of justice or to correct irregularity of the procedure or to mete out justice. In addition, the inherent power of the High Court is preserved by Section 482. The power of the High Court, therefore, is very wide. However, the High Court must exercise such power sparingly and cautiously when the Sessions Judge has simultaneously exercised revisional power under Section 397(1). However, when the High Court notices that there has been failure of justice or misuse of judicial mechanism or

> procedure, sentence or order is not correct, it is but the salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities/ incorrectness committed by inferior criminal court in its judicial process or illegality of sentence or order."

22. In the present case, complainant(PW-1) stated that on 14.11.1999, at about 7:30 PM when she was answering the call of nature, accused Kamal Singh appeared and put a torch on her and started scuffling with her, as a result whereof, he broke her bangles and tore her clothes. It has come in her statement that when she raised hue and cry, daughters of accused Anjana Kumari and Sanjana, his son Bittu and his wife Smt. Kaushalya Devi came on the spot. She also stated that accused Kaushalya Devi was holding danda in her hand with which she started giving beatings to her. She also stated in her statement that accused threatened her to do away with her life while leaving the spot of occurrence. She also stated that after the occurrence she telephonically informed the police but police did not take any action and, as such, she was compelled to file an application before the Deputy Commissioner. She also stated in her statement before the police that police visited the spot and took into possession the torn clothes as well as bangle pieces vide memo Ex.PW1/B, on which she appended her signatures. However, in her cross-examination, she admitted that there have been litigation with regard to the path with the accused persons for the last 12/13 years. She also admitted that the path is situated on the back side of the kitchen. She also admitted in her cross-examination that application Ex.PW1/A was written by the SHO and she had disclosed to the police that the accused had dragged her and that fact was mentioned in the application. But during her cross-examination when she was confronted with Ex.PW1/A statement recorded by the police under Section 161Cr.P.C, this fact was not recorded so in her statement recorded by the police. In her examination-in-chief, she stated that during scuffle her bangles were broken, however this fact also does not find mention in Ex.PW1/A. She stated in her cross-examination that danda blow was given by accused Kamal Singh but she does not remember that how many blows of danda were given to her. She also admitted in her cross-examination that she disclosed to the police that she had received injuries but fact remains that this fact does not find mention in her statement Ex.PW1/A recorded by the police. she also stated that there are 5-6 houses adjacent to her house and at the time of incident it was dark and accused ran towards the house of Kamal Singh. She stated that since accused ran towards the house of Kamal Singh, she could identify the accused to be Kamal Singh. However, in cross-examination, she denied the suggestion that on the basis of doubt she disclosed the name of accused to be Kamal Singh. She also admitted in the cross-examination that she telephonically informed the police herself. In her cross-examination, she also admitted that they want to close the path but lateron denied that she fenced the path on the day of occurrence and when accused removed the same, she hurled abuses to them.

23. PW-2, Saroj Kumari stated that on 14.11.1999 she had come to her parental house. She further stated that when she, her maternal aunt as well as Sunita were sitting in the room, her maternal aunt i.e. complainant had gone to answer the call of nature at 7:30 PM and thereafter they heard cries of the complainant and when they reached on the spot, accused Kamal Singh was giving beatings to the complainant and she was lying on the ground. She also stated that all the bangles of the complainant were broken and her clothes were torn. She categorically stated that on seeing them, the accused disappeared from the spot. She also stated in her examination-in-chief that thereafter the wife of the accused as well as daughters of the accused came on the spot and threatened that they will do away with their lives. She also stated that Smt. Kaushalya Devi was holding danda in her hand. However, during her cross-examination, she stated that the accused was giving beatings to the complainant with hand and fist blows and this fact was disclosed by her to the police, however, such fact does not find mention in the statement recorded by the police. Similar, deposition made by her that she had disclosed to the police that bangles of the complainant were broken, does not find mention in the initial statement given by her to the police. She in her cross-examination specifically admitted that accused Kaushalya Devi and Kamal Singh had not given any beatings to the complainant

with danda blows. Now, if at this stage, statements given by PW-1 and PW-2 are examined critically, this Court has no hesitation to conclude that there are major contradictions in their statements.

24. Smt. Bimla Devi, PW-1 categorically stated in her examination-in-chief that when accused Kamal Singh appeared and started scuffling with her, she raised hue and cry and then daughters of the accused namely Anjana Kumari and Sanjana, his son Bittu and his wife Kaushalya Devi came on the spot. But, she nowhere stated that after hearing her hue and cry, PW-2, Saroj Kumari and PW-5, Sunita Devi came to the spot. Whereas, PW-2, Saroj Kumari in her statement stated that after hearing cries of the complainant they reached on the spot and found that accused Kamal Singh was giving beatings to the complainant and she was lying on the ground. Similarly, PW-1 stated that accused Kamal Singh had given danda blows but PW-2 admitted in her cross-examination that accused Kaushalya Devi and Kamal Singh had not given any danda blows to the complainant.

25. Conjoint reading of the statements given by PW-1 and PW-3, clearly suggest that there are material contradictions in the statements given by both the prosecution witnesses and, as such, same cannot be termed to be trustworthy.

26. Sunita Devi, PW-5 also stated that on 14.11.1999 at about 7/8 PM when she was talking to her parental aunt, whereas her mother had gone to answer the call of nature in their courtyard, thereafter they heard cries of her mother and when they came out, saw that a scuffle was going on between the complainant and the accused. Thereafter, accused pushed her mother and jumped over the wall and ran away. She further stated that thereafter accused started hurling abuses and after hearing the noise, wife of the accused and his daughters came on the spot. She also stated that wife of the accused was holding danda in her hand. She categorically stated that when they came inside, they saw that the clothes of her mother were torn. She stated that police came on the spot and took into possession Ex.P1 and Ex.P2 vide memo Ex.PW1/B. During her cross-examination, she admitted that she is serving at Chamba and wife as well as daughters of the accused Kamal Singh were standing on the other side of the wall and were hurling abuses from there. She categorically admitted in her cross-examination that they had not entered into their houses.

27. PW-3, SI Rattan Chand also stated that in the year, 1999 he was posted as ASI. He stated that on 18.11.1999, he visited the spot and prepared spot map Ex.PW3/A and had taken into possession Ex.P1 and Ex.P2. He also stated that bangles pieces were put in a parcel and sealed with seal impression 'R' and were thereafter taken into possession vide memo Ex.PW1/B. During his cross-examination, he admitted that he had not recorded the statement of Anjana Kumari and Sanjana. He also admitted that there is no path, which leads to the house of the accused from the back side of the kitchen of the complainant. Now, if the statements of PW-3 and PW-5 are read in conjunction with the statements of PW-1 and PW-2, it can be safely concluded that none of the prosecution witnesses have been specific with regard to the spot of the occurrence as well as presence of family member of the accused. All the prosecution witnesses have contradicted the statements of each other. PW-1 stated that when she raised hue and cry, family members of the accused reached the spot, whereas PW-2 and PW-5 stated that after hearing the cries of the complainant they reached the spot. Whereas PW-1 has nowhere stated that after hearing hue and cry, her family members reached the spot. PW-2, Saroj Kumari also contradicted with the statement of PW-1 with regard to the alleged beatings given to her by the accused Kamal Singh because PW-2 categorically stated that accused Kaushalya Devi and Kamal Singh had not given any beatings to the complainant with danda blows. PW-5, Sunita Devi also stated that none of the family members entered into their house; rather she stated that wife as well as daughter of the accused were standing other side of the wall and were hurling abuses from there.

28. PW-3, S.I. Rattan Chand categorically stated in his cross-examination that there is no path, which leads to the house of the accused from the back side of the kitchen of the

complainant. PW-1, Bimla Devi also admitted in her cross-examination that there are 5-6 houses near her house. Admittedly, in the present case, none of the independent witness from the locality was associated by the prosecution. Admittedly, in the present case, PW-2 and PW-5 are closely related to the complainant (PW-1). True it is that testimony of these witnesses cannot be brushed aside solely on the ground that they are related to the complainant. But in the present facts and circumstances of the case where admittedly number of houses were there adjacent to the house of the complainant, where this alleged occurrence took place, prosecution could always associate independent witness to prove its case beyond reasonable doubt. In the present case, it stands duly proved on record that the complainant was not having good relation with the accused as they were having litigation with regard to the path pending in the court. The version put forth by PW-2 and PW-5 being close relative of the complainant cannot be accepted on its face value, in the absence of some independent witness of the locality, which could be easily available given the timing of the occurrence i.e. 7/8 PM.

29. In the present case, PW-1 stated that accused Kamal Singh gave danda blow to her and other accused Kaushalya Devi also gave beatings to her with hands and first blows. But PW-2 stated that accused persons were giving beatings to complainant with hand and fist blows, whereas PW-5 stated that accused Kamal Singh pushed her mother and thereafter ran away from the spot after jumping over by the wall. The story put forth by PW-5 that accused Kamal Singh after pushing her mother jumped over the wall has been not supported by any of the prosecution witnesses. Moreover, PW-5 stated that other accused persons were standing on their own landed property, which was on the other side of the wall. Admittedly, all the prosecution witnesses have contradicted with regard to the allegations of beatings given to the complainant by the accused. Moreover, no medical evidence worth the name has been led on record to corroborate the statement of complainant and other witnesses with regard to the beatings, if any, given to the complainant. Hence, in the absence of medical evidence, the version put forth by the prosecution with regard to the injuries received by the complainant cannot be accepted at all. As far as recovery of Ex.P1 and PW-2, which were taken into possession in the presence of PW-1 and PW-5 also appears to be doubtful because none of these witnesses stated that Ex.P1 and Ex.P2 were put in a parcel and sealed with seal impression 'R' and thereafter were taken into possession. In the present case admittedly on the face of the evidence available on record, PW-1 and PW-5 have contradicted to the statement of PW-3 and, as such, statements made by these, two witnesses are required to be dealt with great caution and care. Hence, in view of the observations made hereinabove, recovery of Ex.P1 and Ex.P2 from the spot is doubtful and cannot be relied upon.

30. PW-1,Bimla Devi in her statement nowhere stated in clear terms that accused Kamal Singh used some criminal force with intent to outrage the modesty of the complainant. She only stated that accused Kamal Singh gave beatings to her but she nowhere stated in her statement before the Court that her clothes were torn by the accused, rather complete reading of her statement leaves no doubt in the mind of the Court that her testimony does not inspire confidence and same does not appear to be trustworthy.

31. Plain reading of Section 354 of IPC reproduced hereinabove suggests that it is essential for bringing accused within the ambit of section 354 IPC, to prove that criminal force is used on any woman that too with an intent to outrage her modesty or in other way whoever assaults or uses criminal force on woman, knowing fully well thereby that he will be outraging her modesty, shall be liable for punishment prescribed under this section.

32. In totality of facts and circumstances of the case, this Court has no hesitation to conclude that the prosecution has not been able to prove its case beyond reasonable doubt and, as such, same has been rightly rejected by the learned trial Court below. Consequently, in view of the aforesaid discussion, this Court sees no merit in the present appeal preferred by the petitioner-State and the same is accordingly dismissed along with pending applications, if any.

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

Jagan Nath ….. Petitioner.

Versus

National Hydro-Electric & another … Respondents.

CWP No. 2088 of 2008.

Date of Decision: 17th June, 2016

Constitution of India, 1950- Article 226- Petitioner was appointed as Scientific Assistant Grade I in Salal Hydro Electric Project – he was reappointed as Research Assistant and was posted in Quality Control Division- services of the petitioner were transferred to NHPC- petitioner was promoted to the post of Manager Research in NHPC- respondent invited application for the post of Research Officer- a person with M.Sc in Chemistry or Physics was eligible for the said post- petitioner pleaded that a person with M.Sc in Chemistry or Physics with experience in the field of Concrete Technology and Soil Mechanics is not fit to work in the field- promotion policy was formulated to benefit the favourites of the respondent- petitioner filed a representation, which was rejected- held, that petitioner has retired from the services - he will not benefit from the judgment of the Court - respondent had rejected the representation of the petitioner without assigning any reasons - however, directing the respondent to reconsider the representation will not serve any fruitful purpose - it is the prerogative of rule making authority to prescribe mode of selection and minimum qualification for any recruitment and the action of the respondent cannot be faulted. (Para-10 to 15)

Cases referred:

Chandigarh Administration through the Director Public Instructions (Colleges), Chandigarh versus Usha Kheterpal Waie and others 2011(9) Supreme Court cases 645

P.U.Joshi and others versus Accountant General, Ahmedabad and others 2003(2) Supreme Court Cases 632

For the Petitioner : Mr. Surinder Saklani, Advocate.

For the Respondents : Ms. Shreya Chauhan, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge(oral)

By way of present writ petition, petitioner has prayed for following reliefs:-

a) That a writ of certiorari may be issued thereby setting aside the minimum qualification prescribed for considering promotion beyond the post of Deputy Manager in the Research Wing in the Rules/ procedure of promotion policy of the respondents as given vide clause 6 and letters whereby representations of the petitioner for the purpose are rejected may very kindly be set aside.

b) That a Writ Mandamus may very kindly be issued thereby directing the respondents to prescribe requisite qualification meant for the purpose i.e. B.E.(Civil) with benefit of improvement of qualification viz AMIE(Civil) and M.Sc/B.Sc in Chemistry or Physics with relatively more experience as is provided by the Ministry of Energy, Department of Power, New Delhi and further as is available with respect to the post being advertised and filled up by the Union Public Service Commission for the post of Research Officers/ in the Research Wing of the field of Concrete Technology and Soil Engineering as otherwise, Corporation is acting contrary to the national interest by providing qualification of M.Sc from recognized University in any faculty, which

qualification as provided for the purpose in law by any stretch of imagination cannot be held good, with directions to the respondents to reconsider and re-frame the Rules with respect to the qualification in Rules/ promotion policy vide clause No.6, and accordingly, to reconsider and grant benefit to the petitioner throughout from the date same fell due to the petitioner with respect to the promotion, in the interest of law and justice.

c) Directions may be given to the respondents to produce the records of the case.

d) Any other and further reliefs to which the petitioner is found fit and proper may also very kindly be granted in favour of the petitioner and against the respondents.

2. Briefly stated facts necessary for the adjudication of the case are that the petitioner was appointed as Scientific Assistant Grade-I vide order dated 2.2.1978 and he joined as such on 20.7.1978 in Salal Hydro Electric Project and was posted in Quality Control Unit. Vide order dated 20.7.1978, petitioner was reappointed as Research Assistant (Regular) and was posted in Quality Control Division. However, on account of transfer of Salal Project to NHPC Limited, services of the petitioner were transferred in the same capacity, designation and nature of job with effect from 1.4.1983 to NHPC Limited. Petitioner also averred that owing to re-designation of the post of Research Assistant, designation of the petitioner was changed vide letter dated 14.1.1985 and he was promoted w.e.f. 1.7.1984 as Senior Supervisor (Research) Grade-II. However, vide order dated 1.7.1988, petitioner was promoted as Senior Supervisor Grade-1 and thereafter promoted as Research Officer in the year, 1992 and Assistant Manager(Research) in the year, 1996. In the year 2001, petitioner was promoted as Deputy Manager and as Manager (Research) w.e.f. 1.4.2006.

3. Petitioner being aggrieved with the advertisement No. PER/4/1990 (Annexure P-3) issued by the respondents, inviting applications for the few posts in its Corporate Office and existing/future Projects/Units. Vide aforesaid advertisement; respondents also invited application for the post of Research Officer. Perusal of the advertisement suggests that a person with M.Sc in Chemistry or Physics was eligible to apply for the aforesaid posts. Petitioner alleged that a person with M.Sc in Chemistry or physics with experience in the field of Concrete Technology and Soil Mechanics cannot be termed to be a fit person to work in the said field. Petitioner also alleged that the respondents solely with a view to help their favourites, issued Rules/Procedure of promotion policy (Annexure P-4),wherein for the post in Research Wing, qualification of M.Sc from a recognized university has been prescribed. Petitioner averred that for the job assigned to the research cadre, employees of the Corporation, who are performing their duties in Concrete Technology and Soil Mechanics apart from maintenance and up-keep of machines, are fit to be appointed as Research Officer.

4. Petitioner with a view to substantiate his claim also placed on record communication issued by the Ministry of Energy, Department of Power, New Delhi(Annexure P-1), wherein nature of job assigned to the Research cadre employees of the corporation is prescribed. Petitioner specifically averred that perusal of Annexure P-1 clearly suggests that a person with M.Sc in Chemistry from any recognized university cannot be held eligible for the post of Research Officer, as advertised vide Annexure P-3. He specifically invited the attention of the Court to Annexure P-1 and submitted that if clause No.2 of Annexure P-3, whereby qualification of M.Sc in Chemistry or Physics have been provided for the post of Research Officer is perused, it is crystal clear that qualification prescribed by the respondents is absurd and a person having M.Sc in Botany or Zoology are not fit person to be appointed as Research Officer. He invited the attention of this Court to the letter issued by Ministry of Energy (Annexure P-2), which provides that posts of Research Officer in Hydro-electric project are required to be filled up on the basis of qualification prescribed i.e. B.E.(Civil) or M.Sc/B.Sc in Chemistry and Physics with relative experience. Petitioner further averred that without proper application of mind and by putting national interest in jeopardy respondents issued advertisement No.4/90, inviting application for Research Officer, wherein person having M.Sc in Chemistry or Physics with the experience in the

field of Concrete Technology have been held eligible. Petitioner also averred that the respondents solely with a view to help their favourites issued/changed rules/ procedures of promotion policy further by making provisions that post in researching can be filled on the basis of qualification i.e M.Sc from a recognized university. Petitioner specifically averred that in view of the specific nature of job in Hydro-electric projects, specifically in the Research wing, where the person concerned is to deal with the Concrete Technology and Soil Mechanics, requisite qualification in law can only be B.E.(Civil) and any attempt on the part of the petitioner to fill up the post of Research Officer on the basis of qualification prescribed vide Annexure P-3 cannot be held to be justifiable.

5. Perusal of Annexure P-5, suggests that petitioner being aggrieved with the action of the respondents made detailed representation to the respondents to review the qualification criteria laid in N.H.P.C revised policy effective w.e.f. 1.1.1997. Careful perusal of Annexure P-5, clearly suggests that petitioner in support of his contention also supplied number of documents, perusal whereof certainly suggests that in the field of Concrete Technology and Soil Mechanics, B.E.(Civil) or M.Sc/B.Sc with relative experience is professional qualification for the post of Research Officer.

6. Respondents by way of detailed reply submitted that NHPC has framed "a Promotion Policy for its Executives" after considering all the factors including the responsibilities to a particular post. Respondents further submitted that minimum qualification for each post has been prescribed after detailed deliberation keeping in view of the particular post and, as such, petitioner has no right, whatsoever, to agitate against the policy as well as inclusion of particular educational qualification simply because he himself does not possess such qualification. Respondents further submitted that the petitioner have already got different promotions under the said Promotion Policy i.e upto the level of Manager and as such he cannot be allowed to allege that said policy is illegal and unjustified. Respondents also submitted that it is for the respondents to decide as to what should be the pre-requisites for a particular promotion and petitioner has no right whatsoever to suggest that what qualification should be included in the relevant Recruitment and Promotion Rules for Hydroelectric Power Corporation (NHPC). Respondents also averred that since petitioner has not challenged particular clause of the promotion policy, wherein qualifications and pre-requisites for promotions to the higher post have been prescribed, he cannot be allowed to challenge particular clause of the promotion policy to his advantage.

7. Respondents also refuted the claim of the petitioner that the work of Research discipline is only confined to Civil works, whereas research in respondents corporation includes quality control activities like sampling and testing of construction materials, study of mix design, preparation and up-keeping of quality control records at different stages of development of records etc. Respondents further submitted that samples are generally tested by the third parties in NHPC. Besides this, person with qualification of M.Sc with Botany and Zoology can be engaged in the study of Environmental impact of Hydro electric project, environmental conservation, Conservation of Biodiversity, Social Development study, Catchment Area Treatment, Restoration and rehabilitation of Project Affected Families, Compensatory Afforestation, Green Belt Development, Fist and other living creatures like, Flora-Fauna, Management of Landscaping and Restoration of Construction sites, Herbal Park Development, Dumping/Quarry site management etc.. Respondents also submitted that since respondents (NHPC) is aiming to secure benefits of clean Development Mechanism (CDM), therefore, the services of Research Officer with Botany and Zoology are also required. It is also stated in the reply that NHPC has separate cadre of Civil Engineers and Research Officer and their services are utilized as per their requirements. Hence, prayer for seeking direction against the respondents to include the qualification of AMIE for Offices in the Research wing cannot be held to be justified and deserves to be rejected out rightly.

8. Respondents also stated that the representation filed by the petitioner was duly considered by NHPC vide Annexure R-2 and R-3 and decision of NHPC was communicated to the petitioner. Respondents also submitted that qualifications prescribed by it for the post of

Research Officer are directly connected/concerned with the post in question and same cannot be changed to facilitate the promotion of the petitioner, who admittedly does not possess requisite qualification for further promotion in Research Cadre. Respondents also denied prescribed qualification of M.Sc from recognized university is contrary to the public interest.

9. I have heard the learned counsel representing the parties and have carefully gone through the record made available.

10. During proceedings of the case, this Court was informed that the petitioner has already retired from the services and perusal of records suggest that no stay was granted by this court qua Annexure P-3. Since no stay, whatsoever, was granted by this Court at the time of admission of this petition, respondents-corporation has already acted on the basis of the advertisement issued by the department for appointments of various posts including Research Officer. Since petitioner has already retired from service, no effective relief as have been prayed in the writ petition can be granted to him by this Court. Moreover, if at this stage, this Court comes to the conclusion that the minimum qualification prescribed by the respondents-Corporation for appointment to the post of Research Officer/ Deputy Manager in the Research Wing is not in conformity with the nature of job/responsibility to the post in question, petitioner would not be benefited in any manner at this stage, especially when he stands retired.

11. However after perusing the detailed representation filed by the petitioner as well as reply thereto given by the respondents-Corporation, this Court has no hesitation to conclude that the respondents-corporation has rejected the representation of the petitioner in very slip shod manner without any application of mind. Bare perusal of Annexure R-2, suggests that respondents have not assigned any reason, whatsoever, while rejecting the contentions of the petitioner, which was fully substantiated by placing/ citing instructions/ examples of other government departments as well as undertakings. Respondents while rejecting the claim of the petitioner has only informed that they are not in a position to consider the request for relaxation in specification for the post of Research Officer in the scale of Rs. 700-1300. Perusal of Annexures R-1 & R-2, nowhere demonstrate that respondents-NHPC actually dealt with each and every aspect of the matter raised by the petitioner in his representation. Moreover, no opportunity of being heard was ever afforded to the petitioner before passing of the order.

12. But as has been noticed above that the petitioner stands retired from services, no fruitful purpose would be served in case respondents are directed to re-consider the representation at this stage.

13. Undoubtedly, it is prerogative of rule making authority or appointing authority to prescribe mode of selection and minimum qualification for any recruitment and, as such, action of respondents-corporation for the prescribed qualification for particular post cannot be faulted.

14. In this regard reliance is placed upon ***Chandigarh Administration through the Director Public Instructions (Colleges), Chandigarh versus Usha Kheterpal Waie and others*** **2011(9) Supreme Court cases 645**, wherein it was held as under:-

> **"22.** It is now well settled that it is for the rule-making authority or the appointing authority to prescribe the mode of selection and minimum qualification for any recruitment. The courts and tribunals can neither prescribe the qualifications nor entrench upon the power of the authority concerned to long as the qualifications prescribed by the employer is reasonably relevant and has a rational nexus with the functions and duties attached to the post and are not violate of any provision of the Constitution, statute and rules.(See. ***J.Ranga Swamy V. Govt. of AP*** **(1990)1SCC 288:1990 SCC (L&S) 76 and** ***P.U. Joshi V. Accountant General*** **(2003) 2 SCC 632:2003 SCC(L&S) 191.** In the absence of any rules, under Article 309 or statute, the appellant had the power to appoint under its general power of administration and prescribed such eligibility criteria

as it is considered to be necessary and reasonable. Therefore, it cannot be said that the prescription of phD is unreasonable.

15. Further Hon'ble Apex Court in ***P.U.Joshi and others versus Accountant General, Ahmedabad and others*** 2003(2) Supreme Court Cases 632, has held as under:-

> "We have carefully considered the submissions made on behalf of both parties. Questions relating to the constitution, pattern, nomenclature of posts, cadres, categories, their creation/abolition, prescription of qualifications and other conditions of service including avenues of promotions and criteria to be fulfilled for such promotions pertain to the field of Policy and within the exclusive discretion and jurisdiction of the State, subject, of course, to the limitations or restrictions envisaged in the Constitution of India and it is not for the Statutory Tribunals, at any rate, to direct the Government to have a particular method of recruitment or eligibility criteria or avenues of promotion or impose itself by substituting its views for that of the State. Similarly, it is well open and within the competency of the State to change the rules relating to a service and alter or amend and vary by addition/substruction the qualifications, eligibility criteria and other conditions of service including avenues of promotion, from time to time, as the administrative exigencies may need or necessitate. Likewise, the State by appropriate rules is entitled to amalgamate departments or bifurcate departments into more and constitute different categories of posts or cadres by undertaking further classification, bifurcation or amalgamation as well as reconstitute and restructure the pattern and cadres/categories of service, as may be required from time to time by abolishing existing cadres/posts and creating new cadres/posts. There is no right in any employee of the State to claim that rules governing conditions of his service should be forever the same as the one when he entered service for all purposes and except for ensuring or safeguarding rights or benefits already earned, acquired or accrued at a particular point of time, a Government servant has no right to challenge the authority of the State to amend, alter and bring into force new rules relating to even an existing service".

In view of what has been stated hereinabove, the present petition is dismissed. Pending application(s), if any, shall also stand disposed of.

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

State of Himachal Pradesh ....Petitioner.
Versus
Ravi Dutt ....Respondent.

Cr. Revision No. 198 of 2008
Date of Decision: 17.6.2016.

Indian Penal Code, 1860- Section 406 and 420- An advertisement was issued in the newspaper inviting admission to M.Sc. course- informant paid Rs. 30,000/- to one A and handed over the testimonials of his daughter to A- daughter of the informant was not admitted in M.Sc course nor the amount was refunded- accused was tried and acquitted by the trial Court- an appeal was preferred before learned Sessions Judge, which was dismissed- aggrieved from the order, present revision petition has been filed- held in revision that prosecution witnesses had not proved the version of the informant that a sum of Rs. 30,000/- was paid to the accused for admission of the daughter of the informant- informant had himself stated that money was paid to A who was not

arrayed as accused- prosecution version was not proved- accused was rightly acquitted by the trial Court- revision dismissed. (Para-10 to 31)

Case referred:
Krishnan and another Versus Krishnaveni and another, (1997) 4 Supreme Court Case 241

For the petitioner: Mr. Rupinder Singh Thakur, Additional Advocate General.
For the respondent: Mr. Ajay Sharma, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Present criminal revision petition filed under Section 397 read with Section 401 of the Code of Criminal Procedure is directed against the judgment of acquittal rendered by learned Sessions Judge, Hamirpur, H.P., in Criminal Appeal No. 5U of 2007 dated 14.7.2008, affirming the judgment of acquittal dated 20.7.2007, passed by Judicial Magistrate, Ist Class, Barsar, District Hamirpur, HP, in Case No. 23-1-2003/27-II-2003.

2. Briefly stated facts necessary for adjudication of the case are that complainant namely Gupteshwar Singh filed complaint Ext.PW16/A, with the Deputy Commissioner, Hamirpur, which was further referred to police. Perusal of Ext.PW16/A suggests that in July, 2001, Manager Kids Buds Senior Secondary School (in Short School) Bijhar, District Hamirpur, H.P., got advertisement published in the newspaper namely Divya Himachal, wherein candidates were invited/advised to contact for admission in M.Sc. course. Complainant with a view to get admission of his daughter contacted Manager of aforesaid School, whereby he was advised to bring original certificates along with Rs.30,000/-. As per version of complainant, he paid Rs.30,000/- to one Shri Anil Kumar, who told him that as and when admission is done, he would be informed. Complainant also handed over the testimonials to Shri Anil Kumar, who had informed him that Ravi Dutt petitioner-accused is out of station. Since petitioner-accused failed to get the admission of the daughter of the complainant done in terms of advertisement, complainant lodged FIR Ext.16/B specifically alleging therein that accused neither got the admission done nor he returned the amount of Rs.30,000/- paid by the complainant for admission of his daughter. Police on the basis of FIR investigated the matter and took into custody newspaper cuttings of the advertisement as Ext.PW-1/B, two receipts Ext.PW-4/A and Ext.PW-2/A vide memo Ext.PW-7/C, one letter from the office of Divya Himachal Ext.PW-17/A. Record also suggests that police also filed application in the Court of learned ACJM Barsar for getting signatures of accused Ext.PW18/B. Besides above, police also moved an application to State Forensic Science Laboratory Ext.PW-15/G along with hand writing specimen and signatures Ext.PW-15/A to Ext.PW-15/C for examination of documents and procured report Ext.PW-15/D to Ext.PW-15/F. After completion of investigation, police found petitioner-accused guilty of offence having committed under Sections 406 and 420 of Indian Penal Code and accordingly, presented the same in the competent court of law. Police also submitted Supplementary Challan in the case on 19.3.2003.

3. Learned trial Court after satisfying itself that prima facie case exists against the petitioner-accused, charged him for committing offences under Sections 406 and 420 of Indian Penal Code, which accused pleaded not guilty and claimed trial.

4. Learned trial Court also recorded the statement of accused under Section 313 Cr.PC., wherein, he denied all allegations and claimed that he is being falsely implicated. Learned trial Court, on the basis of evidence available on record, came to conclusion that prosecution has not been able to bring home the guilt of the petitioner-accused and, as such, acquitted him of the offences framed against him.

5. Petitioner-accused being aggrieved with the judgment of learned trial Court dated 20.7.2007, filed appeal under Section 378 of Cr.PC before the Court of learned Sessions Judge, Hamirpur, who also vide judgment dated 14.7.2008 dismissed the appeal and upheld the judgment of acquittal learned trial Court. Hence this appeal.

6. At this stage, it may be pointed out that initially petitioner-accused had filed criminal appeal under Section 378 of Cr.PC against the impugned judgment before this Court, however, this Court, keeping in view the fact that State had already exhausted right of appeal before the learned first appellate Court, vide order dated 10.11.2008, converted the same into criminal revision petition, which later on came to be registered as criminal revision petition No. 198 of 2008.

7. Mr. Rupinder Singh Thakur, learned Additional Advocate General, appearing for the petitioner-accused vehemently argued that impugned judgment is not based upon the correct appreciation of the material evidence available on record and as such, same deserves to be quashed and set-aside. He contended that both the courts below have not appreciated the evidence in its right perspective and judgments are based on hypothetical reasons, conjectures and surmises and as such same cannot be allowed to be sustained. He also forcefully contended that court below while discarding the evidence of prosecution has set unrealistic standards to evaluate the direct and cogent prosecution evidence because bare perusal of the reasoning given by the courts below suggests that same is unreasonable, unsustainable and is not based on correction appreciation of the record available on record. He also while advancing his arguments before this Court invited attention to the statements given by various prosecution witnesses to demonstrate that learned court below has discarded the cogent and trustworthy testimonies of prosecution witnesses for untenable reasons. He also invited attention of this Court to the statements given by PWs 1 to 9, who as per him, clearly stated that accused had taken the money from them in order to secure admission in various course, which was later on not got done even by taking money from them. It is also contended on behalf of the petitioner that statement of all prosecution witnesses suggests that all of them made payment to the accused for securing admission in terms of the advertisement and, as such, finding returned by the court below that there is no evidence on record to connect the accused in the case that money was actually received by him, is totally contrary to the facts as well as material available on record. Eventually, he prayed that impugned judgment deserves to be quashed and set-aside and accused is liable to be held guilty and convicted for having committed offences.

8. Per contra, Mr. Ajay Sharma, Advocate, appearing for the respondent supported the judgments of courts below and argued that no interference, whatsoever, of this Court is warranted in the present facts and circumstances of the case, especially, when there are concurrent findings of the courts below. He contended that this Court has very limited powers as far as re-appreciation of the evidence, especially, when both the courts below have meticulously dealt with each and every aspect of the matter. During arguments, he made this Court to travel through the statements made by the prosecution witnesses to demonstrate the discrepancies, contradictions and inconsistencies in the statements given by the prosecution witnesses. He also contended that prosecution has miserably failed to prove the case beyond reasonable doubt, rather, evidence be it ocular or documentary adduced on record by the prosecution itself suggests that there were no sufficient grounds/material on record to prove the guilt of the accused. He prayed that judgments of courts below deserve to be upheld.

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

10. True, it is that this Court has very limited powers under Section 397 Cr.PC while exercising its revisionary jurisdiction but in the instant case, where accused has been acquitted of the offences, it would be apt and in the interest of justice to critically examine the statements of the prosecution witnesses solely with a view to ascertain that the judgments passed by learned

courts below are not perverse and same are based on correct appreciation of the evidence on record.

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

> *8. The object of Section 483 and the purpose behind conferring the revisional power under Section 397 read with Section 401, upon the High Court is to invest continuous supervisory jurisdiction so as to prevent miscarriage of justice or to correct irregularity of the procedure or to mete out justice. In addition, the inherent power of the High Court is preserved by Section 482. The power of the High Court, therefore, is very wide. However, the High Court must exercise such power sparingly and cautiously when the Sessions Judge has simultaneously exercised revisional power under Section 397(1). However, when the High Court notices that there has been failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is but the salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities/ incorrectness committed by inferior criminal court in its judicial process or illegality of sentence or order."*

12. In the present case, where the complainant has specifically alleged that in term of advertisement, he paid an amount of Rs.30,000/- along with original certificates of his daughter for getting admission in M.Sc. course, prosecution with a view to prove its case examined as many as 18 witnesses.

13. PW1, Gupteshwar Singh, stated that in terms of advertisement in the newspaper Divya Himachal, he contacted Manager of the school at Bijhar on telephone No. 83375 and 83383 for admission of his daughter. He further stated that since he wanted to get the admission of his daughter namely Sunita in M.Sc. Course, on enquiring, person namely Anil Kumar advised him to bring certificates of his daughter along with Rs.30,000/-. It has also come in his statement that amount in question along with documents were deposited by him with one Mr. Anil Kumar. He also stated in examination-in-chief that at the time of handing over certificate as well as amount, Anil Kumar informed him that accused-Ravi Dutt has gone out of station with some party, as and when he comes back, admission would be done. He also stated in his examination-in-chief that no receipt, whatsoever, was issued to him in lieu of money paid by him. In his statement, he stated that when he went back to get the money and testimonials of his daughter, Anil Kumar and Ravi Dutt were not there and another person returned the certificates and informed that money would be returned by Anil Kumar or Ravi Dutt. He also proved the application Ext.PW1, which he had allegedly written to Deputy Commissioner, Hamirpur, against the accused Ravi Dutt. In his cross-examination, he admitted that he was told that Anil Kumar is the Manager, who was admittedly not made party by the police in the present case.

14. PW2, Shri Kashmir Singh, also stated that after reading advertisement in the news paper, he contacted the school for admission of his daughter Manjna Kumari. He also stated that he made payment to the Assistant of Ravi Dutt on 28.10.2001. He also stated that wife of Ravi Dutt was also there and Assistant handed over a sum of Rs.90,000/- to the wife of Ravi Dutt, however, in his cross-examination, he submitted that on 12th January, 8 girls and 6 parents along with Ravi Dutt and Kartar Singh went to Dehradun where Ravi Dutt made them to stay in Dharamshala. He further admitted in his cross-examination that on the basis of address mentioned in identity card, they went to the Principal of the college and enquired about the

admission of their children. They were informed that examinations are going on. He further stated that when he came back to Barsar, they along with Ravi Dutt and Kartar Singh went to Police Station Barsar, who asked Ravi Dutt regarding the admission and names of the persons and amount paid by them. He also admitted that SHO asked Ravi Dutt to return the money, who assured that half of the money would be returned in the morning. He also admitted that Ravi Dutt returned half of the amount in the morning and ensured that remaining would be paid within eight days. Similarly, PW3 Jitender Kumar deposed that he also contacted the school on the basis of advertisement for getting admission in B.Ed. course. It has also come in his statement that he was asked to bring Rs.80,000/- but ultimately, accused Ravi Dutt agreed to get his admission for Rs.60,000/- He further stated that on 14th October, he paid Rs.25,000 to Ravi Dutt and Rs.10,000 on October, 27. As per his statement, accused assured him for admission at Meerut. He also stated in his cross-examination that Ravi Dutt gave him his mobile number, but thereafter, he went to school in January, where he was told that they don't know about Ravi Dutt, however, his documents were returned.

15. PW4, Kanshi Ram, also stated that Ravi Dutt got one advertisement published in news paper. Since he wanted to get his daughter admitted in M.Sc. Course, he contacted Ravi Dutt at Bijhar, who advised him to bring Rs.30,000/-. He further stated that on 27th July, he went to Bijhar when accused Ravi Dutt was present in office along with two persons, one Kashmir Singh from Hamirpur and one Kashmir Singh from Nadaun. He also stated that he deposited a sum of Rs.30,000 with Ravi Dutt, who told him that he will be telephonically informed qua the admission. He further stated that on 11th October, 2007, accused told him on telephone that they have to go to Dehradun for admission. It has also come in the statement that six girls and six persons accompanied Ravi Dutt in a vehicle to Dehradun, where Ravi Dutt made them stay in a Dharamshala.

16. PW5 Kashmir Singh, has stated that on the basis of the advertisement in the month of July, 2001, he contacted Principal of the school Bijhar, for getting admission of his daughter in M.Sc. course. Ravi Dutt demanded ` 30,000 and certificates of the candidate. He stated that he along with Kanshi Ram and Kashmir Singh went to the Bijhar and deposited Rs.30,000/- with Ravi Dutt along with documents. He further stated that after one month, accused Ravi Dutt informed that admission has been got done but thereafter, they kept on contacting Ravi Dutt, but every time, they were informed that they will be informed when the admissions are done.

17. PW6 Hemawati, PW7 Arun Mahajan, PW8 Mohan Lal, PW9 Sanjeev Kaundal, also stated in their statements that on the basis of advertisement in question, they paid sums of Rs.40,000/-, 20,000/-, 15,000/- and 30,000/- respectively to the accused for getting admissions of their children done in the various courses but they all stated that despite paying money, no admission has been got done by the accused.

18. PW10 Satish Kumar stated that he remained posted as TGT teacher of Science and maths in Kids Buds School, Bijhar. He stated that he knew accused Ravi Dutt, who used to meet him in Barsar, however, record suggests that this witness was declared hostile. In his cross-examination conducted by learned PP, he categorically denied the suggestion that he knew that accused-Ravi Dutt was Manager of the School.

19. PW11 Ravinder Chandel, the correspondent of Divya Himachal stated that accused Ravi Dutt had contacted them for publishing of the advertisement.

20. PW12 Anil Kumar stated that he remained posted as TGT teacher in the School, from 2000 to 2002 and accused Ravi Dutt has not done any transaction in his presence with anyone. This witness was also declared hostile. Even in his cross-examination, no material could be extracted by the defence, which could be of any help to the case of the prosecution.

21. PWs13 and 14 Parvesh Kumar and Raman Kaishtha, also stated in their examination-in-chief that they contacted the school on the basis of advertisement and thereafter,

they went to school where accused Ravi Dutt and Anil Kumar met them. Accused assured them of admission in M.Sc. (Chemistry) for an amount of ` 30,000/- each. They stated that Rs.30,000/- each were deposited with the accused and, thereafter, they were informed by the accused that admission has been done and given identity card Ext.PW13/A, which was later on found fake/duplicate.

22. PW.15 Visheshwar Sharma, Scientific Officer in State Forensic Science Laboratory, Junga, also admitted that one sealed parcel was received in the Laboratory on 28.11.2002, wherein original documents i.e. admitted hand writing and signatures of the accused Ex.t.PW7/A, Ext.PW7/B and Ext.PW15/A to Ext.PW15/C specimen handwriting and signatures of the accused were also received. He also stated that on examination using scientific technique, report Ext.PW15/D, bearing his signatures and official stamp was handed over to the police. He also stated that case was also examined by Assistant Director Ms. Meenakshi Mahajan, who countersigned the report along with her official stamp. This prosecution witness also proved Ext.PW15/E i.e. reasons for opinion. In his cross-examination, he admitted that writing Ext.PW7/A and Ext.PW7/8, Ext.PW15/A and Ext.P15/B appears to be relative in age. He admitted in cross-examination that with the passage of time, some variations in habit of writing may occur, however, in cross-examination, he admitted the suggestion that relative age of the writing is similar and there can be variation of opinion from expert to expert.

23. PW16. Inspector Madan Lal deposed before the learned trial Court that FIR Ext.PW16/B was registered on the basis of complaint No. 226. He also stated that accused Ravi Dutt had taken Rs.30,000/- from a girl from his relations for admission in M.Sc. course but no admission was got done in the said course. He also stated in examination-in-chief that he repeatedly had a telephonic talk with the accused regarding the aforesaid fact. However, in cross-examination, he admitted that he has not brought all these facts on record during the course of the investigation.

24. PW17 Shri Ashok Katoch, Editor of Divya Himachal newspaper stated that record qua the advertisement is weeded out after every one year. He also proved letter Ext.PW17/A issued from their office.

25. PW18. ASI Rajinder Pal, who was the Investigating Officer and during investigation, he had taken into custody two receipts, Ext.PW7/A and Ext.PW7/B vide memo Ext.PW7/C. He also stated that specimen signatures and writing of the accused, Ext.PW15/A to PW15/C were taken by him before the Court. In his cross-examination, he admitted that no proof was found that accused was employee of the said school. In his cross-examination, he also admitted that he had taken into possession the record from the school but not attached with the challan. He also admitted the suggestion put to him in the cross-examination that he did not cite the magistrate from whom, he had procured the specimen signatures of the accused, as a witness in the case.

26. Careful perusal of the depositions made by complainant PW1 depicts that on the basis of advertisement, he contacted the school at Bijhar telephonically for admission of his daughter Sunita in M.Sc. Course. As per his statement one Anil Kumar asked him to bring certificates of his daughter along with amount of Rs.30,000/-, which he deposited along with documents with one Anil Kumar. PW1 nowhere in his statement stated that he had actually handed over the documents as well as amount to accused Ravi Dutt, rather, he categorically stated that he handed over amount along with documents to one Anil Kumar, who has been admittedly not made accused/party in the present case. It has also come in the statement of PW1 that when he again went back to the aforesaid school, to get back the money as well as certificates, Anil Kumar and Ravi Dutt did not meet him and another person returned certificates, who told him that money would be returned by Anil Kumar and Ravi Dutt. Thereafter He lodged complaint, which was ultimately registered as FIR Ext.16/B. Careful reading of the deposition made by the complainant nowhere suggests that actually, he was ever able to see accused Ravi Dutt in person. In his statement, it has come that on both the occasions, when he visited the

School, accused Ravi Dutt was not present. As per his statement, he had handed over the amount of Rs.30,000/- along with certificates to one Shri Anil Kumar, who has been not admittedly made accused in the present case for the reasons best known to the prosecution. Hence, in the absence of specific proof that money ultimately travelled to Ravi Dutt from Anil Kumar, version put forth by the prosecution that the complainant paid a sum of Rs.30,000/- to the accused Ravi Dutt for admission cannot be accepted on its face value.

27. In the present case, admittedly, complaint was lodged against the accused that an amount of Rs.30,000/- was taken by accused Ravi Dutt for admission of his daughter but ultimately, admission was not got done. Prosecution with a view to prove its case, examined PW2 Kashmir Singh, PW3 Jitender Kumar, PW4 Kanshi Ram, PW5 Kashmir Singh, PW6 Hemawati, PW7 Arun Mahajan, PW8 Mohan Lal, PW9 Sanjeev Kaundal, PW13 Parvesh Kumar and PW14 Raman Kaistha, to substantiate that so many people in terms of the advertisement, paid money as well as deposited certificates to accused Ravi Dutt. But, this Court while hearing the parties as well as examining the record had an occasion to peruse the statements of each and every PW, as referred above. Careful perusal of the depositions made by aforesaid witnesses nowhere supported the version of the PW1 where he stated that he had paid amount of ` 30,000 to the accused Ravi Dutt, rather, these witnesses, as referred above, have narrated their own instances, where they in terms of advertisement, contacted the petitioner-accused and paid some amount for admission of their children for courses, but admittedly these witnesses, nowhere substantiated the claim put forth by the PW1-complainat, in the present case that he had actually paid amount of Rs.30,000/- to the accused Ravi Dutt for admission of his daughter. Since in the present case, where the police on the basis of specific complaint filed by the PW1 registered the case against the accused, witnesses cited by prosecution were expected to support the case of the complainant-PW1 by stating that amount of Rs.30,000 along with original certificates was deposited by PW1 in their presence with accused Ravi Dutt but in the present case, all these prosecution witnesses have not supported the statement given by PW1, rather, they have stated their own tales indicating therein that money was taken by accused Ravi Dutt for admission in course by taking money. Interestingly, in the present case, all PWs, as referred above, have nowhere reported the matter to the police and, as such, no case whatsoever was registered against the accused Ravi Dutt on their specific complaint. However, perusal of statement given by PW2 suggests that 8 girls and 6 parents along with Ravi Dutt and Kartar Singh had gone to Dehradun for admission and, subsequently, they along with accused Ravi Dutt met SHO Barsar, who asked Ravi Dutt to return the amount taken by him. PW2 also stated that Ravi Dutt returned half of the payment and assured them to return the remaining within eight days. But fact remains that PW2, who as per his statement, had an occasion to meet Ravi Dutt and visit Dehradun along with him never lodged any complaint against the accused. Hence, in the absence of specific statement that PW1 had actually made payment to the accused in their presence, version put forth by these PWs, as referred above, cannot be of any help to the prosecution. Interestingly, in the present case, where PW1 specifically stated that money was paid to Anil Kumar, police for the reasons best known to it, has not arrayed Anil Kumar as Accused in the present case, who as per the version of PW1 received money on behalf of accused Ravi Dutt. Had police arrayed aforesaid Anil Kumar as accused and investigated the matter, perhaps, it would have been discovered whether money actually travelled to the accused, Ravi Dutt or not? Hence, in the absence of some specific proof, it cannot be assumed/believed that money actually paid by complaint travelled to the accused Ravi Dutt.

28. Moreover, in the present case, PW10 and 12, employees of school categorically denied that accused Ravi Dutt in some manner was associated with school. Though, these aforesaid witnesses were declared hostile but in their cross-examination they have specifically denied that Ravi Dutt was the Manager of the school. In the present case, as per statement of PW18 ASI Rajinder Pal, no proof, whatsoever, could be found to connect the accused with the school. PW18 in his statement admitted that no connection was found of the accused that he was employee of the school. He also admitted in cross-examination that though, he had taken record from the school but same was not attached with the challan. Hence, it can be safely

inferred that police had no record, whatsoever, to connect accused Ravi Dutt with the school, who allegedly got the advertisement published in the news paper. Similarly, PW17 also stated in cross-examination that record pertaining to advertisement is weeded out after one year and as such, advertisement, if any, got issued by the accused on behalf of the school, has not been proved by the prosecution. Moreover, PW15 who proved the opinion Ext.PW15/C stated that Ext.PW7/A and Ext.PW7/B appears to be relative in age. He admitted the suggestion put to him in cross-examination that relative age of the writing is similar and there is a possibility of variation of opinion from expert to expert. Moreover, proseuciton has not examined learned Magistrate in whose presence, signatures were obtained for sending it to the Forensic Scientific Laboratory for examination. Interestingly, in the present case, PW16 Madan Lal admitted that complaint was received by him, which was converted into FIR vide Ext. PW16/B. He in his statement stated that accused had taken Rs.30,000/- from girl from his relations for admission in course but later on, admission was not got done in terms of the promise made to her. He admitted that thereafter, he had a telephonic talk with the accused on several occasion, but in cross-examination, he admitted that he had not brought all facts on record during the courts of investigation. Hence, in the absence of specific complaint in this regard made by PWs, their version cannot be of any help to prosecution to prove the instant case.

29. Careful perusal of the record suggests that in the instant case, case was registered by the police on the basis of compliant lodged by PW1, which was ultimately converted into FIR. Close scrutiny of the FIR nowhere suggests that any other instances, as have been put forth by the prosecution witnesses, were made basis of the FIR. Rather, FIR in question was specifically lodged on the specific allegation of the complainant, where he reported that he had paid a sum of Rs.30,000/- to the accused Ravi Dutt. Since case at hand was registered on the basis of specific complaint, accused cannot be held guilty of having committed offence under Sections 406 and 420 of the Indian Penal Code on the statement of witnesses that they had also made payment to the accused for admission of their children in the various courses. In the extant case, prosecution was expected to lead specific evidence on record to demonstrate that complainant had made the payment of Rs.30,000/- for admission of his daughter but as appears from record, none of the witnesses have supported the specific case, which ultimately culminated into criminal proceedings that money was paid by the complaint to accused-Ravi Dutt.

30. In view of the detailed discussion made hereinabove as well as critical analysis of the material evidence brought on record by the prosecution, this Court has no hesitation to conclude that prosecution has miserably failed to prove its case beyond reasonable doubt. Save and except statement of PW1, no prosecution witness has stated that complainant PW1 had made payment of Rs.30,000/- to the Ravi Dutt. Rather, instead of proving the case, all the prosecution witnesses narrated their own instances of making payment to the accused on the basis of advertisement got published in the news paper but fact remains that all these witnesses never lodged the complaint to the police and as such their statements cannot be of any help to the prosecution to prove that PW1 paid amount of Rs.30,000/- to the accused on the basis of the advertisement. Moreover, prosecution has also failed to prove on record that advertisement was actually got published by accused Ravi Dutt in the news paper and he actually received the money from PW1 for admission of his daughter. In the present case where there is a specific statement of PW1 that he had paid amount of Rs.30,000/- to one Shri Anil Kumar, prosecution has not led any evidence on record to prove that Anil Kumar received money on behalf of the accused Ravi Dutt, which later on travelled to him.

31. Consequently, this Court sees no reason whatsoever, to interference with the judgments of acquittal passed by the courts below, which appear to be based on correct appreciation of the material evidence available on record. Hence the petition stands dismissed.

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

C.M. Chawla ………Petitioner

Versus

State of Himachal Pradesh. ……….Respondent

Civil Revision No. 140 of 2005
Date of Decision: 21.6.2016.

Arbitration and Conciliation Act, 1996- Section 13 and 33- Petitioner was awarded contract of construction of Lift Irrigation Scheme- a dispute arose between the parties, which was referred to Arbitrator- Arbitrator allowed the claim of the petitioner and held the petitioner entitled to Rs. 78,947/- over and above the amount paid to him – amount of Rs. 12,582/- was awarded as interest- State preferred objections, which were allowed and award was set aside- an appeal was preferred by the petitioner before District Judge who allowed the same and awarded Rs. 64,074/- over and above the final payment - however, no interest was awarded- aggrieved from the order of District Judge, a revision petition was filed- held that State has not preferred any appeal against the order of the District Judge which means that State has accepted the order of the District Judge as correct- Petitioner had no remedy of appeal- therefore, he had rightly filed the revision petition- District Judge had not assigned any reason for not awarding the interest- once petitioner is held entitled to the amount, he is also entitled to interest- petition allowed and the interest @ 12% per annum awarded from the date when award was made the decree of the Court till payment. (Para-6 to 18)

Cases referred:

ITI Ltd. v Siemens Public communication Network Ltd.", 2002 (5) SCC 510
Shyam Sunder Agarwal & Co. v. Union of India, 1996(2) SCC 132
Shin-etsu Chemical Company limited and others v. Vindhya Telelinks Limited and others," 2009(14) SCC 16
Jagdish Rai and Brothers v. Union of India (1999) 3 SCC 257
Ghulam Mohammad Dar versus State of J&K and others, (2008) 1 SCC 422

For the petitioner: Mr. Ruma Kaushik, Advocate, for the petitioner
For the respondent: Mr. Rupinder Singh Thakur, Additional Advocate General, with Mr. Rajat Chauhan, Law Officer.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral).*

The present civil revision petition filed under Section 115 CPC is directed against the Judgment dated 19.3.2005 passed by the learned District Judge, Una, HP, in Civil Misc. Appeal No. 61 of 1999, whereby learned court below partly accepted the appeal preferred by the present petitioner and held him entitled to amount of Rs.64,074/- over and above the finally payment. Petitioner being aggrieved with the non-granting of interest, if any, on the aforesaid amount, approached this Hon'ble Court by way of present proceedings.

2. Briefly stated facts necessary for adjudication of the present case are that petitioner was awarded contract of construction of Lift Irrigation Scheme, Santoo Tilla on the basis of agreement No.1 of 1990-91 amounting to Rs.6,18,227/-. Since the dispute with regard to payment arose between the parties, matter was referred to arbitration in terms of the agreement. Learned Arbitrator, vide award dated 10.10.1994 (Annexure P-1) allowed the claims filed by the present petitioner and held him entitled to an amount of Rs.78,947/-. Perusal of the award also suggests that learned Arbitrator while passing award also granted an amount of

Rs.12,582/- on account of interest for nonpayment of substitute/ extra items. Respondent-State being aggrieved and dissatisfied with the award passed by the learned Arbitrator, filed objections under Sections 30 & 33 of the Indian Arbitration Act, in the Court of learned Senior Sub-Judge Una, whereby the objections filed by the respondent-state were allowed and award was set-aside. Being aggrieved with the order of learned Sub-Judge, petitioner preferred an appeal before the court of learned District Judge, Una, whereby he partly allowed the appeal holding him entitled to an amount of Rs.64,074/- over and above the final payment. Since, learned Court below while partly allowing the appeal, held petitioner entitled for an amount of Rs. 64,074/- over and above the final payment but failed to award any interest, the petitioner approached this Hon'ble Court by way of Civil Revision Petition.

3. Smt. Ruma Kaushik. Advocate for the petitioner vehemently argued that learned court below while partly allowing appeal, vide judgment dated 19.3.2005, has erred in not awarding the interest to the petitioner. She forcefully contended that learned court below, while passing the impugned judgment, miserably failed to take cognizance of the law laid down by the Hon'ble Apex Court, wherein it has been repeatedly held that the court has power to award interest on the awarded amount to the petitioner. It is contended on behalf of the petitioner that since the petitioner was held entitled to amount over and above the final payment, learned court below ought to have awarded interest on the awarded amount. Ms. Kaushik forcefully contended that learned Court below failed to appreciate that learned Arbitrator while passing award dated 10.10.1994 had awarded the interest of Rs. 12,582/- for nonpayment of substitute/extra items and, as such, learned court below has failed to exercise jurisdiction duly vested in him, whereby he could always grant interest on the amount awarded by him. In the aforesaid background, it is prayed that judgment passed by the court below in Civil Misc Appeal No. 61 of 1999 dated 19.3.2005 be modified and petitioner be held entitled to the interest on the amount so paid to the petitioner in terms of judgment dated 19.3.2005 as per law.

4. Per contra, Mr. Rajat Chauhan, Law Officer, representing the respondent-state vehemently opposed the present petition preferred by the petitioner on the ground of jurisdiction. Mr. Chauhan, strenuously argued that this Court has no jurisdiction, whatsoever, to entertain the present petition in view of the specific remedy provided under Section 37 of the Arbitration Conciliation Act, 1996 (in short "the Act, 1996"). It is also contended that petition filed by the petitioner is not maintainable at all, especially, when remedy of appeal in the Act, 1996 has been already exhausted by the petitioner by filing the appeal in the court of learned District Judge, Una. He also forcefully contended that learned court below has rightly not awarded interest on the amount so awarded by it as it is exclusive domain of the Arbitrator in terms of the Section 31 of the Act, 1996 to award interest, if any. In view of the aforesaid submissions, he prayed for dismissal of the present petition.

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

6. Before adverting to the merits/demerits of the case, it may be noticed that judgment dated 19.3.2005 has attained finality, as no challenge, whatsoever, has been laid to the same by the respondent-State in any competent court of law, meaning thereby, respondent-State has accepted the verdict of the learned District Judge, Una, whereby present petitioner has been held entitled to amount of Rs. 64,074/- over and above the final payment.

7. Since specific objection with regard to the maintainability of present petition has been raised on behalf of the State, it would be proper for this court to examine the issue of maintainability and jurisdiction of this Court at the first instance. To find answer to aforesaid issue, it would be apt to reproduce Section 37 of the Act, 1996, which is as follows:-

> "37. Appealable orders.—
>
> (1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:—

(a) granting or refusing to grant any measure under section 9;

(b) setting aside or refusing to set aside an arbitral award under section 34.

(2) An appeal shall also lie to a Court from an order granting of the arbitral tribunal.—

(a) accepting the plea referred in sub-section (2) or sub-section (3) of section 16; or

(b) granting or refusing to grant an interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court."

8. Bare perusal of aforesaid section suggests that appeal would lie to the court authorized by law to hear appeals against the order granting or refusing to grant any measure under Section 9 and order setting aside or refusing to set-aside an arbitral award under Section 34. Hence, after careful perusal of the aforesaid provision of law, it can be safely inferred that order passed by Court below considering the objection filed under Section 34 of the Act, 1996, is an appealable order and appeal, if any, can be filed against that order in terms of Section 37 of the Act, 1996. Since in the present case, remedy of appeal, as prescribed under Section 37 of the Act, 1996, has been availed by the petitioner by filing CMP No. 61 of 1999, in the court of learned District Judge, Una, no further appeal is maintainable. But in the present case aggrieved with the judgment passed by the learned District Judge, Una, the petitioner has filed civil revision petition under Section 115 CPC, hence, question, which needs to be determined at this stage is, whether revision petition preferred by the petitioner is maintainable or not? It is undisputed that perusal of the section 37 of Arbitration Act clearly bars filing second appeal. Now question which requires to be determined is that in absence of any specific remedy appeal/proceedings, what is the remedy available to the petitioner for assailing the judgment passed by learned appellate Court in appellate proceedings under Section 37 of the Act, 1996. Learned counsel appearing for respondent –State argued that petitioner has/had any remedy if, any, to file special leave petition under Article 136 of the Constitution of India, before the Hon'ble Apex Court. Since present petition has been filed under Section 115 CPC, it would be profitable to reproduce the provisions of Section 115 CPC herein below:-

"115. Revision.- *(1) The High Court may call for the record of any case which has been decide by any court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate court appears—*

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit:—

Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings.

(2) The High Court shall not, under this section vary or reverse any decree or order against which an appeal lies either to the High Court or to any court subordinate thereto.

(3) A revision shall not operate as a stay of suitor other proceeding before the Court except where such suit or other proceeding is stayed by the High Court.

> *Explanation .- In this section, the expression "any case which has been decided" includes any order made, or any order deciding an issue, in the course of a Suit or other proceeding."*

Close scrutiny of provisions of Section 115 CPC clearly suggests that High Court is empowered to call for the records of any case decided by the court subordinate to it, where there is no further provision of appeal. When it is satisfied that subordinate court has not exercised jurisdiction vested in it by law or have failed to exercise jurisdiction so vested or to have committed any exercise of its jurisdiction illegally with material irregularity. In the present case also, learned District Judge has passed impugned order /judgment while exercising power under Section 37 of the Act, 1996, meaning thereby, party aggrieved with the order of learned District Judge in exercise of Section 37 has no remedy of appeal, if any, to challenge the order passed by learned District Judge in exercise of power under Section 37 of the Act. As has been noticed above, since there is no further remedy available to the petitioner to assail the order/judgment passed by learned appellate Court in exercise of its power under Section 37 of the Arbitration Act, he has rightly approached this Court invoking provisions of Section 115 CPC which certainly empowers the High Court to entertain the petition in the facts and circumstances as discussed hereinabove. Moreover, perusal of the impugned order passed by the learned Appellate Court clearly suggests that he has failed to exercise jurisdiction vested in him by not awarding interest on the amount to which petitioner has been held entitled over and above the final

9. In this regard, reliance is also placed in judgment rendered by the Hon'ble Apex Court in "***ITI Ltd. v Siemens Public communication Network Ltd.", 2002 (5) SCC 510***, the relevant paras of which are reproduced herein below:-

> *"21. Provisions of Section 37 of the Act of 1996 bars Second Appeal and not revision under Section 115 of the Code of Civil Procedure. The Power of appeal under Section 37(2) of the Act against order of arbitral Tribunal granting or refusing to grant an interim measure is conferred on court. Court is defined in Section 2(e) meaning the 'principal Civil Court of Original Jurisdiction' which has 'jurisdiction to decide the question forming the subject-matter of the arbitration if the same had been the subject matter of the suit'. The power of appeal having conferred on a Civil court all procedural provisions contained in the Code would apply to the proceedings in appeal. Such proceedings in appeal are not open to Second Appeal as the same is clearly barred under Sub-section (3) of Section 37. But I agree with the conclusion reached by Brother Hegde J. that the supervisory and revisional jurisdiction of High Court under Section 115 of the Code of Civil procedure is neither expressly nor impliedly barred either by the provisions of Section 37 or Section 19(1) of the Act. Section 19(1) under Chapter V of the Part I of the Act merely states that the Arbitral Tribunal shall not be bound by the Code of Civil Procedure. The said action has no application to the proceedings before civil court in exercise of powers in appeal under Section 39(2) of the Act.*
>
> *22. The supervisory jurisdiction to be exercise by the High Court under Section 115 of the Code is for the purpose of correcting jurisdiction error if any committed by Sub-ordinate Court in exercise of power in appeal under Section 37(2) of the Act. The approach made to the Revisional Court under Section 115 of the Code is not a resort to remedy of appeal. In appeal, interference can be made both on facts and law whereas in revision only errors relating to jurisdiction can be corrected. Such revisional remedy is not expressly barred by the provisions of the Act. We have also not found any implied exclusion of the same on examination of the scheme and relevant provisions of the Act."*

10. Reliance is also placed on judgment passed by the Hon'ble Apex Court in ***Shyam Sunder Agarwal & Co. v. Union of India, 1996(2) SCC 132***,*which also reads as follows:-*

> *"26. In our view, a revisional application before the High Court against an appellate order passed under Section 39 of the Arbitration Act is maintainable. There is no express provision in the Arbitration Act putting an embargo against filing a revisional application*

against appellate order under Section 39 of the Act. The Arbitration Act has put an embargo on filing any second appeal from appellate order under Section 39 of the Act. The Arbitration Act is a special statute having limited application relating to matters governed by the said Act. Such special statute, therefore, must have its application as provided for in the said statute. The revisional jurisdiction of the High Court under the Code or under any other statute therefore shall not stand superseded under the Arbitration Act if the Act does not contain any express bar against exercise of revisional power by the High Court provided exercise of such revisional power does not mitigate against giving effect to the provisions of the Arbitration Act.

28. It may be stated that even if a special statute expressly attaches finality to an appellate order passed under that statute. It has been held by this Court in the case of Hari Shanker (supra) that such provision of finality will not take away revisional powers of the High Court under Section 115 of the Code of Civil Procedure. There is also no such express provision in the Arbitration Act attaching finality to the appellate order under Section 39 of the said Act. As already indicated, only bar under sub section (2) of Section 39 is of a second appeal from an appellate order under Section 39. The impugned order of the High Court upholding maintainability of revisional application under Rule 36A of the Rules, therefore, is justified and no interference against such decision is warranted. This appeal, therefore, fails and is dismissed without any order as to costs. As the revision application is sending for a long time, the High Court is directed to dispose of revisional application on merits as early as possible but not exceeding four months from the date of communication of this order."

11. This court also examined submission made on behalf of respondent, wherein specific submission was made that remedy, if any, against the judgment passed by learned District Judge under Section 37 of the Act lies before the Hon'ble Apex Court under Article 136 of the Constitution of India in the absence of any specific remedy available under the Act. Though, the Hon'ble Apex Court in the judgments referred herein above, has categorically held that provisions contained in Section 37 of the Act, 1996, bars second appeal but not revision under Section 115 of CPC, meaning thereby, revision petition filed under Section 115 CPC is maintainable challenging therein the order passed by the first Appellate court under Section 37 of the Act, 1996. Similarly, the Hon'ble Apex Court while examining the scope of granting leave to appeal under Article 136 of the Constitution of India against any order/judgment, wherein there is no provision of second appeal provided under the Act, held in ***"Shin-etsu Chemical Company limited and others v. Vindhya Telelinks Limited and others," 2009(14) SCC 16***, as under:-

"16. Relying upon the exception contained in sub-section (2) of Section 50, the appellant contended that even though an appeal may not lie from the order in the appeal, the right of appeal to Supreme Court having been specifically saved, these appeals to the Supreme Court are maintainable. The appellant does not dispute that the Act does not provide a `right to appeal' to Supreme Court against an appellate order under Section 50(1)(a) of the Act.

17. The appellant would contend that as Article 136 contemplates Supreme Court granting leave to appeal from any judgment, decree or order and as sub-section (2) of Section 50 of the Act specifically saves the right to appeal to Supreme Court, an appeal to Supreme Court by obtaining leave under article 136 should be held to be a remedy in regard to an appellant order under Section 50(1) of the Act, even if the court of appeal was a court inferior to the High Court.

18. What is exempted from the bar against second appeals is `any right to appeal to the Supreme Court'. Article 136 of the Constitution provides that notwithstanding anything in Chapter IV of Part V of the Constitution, the Supreme Court may in its discretion grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.

19. Article 136 does not confer a right to a party to appeal to the Supreme Court. The said article confers discretion upon the Supreme Court to grant leave to appeal in suitable cases. The power vested in Supreme Court to grant leave, which is to be used sparingly in appropriate cases, cannot be construed as vesting of a right of appeal in a party under Article 136.

28. Though, Article 136 provides that this Court has the discretion to grant leave to appeal against any order (judgment, or determination) in any cause by any court, this Court has been consistently following the practice of not entertaining appeals directly from the orders of district courts or court subordinate thereto, if an alternative remedy by way of appeal or revision was available before the High Court. In fact, after the scope of revision under section 115 was curtailed by Amendment Act 46 of 1999 with effect from 1.7.2002, the availability of even the remedy by invoking the supervisory jurisdiction under Art. 227 of the Constitution (as enunciated by this Court in Surya Dev Rai vs. Ram Chander Rai - 2003 (6) SCC 675), has been considered as an adequate alternative remedy, for the purposes of Article 136."

12. In view of the discussion made herein above as well as law laid down by the Hon'ble Apex Court, this Court has no reason whatsoever to accept the contention with regard to maintainability put forth on behalf of the respondent-State. After perusing the relevant provision of law as well as judgments cited above, it can be safely concluded that present petition filed under Section 115 CPC is maintainable.

13. Now adverting to the merits of the present petition, wherein petitioner has sought modification of the impugned judgment and claimed interest on the amount to which he has been held entitled by the learned District Judge in its judgment, perusal of the grounds of appeal (Annexure-P2) filed by the petitioner in the court of learned District Judge, Una, challenging therein order dated 23.6.1999 passed by learned Senior Sub Judge in Arbitration Case No. 1 of 1994 suggests that present petitioner had specifically prayed for acceptance of the award passed by the learned Arbitrator as a whole, by rejecting the objections filed by the respondent and with further prayer to award the interest @18% p.a.

14. Careful perusal of impugned judgment nowhere suggests that learned Appellate Court while holding the present petitioner entitled to the amount in question over and above the final payment dealt with issue of entitlement of interest, if any, to the petitioner. Learned Appellate Court after perusing the record made available to him observed that Executive Engineer made an offer of Rs. 747.05 as the costs of per kilo gram of 4mm thick pipe as per agreement and as such contractor-petitioner was entitled to the rate i.e. Rs. 747.05 per meter.

15. Learned Court below also observed that since aforesaid offer was made by the Government to the Contractor, Government cannot wriggle out of the same. Fact remains that by way of impugned order appellant was held entitled for payment of rates as suggested by the Executive Engineer to the Arbitrator vide letter and on the basis of calculations, as reproduced in the impugned judgment, present petitioner was held entitled for the payment of Rs. 74,047/- over and above the final payment of Rs. 2,66,122.92 paisa, which stood received by the Contractor at the time of adjudication by the Court of learned District Judge, Una. As has been noticed above, the aforesaid judgment has attained finality as no appeal/proceedings, if any, were filed by the respondent in any court of law, meaning thereby, amount determined by the learned District Judge in the appeal was accepted by the respondent. This Court is of the view that once respondents accepted the verdict of learned District Judge, wherein petitioner was held entitled to amount of Rs. 60,474/- over and above the final payment of Rs. 2,66,122.92 paisa, petitioner has rightly staked his claim for interest on the amount so awarded by learned District Judge. As per Section 31 of the Arbitration and Conciliation Act, Arbitrator is competent to award the interest on the awarded amount, as has been noticed above.

16. Since specific challenge was laid to the award passed by the learned Arbitrator and ultimately, petitioner was held entitled to the sum over and above the final payment received

by him, learned Appellate Court ought to have awarded interest on the amount awarded by it to the petitioner. Since learned appellate Court had passed judgment dated 19.3.2005 in the arbitration appeal constituted/maintained by the present petitioner in terms of Section 37 of the Act, 1996, proceedings, if any, would be considered in continuation of the Arbitration proceedings initiated with the reference of dispute to the Arbitrator and, as such, same would be governed by the provisions of the Arbitration and Conciliation Act. Since Section 31 of the Arbitration Act specifically provides for interest on the awarded sum and as such this, Court has no hesitation to conclude that the petitioner is entitled to be awarded interest on the amount determined by the learned Appellate Court.

17. In this Regard, reliance is placed on Judgments rendered by the Hon'ble Apex Court in ***Jagdish Rai and Brothers v. Union of India (1999) 3 SCC 257*** and ***Ghulam Mohammad Dar versus State of J&K and others, (2008) 1 SCC 422***, which reads as follows:-

> ***"Jagdish Rai and Brothers v. Union of India (1999) 3 SCC 257:-***
>
> ***8***. *The learned counsel for the appellant relied upon several decisions of this Court to state the proposition that such interest could be granted. It is unnecessary to make any detailed reference to them. We think it appropriate to modify the decree of the court of Sub-Judge by including a direction for payment of interest @ 12% per annum from the date when the award was made the decree of the court of Sub-Judge till realisation. The appeal is allowed to the extent indicated above. However, in the circumstances of the case, there shall be no orders as to costs."*
>
> ***"Ghulam Mohammad Dar versus State of J&K and others, (2008) 1 SCC 422:-***
>
> *8. Learned senior counsel appearing for the appellant, by drawing our attention to the direction of the Arbitrator as well as the ultimate order passed by the High Court, submitted that in view of default in payment of the amount within the stipulated time, the appellant is entitled interest @ 18% p.a. from the date of the Award and not from the date of the decree. In the light of the controversy, we verified the direction of the Arbitrator and the order passed by the High Court both in the Arbitration and Revision Petition. On perusal of the same and of the fact that the respondents are none other than the State Government, we agree with the order of the High Court dated 30.04.1998 passed in Arbitration Petition No. 171 of 1991 and hold that the claimant is entitled to interest @ 18% p.a. for the award amount from the date of the decree till realization. To this extent, we clarify the position. The Civil Appeal is disposed of on the above terms. No costs."*

18. In view of the discussion made hereinabove as well as law cited by this Court, present civil petition is allowed and the petitioner is held entitled to the interest @ 12% p.a. from the date when award was made decree by the court of learned District Judge, Una, on 19.3.2005 till its payment. The petition stands disposed of accordingly.

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

Pawan Kumar Sharma ………Appellant
Versus
Kiran Sharma ……….Respondent

FAO(HMA) No. 454/2015
Reserved on: June 21, 2016
Decided on: June 22, 2016

Hindu Marriage Act, 1955- Section 13- Marriage between the parties was solemnized in the month of March, 1993- a daughter and a son were born from wedlock – behaviour of the wife was

harsh, cruel and insulting towards the appellant- she started pressurizing the appellant to reside separately from the parents- she stopped doing household works and used to misbehave with the husband, his mother and his sister- she left home without any reason- divorce was sought on all these grounds- petition was dismissed by the trial Court- held, in appeal that allegations made in the petition are vague and sketchy- husband had failed to prove that wife had treated him with cruelty- mere failure to do household work will not amount to cruelty- on the other hand, it was proved that husband had treated wife with cruelty- he cannot take advantage of his own wrongs- petition was rightly dismissed by the trial Court- appeal dismissed. (Para-7 to 11)

Cases referred:

Bipinchandra Jaisinghbai Shah versus Prabhavati, AIR 1957 SC 176
Manisha Tyagi vs. Deepak Kumar 2010(1) Divorce & Matrimonial Cases 451
Ravi Kumar vs. Julumidevi (2010) 4 SCC 476

For the Appellant : Mr. Shanti Swaroop, Advocate.
For the Respondent : Mr. Vikas Rathore, Advocate.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge:

This appeal has been instituted against Judgment dated 1.8.2015 passed by the learned Additional District Judge (II), Shimla in HMA Petition No. 29-S/3 of 2014/11.

2. "Key facts" necessary for the adjudication of the present appeal are that the appellant instituted a petition under Section 13 of the Hindu Marriage Act, 1955, before the Additional District Judge(II) Shimla, for the dissolution of marriage between the parties by way of a decree of divorce. According to the averments made in the petition, marriage between the appellant and respondent was solemnised in the month of March, 1993 at Hamirpur, in accordance with Hindu rites and rituals. Both the parties cohabited as husband-wife. Out of said wedlock a daughter and a son were born. Attitude and behaviour of the respondent was cordial towards the appellant but after 4-5 months of their marriage, all of a sudden, her behaviour became very harsh, cruel and insulting towards the appellant. Respondent started pressurizing and compelling the appellant to reside separately from the parents. There was no one to look after and maintain the old aged mother and sister after the death of father of the appellant. Respondent stopped doing minor household works and pressurized the appellant to live separately. Respondent used to misbehave and used abusive language against the mother and sister of the appellant. Matter was amicably settled between the parties by way of compromise. However there was no change in the attitude of the respondent. Separate accommodation was also provided to them in the month of October 1998. Respondent left the matrimonial home in October, 2008. She also developed unwanted relations with one Shri Gurjeet Singh. According to the appellant, he was treated with cruelty by the respondent. She deserted the appellant without assigning any sufficient reasons.

3. The petition was contested by the respondent. She has denied that she treated the appellant with cruelty. She had never pressurized the appellant to live separately from his family. Appellant was responsible for forcing the respondent to live with her parents. Rejoinder was filed by the appellant. Issues were framed by the learned Additional District Judge on 18.8.2012.

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

5. Appellant has appeared as PW-1. He has led his evidence by way of filing an affidavit, Ext. PW-1/A. According to the averments made in the affidavit, relations between the

parties were cordial for 4-5 months. Thereafter, relations deteriorated. Respondent used to pick up quarrels with him. She used to pressurize him to live separately. His mother provided them with separate accommodation. She left the daughter unattended. He has placed on record Exts. PA to PY. Respondent used to file false complaints against him with the police. She has not maintained any physical relations with him since 2001. Ext. PW-1/B-1 is the envelope. In Ext. PW-1/B, respondent has merely stated that she was not well and the appellant should take care of his daughter. Ext. PW-1/B-3 is a copy of summons issued by the Court of Additional Chief Judicial Magistrate, Hamirpur under Section 125 CrPC. Ext. PW-1/B-2 a copy of application filed by the respondent under Section 125 CrPC seeking maintenance allowance at the rate of `500/- per month. Ext. PW-1/B-7 is legal notice served upon the respondent at the instance of the landlord Shri Jagat Ram, whereby respondent was asked to vacate the accommodation within 15 days of the receipt of the notice. Legal notice was replied vide Ext. PW-1/B-8 by the respondent. She has denied that the house was owned by Jagat Ram. Ext.PW-1/B-9 is a copy of the petition filed by Jagat Ram under Section 14(2)(i) of the HP Rent Control Act against the respondent. Appellant has also filed a complaint against Shri Gurjeet Singh, who was working in Central Potato Research Institute (CPRI), Shimla. Ext. PW-1/B-14 is a copy of letter addressed by the father of the respondent to the Hon'ble Chief Minister bringing to his notice that his daughter was being harassed for bringing insufficient dowry. Appellant has again filed a complaint against Shri Gurjeet Singh vide Ext. PW-1/B-21. Ext. PW-1/B-24 has no relevance in the present case since it is a complaint filed by the wife of Shri Gurjeet Singh, namely Kamaljeet Kaur against her husband. Matter was also looked into by a duly constituted committee as per Ext. PW-1/B-43. The Committee has not found any substance about illegal relations between Gurjeet Singh and the respondent.

6. Respondent has appeared as RW-1. In her statement, she has refuted the averments made in affidavit Ext. PW-1/A. According to her statement, relations between the parties remained normal for 4/5 years. Thereafter, appellant started harassing her. She was forcibly sent to Hamirpur for delivery. She was residing with her husband. She has denied that she has left the matrimonial house in the year 2008. She has denied the allegations about relations with Gurjeet Singh. She also specifically testified that the matter was compromised several times but the appellant was still harassing her. She has denied the suggestion that she was forcing the appellant to live separately. She has admitted that she has filed petition under section 125 CrPC. She used to look after the guests. She has never picked up any quarrel with her husband. She denied the suggestion that she was provided separate accommodation. She was residing with her children in the same house where the appellant was residing. She has admitted that her father has sent a letter to the Hon'ble Chief Minister vide Ext. PW-1/B-14. She has denied the suggestion that she has not served food to her mother-in-law. She has admitted that she has filed complaint before the Police since appellant was not paying her maintenance. Her daughter was pursuing B.Tech. and her son was in 10+2 at the time of recording of her statement.

7. The allegations contained in the petition against the respondent are vague and sketchy. He has miserably failed to prove that the respondent has treated the appellant with cruelty. Merely that the respondent has refused to look after the household work occasionally would not amount to cruelty. No specific year, month or date has been given when the respondent has used abusive language against the appellant.

8. Thus, it is duly proved that it is the appellant who has treated the respondent with cruelty by not providing her the maintenance. She is looking after her two children. It was in these circumstances that the respondent was forced to file a petition under Section 125 CrPC against the appellant. The appellant has not even looked after his children. She has no independent source of income. Appellant could not be permitted to take advantage of his own wrongs. It is intriguing to note that both the parties are living in the same house and despite that ground has been taken that the respondent has deserted him. Besides this, the averments made by appellant are nothing but normal wear and tear of life and trivial in nature. Respondent has

never deserted the appellant. It is the appellant who, has forced the respondent to live separately, particularly by creating a hostile environment. Appellant has failed to prove that he was treated with cruelty by the respondent. The plaintiff has also failed to prove that the respondent has deserted him without any cause.

9. 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.

10. 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."

11. 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."

12. 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 DHARAM CHAND CHAUDHARY, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

State of H.P. ....Appellant.

Versus

Tilak Raj & Another ....Respondents.

Cr. Appeal No. 569 of 2010.
Decided on: 24th June, 2016

Indian Penal Code, 1860- Section 498-A, 306 and 201 read with Section 34- Deceased was married to the accused- accused started maltreating her after one year of the marriage- father of the deceased paid Rs. 20,000/- on four different occasions- she was turned out of her home- she made a telephonic call that she was being beaten and tortured by her in-laws and someone should come and take her therefrom- uncle of the deceased received a call that deceased had expired - when her parents arrived at the spot, her dead body was being cremated- Two vials of pesticides were taken into possession by the police- accused were tried and acquitted by the trial Court- held, in appeal that deceased had committed suicide in her matrimonial home, however, the allegation that deceased was being subjected to cruelty for bringing insufficient dowry was not established as no complaint was made to the police or panchayat- father of the deceased admitted that accused had not demanded any dowry at the time of marriage- allegation that Rs. 20,000/- was paid by him to the accused on four different occasions was not established- the person in whose presence money was paid was not examined- mere fact that dead body was cremated without informing the relatives of the deceased is not sufficient to infer the guilt of the accused- prosecution had failed to prove its case beyond reasonable doubt and the accused were rightly acquitted by the trial Court- appeal dismissed. (Para-11 to 22)

Case referred:

Manju Ram Kalita versus State of Assam, (2009) 13 Supreme Court Cases 330

For the appellant : Mr. D.S. Nainta, Addl. A.G.
For the Respondents : Mr. Ramesh Sharma, Advocate

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

State of Himachal Pradesh has come up in appeal being aggrieved by the judgment dated 7.7.2010, passed by learned Additional Sessions Judge, Fast Track Court, Kangra at Dharamshala, in Sessions Trial No.22/10, whereby both accused (respondent herein) have been acquitted of the charge under Sections 498-A, 306 and 201 read with Section 34 of the Indian Penal Code framed against each of them.

2. In a nut shell the case of the prosecution as disclosed from the record is that Surekha Rani (since deceased) was married to accused Tilak Raj on 2nd November, 2002. Her parents had given dowry to her as per their capacity. Accused Sagro Devi is her mother-in-law. Deceased Surekha Rani, allegedly was treated nicely in the matrimonial home for a period of one year and thereafter both accused started maltreating her at the pretext of dowry. In order to fulfill their demands, PW-1 Raj Kumar, father of the deceased, paid Rs.20,000/- on four different

occasions, however, the accused were not satisfied and continued the torturing and maltreatment of the deceased. She was thrown away from the matrimonial home on 3rd September, 2007. She made a call on 2.30 p.m. from nearby PCO on the telephone number of her parents, which was attended to by her mother PW-2 Santosh Kumari. The deceased allegedly told her mother that she was being beaten and tortured by her in-laws and someone should come and take her therefrom.

3. Rampal, the uncle of deceased received a call on telephone from the house of the accused that Surekha had expired. He asked Mukeshwar her brother to call PW-1, her father. PW-1 and PW-2 when reached in the evening at 6.00 p.m. in the house of the accused, the dead body of Surekha was cremated. The police was informed by PW-14 Ashok Kumar, the cousin (maternal uncle's son) of deceased.

4. The Police swung into action and as per PW-20, the I.O., the police party reached on the spot at 5.30 p.m. At that time the pyre was burning. PW-18 Chain Singh went to cremation ground and taken photographs. The I.O. PW-20 reached thereafter on the spot. He recorded the statement Ex.PW-1/A of Raj Kumar, father of the deceased and prepared the spot map Ex.PW-20/B. He had also taken into possession ash, charcoal and burnt bones from the cremation ground, which was sealed in a container. Two vials of pesticides named 'Cyper Hit' and 'Ground up' were also taken into possession and sealed in parcel. On the receipt of the chemical examiner's report and also completion of the investigation challan was filed against both the accused.

5. Learned Trial Judge after taking into consideration the challan and the documents annexed therewith has prima facie found the involvement of the accused persons in the commission of the offence punishable under Sections 498-A, 306 and 201 read with Section 34 of the IPC. Charge against them was, therefore, framed accordingly.

6. The prosecution has examined as many as 20 witnesses. The material prosecution witnesses are Shri Raj Kumar PW-1, the father of the deceased, his wife Santosh Kumari PW-2, PW-3 Smt. Bimla Sharma, aunt of PW-1, the father of deceased, PW-4 Nashbir Singh, working as driver in a factory 'Healthy Choice' at Mand Majman, nearby the house of the accused, PW-5 Sunil Kumar, a local shopkeeper running STD booth also, PW-6 Rakesh Kumar, proprietor of a chemical lab being run by him in village Tiyora and the neighbours of accused, PW-7, Smt. Kamlesh Sharma, PW-9 Kaushalya Devi, PW-10 Surjeet Singh, PW-12 Harjeet Singh and PW-13 Roshal Lal. Pw-14 Shri Ashok Kumar is the cousin of the deceased being her maternal uncle's son. The remaining witness are formal as PW-11 Murli Dhar is a photographer, PW-16 to PW-18 and PW-20 are the police officials, who remained associated during the investigation of the case in one way or the other. PW-19 is Surinder Singh, who is running a private clinic at Mukerian where the deceased was taken for treatment.

7. Learned Trial Judge on appreciation of the evidence has arrived at a conclusion that the prosecution could not prove its case against the accused beyond all reasonable doubt. The accused as such have been given the benefit of doubt and resultantly acquitted of the charge framed against each of them.

8. The judgment under challenge has been assailed on the grounds *inter alia* that cogent and reliable evidence as has come on record by way of testimony of the prosecution witnesses has erroneously been brushed aside and to the contrary the findings recorded are erroneous and based upon surmises and conjectures.

9. Shri D.S. Nainta, learned Additional Advocate General has vehemently argued that the overwhelming evidence as has come on record by way of the testimony of the prosecution witnesses leads to the only conclusion that the deceased was being tortured and maltreated by her in-laws, the accused at the pretext of dowry and as she has died within five years of her marriage with accused Tilak Raj in the matrimonial home, therefore, it is the accused persons,

who had been torturing and maltreating the deceased, hence abetted the commission of suicide by her.

10. On the other hand Shri Ramesh Sharma, Advocate, learned counsel has urged that no instance of cruelty has come on record by way of evidence produced by the prosecution. The evidence rather reveals that the deceased was being looked-after and treated nicely by the accused in the matrimonial home, therefore, according to learned counsel, learned trial Court has not committed any illegality or irregularity while acquitting the accused of the charge framed against each of them.

11. On reappraisal of the evidence and taking into consideration the rival submissions, true it is that Surekha has committed suicide on 3.12.2007 in the matrimonial home within seven years of her marriage with accused Tilak Raj. However, it is the accused alone, who have abetted the commission of suicide by her, is a question, which needs adjudication on reappraisal of the evidence available on record.

12. Before that we deem it appropriate to discuss as to what constitutes the commission of an offence punishable under Sections 498-A and 306 of the Indian Penal Code. A bare reading of Section 498-A reveals that ***sine qua non*** to establish the said offence is subjecting the wife with cruelty by her husband or his relative with a view to coerce her or any person related to her to meet any unlawful demand for any property or valuable security or willful conduct of the husband of such woman or a relative, of such a nature as is likely to drive her to commit suicide or to cause grave injury or danger to life, limb or health.

13. The Apex Court in ***Manju Ram Kalita*** versus ***State of Assam, (2009) 13 Supreme Court Cases 330*** has held as under:

> **"21.** "*Cruelty*" for the purpose of Section 498-A IPC is to be established in the context of Section 498-A IPC as it may be different from other statutory provisions. It is to be determined/ inferred by considering the conduct of the man, weighing the gravity or seriousness of his acts and to find out as to whether it is likely to drive the woman to commit suicide, etc. It is to be established that the woman has been subjected to cruelty continuously/persistently or at least in close proximity of time of lodging the complaint. Petty quarrels cannot be termed as "cruelty" to attract the provisions of Section 498-A IPC. Causing mental torture to the extent that it becomes unbearable may be termed as cruelty."

14. So far as the commission of offence punishable under Section 306 of the Indian Penal Code is concerned, the prosecution is required to prove beyond all reasonable doubt that some person has committed suicide as a result of abetment by the accused.

15. In the case in hand, the deceased had committed suicide on 3.12.2007 in her matrimonial home. One of the ingredients of the commission of offence under Section 498-A IPC, therefore, stands proved. The prosecution, however, is further required to prove that it is the accused alone who had abetted the commission of suicide by the deceased.

16. Abetment has been defined under Section 107 of the Indian Penal Code. Its simple meaning is that a person abets the doing of a thing who firstly instigates any person to do a thing, or secondly, engages with one or more other person or persons in any conspiracy for doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to doing of that thing, or intentionally aids, by any act or illegal omission, the doing of that thing can be said to have abetted the doing of that thing.

17. Now if coming to the allegations that the deceased was being tortured and maltreated in the matrimonial home at the pretext of demands of dowry and thereby the accused had abetted the commission of suicide by the deceased, no evidence such as the report made to police or Local Gram Panchayat is forthcoming. It is also not the case of the prosecution that the instances when she was tortured, maltreated or beaten at the pretext of demands of dowry, were

complained to local authority, Gram Panchayat or the parents of deceased themselves intervened. No evidence has also come on record suggesting that the deceased was ever thrown out from the matrimonial home by the accused. The father of the deceased PW-1 has rather himself admitted while in the witness box that at the time of marriage the accused persons had not demanded any dowry. No doubt, he tells us that Rs.20,000/- was paid by him to the accused on four different occasions, however, in whose presence, and that the said amount was paid by him to fulfill the demands of the accused for dowry, no corroborative evidence has come on record. His version that the money was withdrawn by him from the bank is also not substantiated on record because the prosecution has failed to produce the evidence qua withdrawal of money by this witness from his account.

18. PW-1 and PW-2 have not said anything while in the witness-box as to when the deceased was treated with cruelty by the accused at the pretext of dowry. The version of PW-2 that the deceased informed her over telephone on the fateful day about she was thrown out by the accused from matrimonial home is not proved because the prosecution has failed to establish that the deceased has made call to her parents on their telephone from the STD booth installed in the shop of PW-5 Sunil Kumar. Sunil Kumar has turned hostile to the prosecution as according to him neither the deceased came to his STD booth nor made any call therefrom. The best evidence in this behalf would have been the calls detail. Had any call been made by the deceased from this booth to her parents on their telephone, would have easily proved from the detail of calls obtained from the office of BSNL.

19. True it is that the accused took a hasty decision to cremate the dead body even without waiting for PW-1 and PW-2, her parents and other near relations, however, this alone also cannot be made basis to record the findings of conviction against the accused particularly when as per the version of her cousin Ashok Kumar PW-14, one Dharam Pal and Charan Dass were present at the time of cremation of the dead body. Not only this, but the sister of deceased Urmila, working in 'Healthy Choice Factory' situated nearby to the house of the accused was called to the house of the accused by PW-12, Harjeet Singh, at about 2.30 p.m. Therefore, the sister of the deceased was also present there well before the dead body was taken for cremation.

20. Dharam Pal and Charan Dass are uncles of the deceased being brother and brother-in-law of her father as has come in the statement of the said witness. Before taking the dead body for cremation, as per version of PW-9, it was got washed by Santosh Kumari and Satish Kumari. According to PW-9, there was no injury on the dead body as she was also present at the relevant time in the house of the accused. The neighbours of the accused, PW-9 Kaushalya Devi, PW-10 Surjeet Singh and PW-7 Kamlesh Sharma, have stated that the deceased was being maintained, looked-after and treated nicely by the accused. No doubt, it is canvassed that neither sister of the deceased nor Dharam Pal and Charan Dass were present at the time of cremation of the deceased, however, without any substance as it was for the sister of the deceased and aforesaid Dharam Pal and Charan Dass to have thrown some light qua this aspect of the matter, but the prosecution did not associate them in the investigation of the case nor cited them as witnesses. Therefore an adverse inference has to be drawn against the prosecution and it would not be improper to conclude that they were present in the house of the accused at the time when dead body was taken for cremation.

21. Now coming to the presumption under Section 113-A of the Evidence Act, since prosecution has failed to discharge initial burden on it, therefore, the presumption that it is the accused, who alone abetted the commission of suicide by the deceased, cannot be drawn.

22. Therefore, examining this case from any angle, the only irresistible conclusion would be that the prosecution has failed to prove its case against the accused beyond all reasonable doubt. They have therefore, been rightly acquitted by learned trial Judge. Consequently, the impugned judgment warrants no interference by this Court and the same is accordingly affirmed.

23. For all the reasons hereinabove, the present appeal fails and the same is accordingly dismissed. The personal bonds furnished by both the accused shall stand cancelled and the sureties discharged.

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

Baldev Raj ….Petitioner.
Versus
State of H.P. …Respondent.

Criminal Revision No.155 of 2007
Date of Decision: 27.06.2016

Code of Criminal Procedure, 1973- Section 482- Accused was convicted by the trial court for the commission of offences punishable under Sections 326 and 323 of I.P.C. – an appeal was preferred, which was dismissed- parties entered into a compromise during the pendency of the revision petition- it was prayed that proceedings be quashed- held, that power to quash the proceedings is not to be exercised in heinous and serious offences having a serious impact on the society- mere compromise at the appellate stage is not sufficient to acquit the accused- application to quash the proceedings dismissed. (Para-2 to 11)

Indian Penal Code, 1860- Section 323 and 326- Informant and F were cutting grass in their fields- accused came and started abusing informant- accused N was holding a danda in his hand and gave a blow on the left wrist of the informant- accused B gave a blow of darati on the small finger of the left hand of the informant- accused were tried and convicted by the trial Court- an appeal was preferred, which was dismissed- held, that PW-1 and PW-2 are related to the each other- no independent witness was examined, although M was cited as an eye witness- court had found that case was not proved against M and K- same evidence could not have been used to convict accused B- injury could have been sustained while cutting grass- two views are appearing on record one of which is favourable to the accused- the view favourable to the accused should have been accepted - Trial Court had wrongly convicted the accused- revision allowed and accused acquitted. (Para-24 to 39)

Cases referred:

Krishnan and another Versus Krishnaveni and another, (1997) 4 Supreme Court Case241
State of UP versus Ghambhir Singh & others, AIR 2005 (92) Supreme Court 2439
Pawan Kumar and Kamal Bhardwaj versus State of H.P., latest HLJ 2008 (HP) 1150

For the Petitioner : Mr. Ajay Sharma, Advocate.
For the Respondent : Mr. Rupinder Singh Thakur, Additional Advocate General with Mr. Rajat Chauhan, Law Officer.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (Oral)

Present Criminal Revision Petition filed under Section 397 read with Section 401 of the Code of Criminal Procedure, is directed against the judgment dated 22.10.2007 passed by learned Additional Sessions Judge-I, Kangra at Dharamshala, H.P in Criminal Appeal No. 32-D/03, affirming the judgment dated 15.10.2003, passed by learned Judicial Magistrate 1st Class, Baijnath in criminal Case No. 49-II-2002, whereby the present petitioner is convicted under Sections 326 and 323 of Indian Penal Code and sentenced to undergo simple

imprisonment for two years under section 326 IPC and to pay fine of Rs. 500/- and to undergo simple imprisonment for three months under section 323 IPC and to pay fine of Rs.100/-. In default of payment of fine, to further undergo simple imprisonment for two months.

2. On 20.12.2007, this Court while admitting the instant Criminal Revision petition for hearing, suspended the sentence imposed by the Court below against the petitioner subject to his furnishing bail bonds in the sum of Rs. 10,000/- with one surety in the like amount to the satisfaction of learned trial Court. However on 23.4.2016, when the matter came up for final hearing before this Court, petitioner-accused moved an application under Section 320 Cr.P.C read with Section 482 Cr.P.C placing therewith a compromise entered between the petitioner-accused as well as complainant.

3. Careful reading of the averments contained in the application suggest that during the pendency of the present criminal revision petition, parties have entered into compromise, which has been placed on record alongwith the application, as referred hereinabove. Learned counsel representing the petitioner, prayed that since the matter has been compromised between the parties, this Court an exercise of its inherent power under Section 482 Cr.P.C can order for compounding the offence. However, Mr. Rupinder Singh Thakur, learned Additional Advocate General, representing the respondent-State opposed the aforesaid prayer having been made on behalf of the petitioner-accused. He stated that petitioner-accused stands convicted by the learned trial Court and his conviction has been further upheld by the learned first appellate Court and as such, no public interest would be served, if the parties are allowed to compromise the matter at hand at this stage. Both the parties are present in person in the Court.

4. Careful reading of the contents of application filed under Section 482 Cr.P.C, suggest that on the complaint of the complainant, an FIR No. 107 of 2001, dated 8.10.2001 was registered against the petitioner-accused at Police Station, Baijnath, District Kangra, HP and thereafter challan was presented before the Judicial Magistrate Ist Class Baijnath, wherein learned trial Court after satisfying itself that a prima-facie case exist against the accused, framed charges under Sections 323, 326 and 506 IPC, to which accused pleaded not guilty and claimed trial. Learned trial Court below after appreciating evidence on record convicted the accused for having committed the offence punishable under Sections 323 and 326 IPC and sentenced him to undergo simple imprisonment for two years under Section 326 IPC and fine of Rs.500/- and simple imprisonment for three months under section 323 IPC and fine of Rs.100/-. Aforesaid conviction and sentence imposed by the learned trial Court was further upheld by the learned Lower Appellate Court vide impugned judgment dated 22.10. 007. Hence, the present revision petition before this Court.

5. The application, which is duly supported by an affidavit of the petitioner-accused suggest that during the pendency of the present revision petition on the intervention of the respectable persons of the society, complainant and the petitioner-accused have compromised the matter in order to maintain cordial relations in future, compromise dated 29.4.2016 is also placed on record. It has been stated in application that compromise has been entered at their own sweet will and without any pressure from anybody in order to maintain good relations.

6. Since the application has been filed under Section 320 read with section 482 Cr.P.C, this Court deems it fit case to consider the present application in the light of the judgment passed by Hon'ble Apex Court in ***Narinder Singh and others versus State of Punjab and another (*****2014)6 Supreme Court Cases 466,** whereby Hon'ble Apex Court has formulated guidelines for accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings. Perusal of judgment referred above clearly depicts that in para 29.1, Hon'ble Apex Court has returned the findings that power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under section 320 of the Code. No doubt, under section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between

themselves. However, this power is to be exercised sparingly and with great caution. Para Nos. 29 to 29.7 of the judgment are reproduced as under:-

> **"29. In view of the aforesaid discussion, we sum up and lay down the following principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercising its power under Section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings:**
>
> **29.1Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.**
>
> **29.2. When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure:**
>
> **(i) ends of justice, or**
>
> **(ii) to prevent abuse of the process of any Court.**
>
> **While exercising the power under Section 482 Cr.P.C the High Court is to form an opinion on either of the aforesaid two objectives.**
>
> **29.3. Such a power is not be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.**
>
> **29.4. On the other, those criminal cases having overwhelmingly and pre-dominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.**
>
> **29.5. While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.**
>
> **29.6. Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore is to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of**

weapons used etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the later case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.

29.7. While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime".

7. Para 29.2 of the judgment of the Hon'ble Apex Court suggest that guiding factor for quashing the criminal proceedings in terms of settlement arrived between the parties would be to secure:

(i) ends of justice, or

(ii) to prevent abuse of the process of any Court.

While exercising the power under Section 482 Cr.P.C. the High Court is to form an opinion on either of the aforesaid two objectives.

8. Careful perusal of para 29.3 of the judgment suggest that such a power is not be exercised in the cases which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Apart from this, offences committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender. On the other hand, those criminal cases having overwhelmingly and predominantly civil character, particularly arising out of commercial transactions or arising out of matrimonial relationship or

family disputes may be quashed when the parties have resolved their entire disputes among themselves.

9. Admittedly, in the present case accused has been convicted under Sections 323 and 326 of Indian Penal Code, which are non-compoundable offences and could not be ordered to be compounded in terms of Section 320 IPC. Since, in the instant case application has been moved under Section 320 read with Section 482 Cr.P.C, this Court is empowered to quash the criminal proceedings in the case, which are not compoundable. But para 29.7 of judgment passed by Hon'ble Apex Court provides that while deciding whether to exercise jurisdiction under Section 482 Cr.P.C or not, timings of settlement play crucial role. The Hon'ble Apex Court has specifically observed that when conviction is already recorded by the learned trial Court and matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same.

10. Admittedly in the present case, application for compounding the offence in question on the basis of compromise has been filed at the appellate stage, when accused has been already convicted by the learned trial Court. Hence, this Court is of the view that it is not a fit case, and a stage, where inherent power under Section 482 Cr.P.C can be invoked to order for compounding the offence. Accordingly, application moved by the petitioner-accused for compounding the offence on the basis of compromise having been entered into the parties is rejected at this stage.

11. Since for the reasons stated hereinabove, application bearing No. Cr.M.P. No. 449 of 2016 filed on behalf of the present- accused for compounding the offence stands rejected, this Court proceeded to decide case at hand on merits.

12. Mr. Ajay Sharma, learned counsel representing the petitioner, vehemently argued that the judgments passed by both the Courts below are not sustainable as the same are not based upon correct appreciation of the evidence available on record. He contended that both the Courts below while recording the conviction against the petitioner-accused have failed to notice major and substantive contradictions in the statements of the prosecution witnesses and, as such, great injustice has been caused to the petitioner-accused. Mr. Ajay Sharma, learned counsel forcibly contended that both the courts below have miserably failed to acknowledge that independent evidence was available but for reasons best known to the prosecution they were not associated by the prosecution. He further contended that one independent witness Smt. Manorma Devi, who in fact is the eye witness, was cited as witness but later on was given up and as such, Court below should have drawn adverse inference against the prosecution. He strenuously argued that both the Courts below have miserably failed to appreciate the material fact that it has come in the statement of the complainant that there was a long drawn civil litigation between the parties and they were not on good terms. Mr. Shama, further pleaded that since PW-1, Bimla Devi and PW-2, Fanti Devi in her statements categorically admitted that they are not having good relation with the petitioner- accused and litigation is pending in the Court, absence of independent witnesses in the present case was fatal to the case of the prosecution and as such, judgments passed by both the courts below are liable to be quashed and set-aside being unsustainable in the eyes of law.

13. During arguments having been made by him, he invited the attention of the Court to the statements made by the prosecution witnesses to demonstrate that there are major contradictions in the statements of the prosecution witnesses. He contended that the petitioner-accused has been falsely implicated in the present case due to personal enmity and litigation between the family of the petitioner-accused and complainant and as such, Court have committed material irregularity and illegality while convicting the accused under Sections 323 and 326 of IPC. He also contended that the prosecution miserably failed to prove its case within the parameters or basic ingredients of Sections 323 and 326 of the Indian Penal Code and sentenced the present petitioner-accused on flimsy grounds. Mr. Sharma contended that

sentence awarded by leaned court below is harsh/excessive and cannot be allowed to be sustained.

14. Mr. Rupinder Singh Thakur, learned Additional Advocate General, representing the respondent-State, supported the judgments passed by both the Courts below and stated that no interference, whatsoever, of this Court is warranted in the present facts and circumstances of the case as judgments passed by both the Courts below are based on correct appreciation of the evidence available on record.

15. I have heard the learned counsel representing the parties and have carefully gone through the record made available.

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

17. As far as scope of power of this Court while exercising revisionary jurisdiction under Section 397 is concerned, the Hon' ble Apex Court in ***Krishnan and another Versus Krishnaveni and another*, (1997) 4 Supreme Court Case241**; has held that in case Court notices that there is a failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities/incorrectness committed by inferior criminal court in its judicial process or illegality or sentence or order. The relevant para of the judgment is reproduced as under:-

> **"8. The object of Section 483 and the purpose behind conferring the revisional power under Section 397 read with Section 401, upon the High Court is to invest continuous supervisory jurisdiction so as to prevent miscarriage of justice or to correct irregularity of the procedure or to mete out justice. In addition, the inherent power of the High Court is preserved by Section 482. The power of the High Court, therefore, is very wide. However, the High Court must exercise such power sparingly and cautiously when the Sessions Judge has simultaneously exercised revisional power under Section 397(1). However, when the High Court notices that there has been failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is but the salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities/ incorrectness committed by inferior criminal court in its judicial process or illegality of sentence or order."**

18. Perusal of the material available on record suggest that on 8.10.2001, at about 9:00 AM, complainant Bimla Devi and Fanti Devi were cutting grass in their fields at Buhli Kothi and while they were talking to each other that someone had cut grass from their fields, accused persons, who were passing by that field heard the complainant Bimla Devi and Fanti Devi regarding removal of grass from their field by someone, came on the spot and started abusing the complainant. As per the story of the prosecution, accused Nikki Devi was holding danda in her hand and gave blow of the same on the left wrist of the complainant and accused Baldev gave a blow of darati on the small finger of the left hand of the complainant. Fanti Devi intervened and attempted to save the complainant from the clutches of the accused but accused Nikki Devi attacked her from behind by giving danda blow on her back. As per story of prosecution, third accused Krishan Lal kept instigating the other two accused to give more beatings to the complainant and Fanti Devi. As emerges from the record, occurrence was witnessed by Smt. Manorma Devi wife of Jindo Ram, R/o village Buhali Kothi, who as per prosecution challenged the accused and thereafter accused persons left the spot administering threats to the

complainant and Fanti Devi to do away with their lives in future. The complainant immediately reported the matter to the police vide FIR Ex.PW1/A. She was medically examined and X-ray examinations were also conducted. Police thereafter procured their MLCs Ex.PW5/A and Ex.PW5/B and X-ray record Ex.PW8/A and Ex.PW8/B. Police during the course of investigation took into possession blood stained clothes of Bimla Devi Ex.P1 and Ex.P-2 vide memo Ex.PW1/B. Complaint also produced danda Ex.P-3 before the police, which was taken into possession vide memo Ex.PW1/C. As per story of the prosecution, accused Baldev Raj i.e. present petitioner produced sickle Ex.P-4, which was taken into possession vide memo Ex.PW1/D and the same was sealed in a cloth parcel with seal impression 'P' after preparing its sketch Ex.PW6/C on a piece of paper. Separate seal impression 'P' was also taken on a piece of cloth. The clothes of the complainant Bimla Devi were also sealed in a separate cloth parcel with seal 'T' and its seal impression Ex.PW6/B was separately taken on a piece of cloth. Police after completion of the investigation found accused guilty of having committed the offence punishable under Sections 323, 326 and 506 read with Section 34 of IPC and accordingly filed challan in the competent Court of law.

19. The learned trial Court after satisfying itself that a prima facie case exist against the accused, charged the accused persons for having committed offences punishable under Sections 323, 326, 506 read with section 34 of IPC, to which they pleaded not guilty and claimed trial.

20. Learned trial Court on the basis of the evidence adduced on record by the prosecution as well as statement of the accused recorded under Section 313 Cr.P.C concluded the trial and held that there is no evidence against accused Nikki Devi and Krishan Lal and accordingly acquitted them of the charges. However, learned trial Court below held the present petitioner-accused Baldev Raj guilty of having committed the offences punishable under Sections 323 and 326 IPC and vide judgment dated 15.10.2003 convicted and sentenced him as per description given hereinabove.

21. Feeling aggrieved and dissatisfied with the judgment dated 15.10.2003, the present petitioner-accused filed an appeal under Section 374 Cr.P.C in the Court of learned Additional Sessions Judge-I, Kangra at Dharamshala, however same was dismissed by the court of learned First Appellate Court vide judgment dated 22.10.2007 and judgment passed by learned trial court convicting the accused was upheld.

22. In the present case, prosecution with a view to prove its case examined as many as nine witnesses. PW-1, Bimla Devi, PW-2, Smt. Fanti Devi, PW-3, Guddi Devi, PW-4,Kapoor Chand, PW-5, Dr.S.K. Sood, PW-6 Inder Singh, PW-7, Krishan Kumar, PW-8 Dr. O.P. Ram Devi and PW-9, Om Prakash.

23. As has been noticed above, learned trial Court after conclusion of the proceedings acquitted the accused Chanchala alias Nikki Devi and Krishan Lal and convicted the present petitioner-accused Baldev Raj for the commission of the offence punishable under Sections 323 and 326 IPC. After careful perusal of the grounds taken in the criminal revision petition as well as arguments having been made on behalf of the petitioner, it clearly emerges that the judgment passed by the learned courts below have been assailed by the present petitioner-accused on the ground that since two witnesses of the occurrence examined by the prosecution were closely related to each other, Court below should not have accepted the version put forth by them in the absence of some independent witnesses of the locality. It has come in the statements of PW-1 and PW-2 that the relations of the complainant as well as accused were not very good as they have been litigating in the court of law. The absence of sole eye witness Manorama Devi, who was been given up without plausible reason by the prosecution has been also raised as a ground for setting aside the judgment passed by the learned trial court.

24. PW-1, Smt. Bimla Devi deposed before the learned trial Court that on 8.10.2001 at around 9:00 AM she along with Fanti Devi had gone to cut the grass and were talking with each other about removal of grass by some unknown person. The accused were going from there

and they came at the spot and gave beatings to them. She specifically stated that the accused Baldev Raj was holding darati and gave a blow of the same on her small finger of the left hand, as a result of which, blood oozed out form the injury. She also stated that accused Nikki Devi gave a stick blow on her left hand and accused also gave beatings to Fanti Devi. Thereafter, she reported the matter to the police and her medical examination was conducted. She also stated that police came on the spot and recorded their statements and her Shirt Ex.P1 and Duptta Ex.P2 were taken into possession vide memo Ex.PW1/B. She also proved Ex.PW1/C, where danda produced by her was taken into possession by the police. She also proved that sickle Ex.PW1/D, was produced by accused Baldev Raj to the police. Careful perusal of the cross-examination conducted of this witness suggest that defence has not been able to extract anything contrary to what she stated in her chief examination, however in her cross-examination she very categorically denied that she received injuries while cutting grass.

25. PW-2, Fanti Devi also stated that in June they were cutting grass and when she and Bimla Devi (PW-1) talking with each other about the theft of grass by some one from their field, accused Baldev Raj along with Nikki devi and Kirshan Lal came at the spot and started giving beatings to her. She specifically stated that accused Baldev Raj gave a blow of darti on the hand of Bimla Devi, as a result of which, blood started oozing out. She also stated that accused Nikki Devi gave a blow of danda to Bimla Devi. In her cross-examination, she denied the suggestion that accused never gave beatings to them. In cross-examination, she denied that a false case has been planted against the accused, however in her cross-examination she admitted that many cases are pending between the accused and them in the Court of law.

26. Careful perusal of the depositions made by these aforesaid material witnesses PW-1 and PW-2, suggest that they very specifically stated that accused Baldev Raj caused injuries to the left finger of PW-1 by sickle. Apart from this, defence has not been able to extract anything contrary to the stand taken by them in the examination-in-chief. Interestingly, no suggestion whatsoever, was put to these witnesses with regard to prior enmity and animosity with the accused. Record reveals that only suggestion put forth to these witnesses was with regard to the pending litigation of the land but no suggestion worth the name that accused has been falsely implicated in the present case was ever put forth to these witnesses. PW-1 in her cross-examination also denied that she received injury on her person while cutting grass. If statement of these witnesses PW-1 and PW-2 are read in conjunction, one thing clearly emerge that on the day of occurrence accused were present at the site of occurrence and they had some altercation with the complainant but the learned trial court below after appreciating the evidence available on record concluded that there is no evidence on record whether injury, if any, was ever caused to Fanti Devi. However, aforesaid witnesses have been very consistent and specific while stating that accused Baldev Raj has caused injuries on the left hand with sickle, which lateron was termed as grievous injury by the medical expert.

27. Statement given by PW-3, Guddi Devi may not be necessary to be dealt with at this stage as she only proved recovery memo Ex.PW1/C and Ex.PW1/B. However, in her cross-examination she also admitted that many cases are pending between the parties in the Court and she also denied the suggestion put forth to her that no recovery was effected in her presence. PW-4, Kapoor Chand is also witness to the recovery memos and as such, his statement is also not required to be dealt with, at this stage.

28. PW-5, Dr. S.K.Sood, stated that he examined the complainant Bimla Devi and opined injury No.1 on her person as grievous in nature caused with sharp edged weapon. He also stated that he examined Fanti Devi and opined the simple injury caused with blunt weapon. It has come in his statement that injury No.1 in MLC Ex.PW5/A can be caused by sickle, which was shown to him in the Court and injury No. 2 can be caused by danda Ex.P3. However, in Cross-examination, he admitted that injury No.1 to Bimla Devi can be caused while cutting grass with sickle and injury No.2 can be self inflicted also. Similarly, PW-8, O.P. Ram Dev, who conducted x-ray of Bimla Devi and issued his opinion Ex.PW8/A stated in his cross-examination that on

8.10.2001 X-ray of Bimla Devi was conducted under his supervision and after perusing the same, he issued his opinion Ex.PW8/A.

29. PW-6, Inder Singh, who was the investigating Officer of the case stated before the Court that he during the investigation visited the spot and prepared spot map Ex.PW6/A. He also stated that during the investigation he recovered danda Ex.P3 vide memo Ex.PW1/C and dupatta and shirt vide memo Ex.PW1/B. He also deposed that on 18.10.2001 accused Baldev Raj produced darati Ex.P4 to the police, which was taken into possession vide memo Ex.PW1/D. In his cross-examination he denied that the danda and clothes were produced at police station by the complainant.

30. In the present case while hearing the arguments having been made on behalf of both the parties, Court had an occasion to peruse the record of the trial court made available to it. PW-1 and PW-2 namely Bimla Devi and Fanti Devi, who admittedly are closely related to each other being mother and daughter, are the only eye witness to the alleged incident. Though, as has been observed above, they both have been very candid and specific while specifically alleging that accused Baldev Raj caused injury on the small finger of the left hand of the complainant but fact remains that no independent witness whatsoever, was ever associated by the prosecution. Had the prosecution associated independent witness to support the version put forth by PW-1 and PW-2, this court would not have any difficulty to accept the version put forth by the aforesaid witnesses. As per the story of prosecution, Smt. Manoram Devi wife of Jindo Ram was an eye witness to the aforesaid alleged occurrence but for the reasons best known to the prosecution, she was given up and no explanation worth the name has been rendered on record for giving up the material witness. As per the own case of the prosecution, PW-3 had an occasion to see the entire occurrence which as per PW-1 and PW-2 occurred in the fields when they were cutting the grass. There cannot be any quarrel with regard to the law taken into consideration by the court below while holding that it is not the number nor the quantity of evidence produced by the prosecution that matter but it is the quality that counts. Similarly, there cannot be any difference of opinion as far as law laid down by the Hon'ble Apex Court that failure on the part of prosecution to produce any independent witness to the incident may not be fatal to the case of the prosecution. But in the present case both the courts while holding that the present petitioner accused guilty of offence having committed under sections 323,326 IPC have miserably failed to take note of specific admission made by these prosecution witnesses i.e. PW-1 to PW-3 where they categorically admitted that many cases are pending between the parties in the court with regard to the land dispute. Once aforesaid admission with regard to the pendency of litigation between accused and complainant had come before the court, the court below while dealing with the statement given by these witnesses was required to deal with the same with great care and caution. Similarly, it stands duly proved on record that PW-1 to PW-3, who are only material evidence in the present case are closely related to each other and story put forth by them, especially in the light of the fact that they were not having good relation with the accused was required to be dealt with great care and caution and same could not be relied upon at first instance without there being corroboration, if any, from independent witness. As per the statement of PW-1, nobody was present at the spot of occurrence but as per own case of the prosecution, at the time of occurrence Smt. Manorma Devi was present, who had actually seen the entire occurrence but for the reasons best known to the prosecution she was given up. At this stage, the court has every reason to drawn adverse inference as far as decision of prosecution to give up aforesaid Manorma Devi who could be material evidence in deciding the present case. Both the courts below while holding the accused guilty of having committed the offence have repeatedly observed that no cross-examination was directed against the material fact deposed by PW-1 and PW-2 but careful perusal of the cross-examination of these prosecution witnesses suggest that specific suggestion with regard to pendency of litigation between the parties has been put to these witnesses. Apart from this, specific suggestion has been put to PW-1 that she had received injuries on her finger while cutting grass and as such, observation of the court below that no cross-examination was conducted on the material facts deposed by these prosecution witnesses appears to be far away from the record available on the file.

31. Now, if this case is viewed from another angle, both the courts below very conveniently used the statement of these prosecution witnesses while holding the accused guilty for having committed the offence. But interestingly, courts below on the basis of the same set of evidence came to the conclusion that prosecution has not been able to prove its case against the other accused Nikki Devi and Krishan Lal. Careful perusal of statement of PW-1 suggests that she stated that accused Baldev Raj and Nikki Devi and Krishan Lal had come on the spot and started giving beatings to her. She specifically stated that Nikki Devi gave danda blow to her and as such, findings of the learned trial court below that these prosecution witnesses have not uttered any word against Nikki Devi and Krishan Lal, appears to be contrary to the record, meaning thereby court below have appreciated the evidence in piece-meals and very conveniently ignoring the material admissions made by these prosecution witnesses, convicted the accused Baldev Raj.

32. PW-5, Dr. S.K. Sood in his cross-examination admitted that injury mentioned in MLC Ex.PW5/A can be caused while cutting grass with sickle and injury No.2 can be self inflicted. If the aforesaid statement of PW-5 is read in the context of the suggestion put forth by the defence to the PW-1 that she suffered this injury while cutting grass, it can also presumed that PW-2 suffered injury on her finger while cutting grass. At this stage, it is not understood why the learned trial court disbelieved the version put forth by the prosecution witnesses that the accused Nikki Devi and Krishan Lal gave danda blow to Bimla Devi.

33. Rather, careful perusal of the statements of these prosecution witnesses suggest that these two prosecution witnesses have been very candid and specific in stating that accused Nikki Devi gave danda blow to Bimla Devi but interestingly, court below while dealing with this part of statement given by this witness came to the conclusion that there version appears to be shaky as far as Nikki Devi and Krishan Lal are concerned. In view of the aforesaid observation, this Court has no hesitation to conclude that the court below used the evidence given by PW-1 to PW-3 in piece-meals to convict the accused Baldev Raj and acquit other co-accused Nikki Devi and Krishan Lal.

34. In the present case interestingly all the three eye witnesses are closely related to each other and admittedly they were not having good relation with the accused. As per their own statements cases are pending in the court with regard to the land and as such, absence of independent witness is fatal to the case of the prosecution. Presence of independent witness could be crucial to ascertain the genuineness and correctness of the version put forth by these prosecution witnesses. As has been observed above, that version put forth by closely related person cannot be brushed aside solely on the ground of absence of independent witness, but in that eventuality, courts are required to deal with the statement of these interested/closely related witnesses with due care and caution. In the present case, as emerges from the record both the parties were inimical to each other and had been litigating for long time and as such, this court is of the view that in the absence of independent witness in the present facts and circumstances of the case, version put forth by the aforesaid prosecution witnesses could not be relied upon.

35. This court while taking judicial note of the facts and circumstances as emerges from the record, is of the view that nature of the injury, which has been caused to PW-1 in the present case could be caused to her only while cutting grass because it has come in the statements of PW-1 and PW-2 that accused gave injury to the left hand of PW-1 with the sickle. It is not understood that how the accused could give injury to only left finger of PW-1 because none of the prosecution witnesses have stated that accused gave blow of sickle on the hand of PW-1 and as a result of which, injury was caused to the left hand, rather both the prosecution witnesses, who were eye witnesses to this incident stated that accused Baldev Raj caused injuries to left finger of PW-1 with sickle. Aforesaid statement with regard to injury to PW-1 and PW-2 rather compel this court to draw inference that actually PW-1 got injury while cutting grass but just with a view to falsely implicate the accused stated that he caused this injury with the sickle. Since there is no independent witness to the alleged incident coupled with the fact that, it stands proved on record that both the parties were inimical to each other, version put forth by the PW-1 and PW-2 could not be relied upon on its face value.

36. Admittedly, after perusing the statement of the prosecution witnesses as well exhibits placed on record, two views are possible in the present case and as such, the petitioner-accused is entitled to the benefit of doubt. The learned counsel for the petitioner-accused has placed reliance on the judgment passed by Hon'ble Apex Court reported in ***State of UP*** *versus* ***Ghambhir Singh & others***, *AIR 2005 (92) Supreme Court 2439*, wherein the Hon'ble Apex Court has held that if on the same evidence, two views are reasonably possible, the one in favour of the accused must be preferred. The relevant paragraph is reproduced as under:-

> ***"6. So far as Hori Lal, PW-1 is concerned, he had been sent to fetch a basket from the village and it was only a matter of coincidence that while he was returning he witnessed the entire incident. The High Court did not consider it safe to rely on his testimony because he evidence clearly shows that he had an animus against the appellants. Moreover, his evidence was not corroborated by objective circumstances. Though it was his categorical case that all of them fired, no injury caused by rifle was found, and, only two wounds were found on the person of the deceased. Apart from this PW-3 did not mention the presence of either PW-1 or PW-2 at the time of occurrence. All these circumstances do create doubt about the truthfulness of the prosecution case. The presence of these three witnesses becomes doubtful if their evidence is critically scrutinized. May be it is also possible to take a view in favour of the prosecution, but since the High Court, on an appreciation of the evidence on record, has recorded a finding in favour of the accused, we do not feel persuaded to interfere with the order of the High Court in an appeal against acquittal. It is well settled that if on the same evidence two views are reasonably possible, the one in favour of the accused must be preferred."***

37. The Hon'ble Division Bench of this Court vide judgment reported in ***Pawan Kumar*** *and* ***Kamal Bhardwaj*** *versus* ***State of H.P.***, *latest* HLJ 2008 (HP) 1150 has also concluded here-in-below:-

> ***"25. Moreover, when the occurrence is admitted but there are two different versions of the incident, one put forth by the prosecution and the other by the defence and one of the two version is proved to be false, the second can safely be believed, unless the same is unnatural or inherently untrue.***
>
> ***26. In the present case, as noticed hereinabove, the manner of occurrence, as pleaded by the defence, is not true. The manner of the occurrence testified by PW-11 Sandeep Rana is not unnatural nor is it intrinsically untrue, therefore, it has to be believed.***
>
> ***27.Sandeep Rana could not be said to have been established, even if the prosecution version were taken on its face value. It was pleaded that no serious injury had been caused to PW-11 Sandeep Rana and that all the injuries, according to the testimony of PW-21 Dr. Raj Kumar, which he noticed on the person of Sandeep Rana, at the time of his medical examination, were simple in nature.***

38. Consequently, in view of the aforesaid discussion, this Court has no hesitation to conclude that the judgment passed by both the Courts below are not based on correct appreciation of evidence available on record and as such, same are quashed and set-aside. Accused is acquitted of the charge. His bail bonds are discharged. The fine amount, if any deposited by the petitioner accused be refunded to him.

The present criminal revision petition stands disposed of, so also pending application(s), if any.

****

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

Munish Verma & another .....Appellants.
Versus
State of H.P. .....Respondent.

Cr. Appeal No.450 of 2007
Decided on : 27.6.2016

N.D.P.S. Act. 1985- Section 20- Car was signaled to stop- accused were sitting the car- search of the car was conducted during which one bag containing 830 grams charas was recovered- accused were tried and convicted by the trial Court- held, in appeal that testimonies of official witnesses corroborated each other – independent witnesses had not supported the prosecution version but had admitted their signatures on the memos - they were estopped to depose in variation to the contents of the memo in view of section 91 and 92 of Indian Evidence Act- however, link evidence was not established- case property and sample were sealed with seal 'I', whereas they were bearing seal impression 'I' and 'M' when they were opened in the Court- case property was not connected to the contraband recovered at the spot- malkhana register shows that case property was carried in wooden box, however, no wooden box was produced in the Court - CFSL refused to accept the sample but no entry was made regarding this fact in the malkhana register- trial Court had wrongly convicted the accused- appeal accepted and accused acquitted. (Para-9 to 15)

For the Appellants: Mr. Anoop Chitkara, Advocate.
For the Respondent: Mr. R.S Thakur, Additional Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant appeal stands directed against the judgment of 20.11.2007 rendered by the learned Special Judge, Fast Track Court, Shimla, H.P., in Sessions trial No. 11-S/7 of 2007, whereby the learned the trial Court convicted and sentenced the accused/appellants (for short "the accused') to undergo rigorous imprisonment for a period of 8 years each and to pay a fine in a sum of Rs.80,000/-each and in default of payment of fine they stood sentenced to further undergo rigorous imprisonment for a period of two years for commission of an offence punishable under Section 20 of Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the ACT").

2. The brief facts of the case are that on 3rd July, 2006 at 10.45 p.m., lady SI Shakuntala Sharma, the then Incharge, Police Post, Sanjauli alongwith HC Kuldeep Singh, HHC Jeet Ram and C Gian Chand was on routine patrol and traffic checking duty at place Sanjauli Chowk. In the meanwhile, a white coloured Maruti car bearing registration No.HP-09A-1666 came from Lakkar Bazar (Shimla) side. The said car was signaled to stop. Its driver brought the vehicle to a halt. The car driver was asked to show his driving licence and RC of the vehicle, which he failed to do. In the meantime S/Sh. Chander Parkash and Sanjeev Kanwar too reached near the car. With a view to search for the certificate of registration of the car, its door was opened. It surfaced that in front of the gear lever of the car in between the driver's seat and front seat of the car, a black and red coloured bag is lying. A cap had been kept on the bag. The bag was opened and checked. A polythene lifafa containing the charas in the shape of sticks was found in it. On being asked the driver of the car disclosed his name to be Munish Verma whereas the person who was sitting with him disclosed his name to be Sudhir Pal. The registration certificate of the car had been concealed behind the sunshade. Its perusal disclosed that the registered owner of the car is Sh. Sita Ram Verma. Thereafter SI Shakuntla Sharma took out the

weights and scale from her investigation kit. On weighment, it transpired that the occupants of the car are carrying 830 grams of charas in all. Out of the recovered contraband, two samples of 25 grams each were separated. The sample parts of the charas were wrapped in the pieces of cloth and sealed by affixing seal impression 'M'. The remaining bulk charas weighting 780 grams was put in the same lifafa which was recovered from the accused. Its parcel was also prepared and sealed by affixing seal impression 'M'. N.C.B forms were filled in on the spot in triplicate. Specimen impression of the seal used was retained on a piece of cloth Ex.PW-12/A and the seal after its user was handed over to Sh. Chander Parkash. The parcels of charas, bag and cap etc., which were recovered from the accused were taken into possession by the police vide memo Ex.PW-12/C. Rukka Ex.PA was prepared. FIR Ex.PW-9/A was registered. Site plan was prepared. Statements of the witnesses were recorded. Accused were arrested. Special report was sent to the office of Superintendent of police, Shimla. On conclusion of the investigation, into the offences, allegedly committed by the accused, final report under Section 173 of the Code of Criminal Procedure was prepared and presented in the Court.

3. The accused stood charged by the learned trial Court for theirs committing an offence punishable under Section 20 of the NDPS Act to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined as many as 12 witnesses. On closure of the prosecution evidence, the statements of the accused, under Section 313 of the Code of Criminal Procedure were recorded in which they pleaded innocence and claimed false implication, also they chose to lead evidence in defence and examined five witnesses in their defence.

5. On an appraisal of the evidence on record, the learned trial Court returned findings of conviction against the accused.

6. The accused are aggrieved by the judgment of conviction, recorded by the learned trial Court. The learned counsel appearing for the 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 exercise of its appellate jurisdiction and theirs being replaced by findings of acquittal.

7. On the other hand, the learned Additional Advocate General has with considerable force and vigor 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. Recovery of charas weighing 830 grams stood effectuated by the Investigating Officer at the site of occurrence whereat it stood carried in a white coloured Maruti car, **car whereof stood** occupied at the relevant time by both the accused. All the official witnesses depose a version qua the occurrence as reflected in the FIR, bereft of any emanation therein of any stain of any inter-se contradictions occurring in their respective examinations-in-chief vis-à-vis their respective previous statements recorded in writing besides their respective cross examinations, also their respective depositions on oath are shorn off any vice of intra-se contradictions. Consequently, this Court is constrained to accept the version qua the occurrence rendered by the official witnesses. Even if two independent witnesses who stood associated by the investigating Officer in the apposite proceedings which stood commenced and concluded at the site of occurrence omitted to lend support to the prosecution version, contrarily when they reneged from their previous statements recorded in writing, the learned counsel for the accused contends with vigor qua the version propagated by the prosecution through the depositions of the

official witnesses suffering impairment, impairment whereof germinates from the independent witnesses associated by the Investigating Officer in the apposite proceedings which stood conducted by her at the relevant site of occurrence not lending corroboration thereto. <u>However the aforesaid submission is extremely frail as solitarily thereupon the unbesmirched testimonies of the official witnesses cannot be disimputed credence bereft of the prime factum of both the independent witnesses admitting their respective signatures borne on the apposite memo comprised in Ex</u>.PW-12/C whereupon they as mandated by the provisions of Section 91 and 92 of the Indian Evidence Act which stand extracted hereinafter stood interdicted besides forbidden to depose in variance therefrom rather in consonance with the statutory mandate engrafted in the afore-referred apposite provisions of the Indian Evidence Act imputing credence also theirs imputing conclusive proof qua the recitals occurring therein on unflinching evidence emanating qua despite theirs orally digressing from their recorded recitals of yet their signatures existing thereon, irrefragable evidence whereof stands evinced by theirs admitting the prime factum of the apposite memos holding their signatures, hence when their apposite admission sequelly statutorily belittles the effects of their deposing orally in variance or in detraction thereto, naturally when they rather emphatically prove the recitals comprised in the apposite memos, it was appropriate besides tenable for the learned trial court to conclude of the recorded recitals borne on the recovery memo comprised in Ex.PW-12/C holding evidentiary clout also hence theirs lending succor to the creditworthy testimonies of the official witnesses qua the effectuation of recovery of the relevant item of contraband under recovery memo PW-12/C by the investigating Officer at the site of occurrence from the purported exclusive and conscious possession of the accused.

> "Proviso (1) Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, [want of failure] of consideration, or mistake in fact or law;
>
> Proviso (2).- The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document:
>
> Proviso (3).- The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved:
>
> Proviso(4).- The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents:
>
> Proviso (5). Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved:
>
> provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of contract:
>
> Proviso(6).- Any fact may be proved which shows in what manner the language of a document is related to existing facts."

10. Even if hence the prosecution has succeeded in proving the factum of the investigating Officer making an efficacious recovery of the relevant item of contraband from the alleged, conscious and exclusive possession of both the accused with both jointly occupying a car, nonetheless it was also enjoined upon the prosecution to by adducing cogent evidence connect the purported case property Ex.P-2 with the relevant item of contraband, recovery whereof stood effectuated in the manner espoused in the FIR, besides the apposite proof qua recovery whereof for reasons afore-stated stands adduced by the prosecution whereupon this Court would hence

stand constrained to conclude with aplomb qua the purported case property Ex.P-2, as stood produced in Court by the P.P concerned for its being shown to PW-1 at the time his deposition stood recorded thereat holding connectivity besides congruity with its recovery standing effectuated in the manner espoused by the prosecution. For determining the aforesaid prime factum of connectivity or lack of connectivity inter-se the purported case property Ex.P-2 vis-à-vis effectuation of its recovery at the site of occurrence, an advertence to the factum of PW-12 the Investigating Officer disclosing in her examination-in-chief of hers at the site of occurrence embossing seal impression 'M' on both parcels respectively containing the sample charas and its bulk, is imperative. She also deposes of thereafter hers transmitting the aforesaid bulk parcel of Charas besides the sample parcel of charas through Constable Gian Chand to the police Station concerned for its standing deposited in the Malkhana concerned. PW-9 who received the aforesaid sample parcel besides bulk parcel of charas from PW-1 Gian Chand, the latter of whom had received it from PW-12 for its onward transmission by him to PW-9, has deposed of, on his receiving the aforesaid sample parcels besides bulk parcel of the purported case property from PW-1, his wrapping both in different pieces of cloth whereon he embossed seal impression "I". The case property stood produced in Court by the learned PP concerned for its being shown to PW-1 yet as displayed by disclosures emanating in the deposition of PW-1 of thereat the parcels containing the parcel of bulk Charas also the parcel containing sample of charas though holding conformity with the deposition of PW-9 qua seal impression "I" as embossed thereon by PW-9 existing thereon yet on theirs standing respectively opened with the permission of the learned trial Court, both the sample parcels of charas also the bulk parcel of Charas contained besides held therein, also bearing seal impressions "I" and "M". Hereat exists a dichotomy inter-se the deposition of PW-9 vis-à-vis the production of both the sealed parcels respectively containing the sample parcel of charas besides the bulk parcel of charas, by the learned PP concerned before the learned trial Court for theirs being shown to PW-1, comprised in the fact of PW-9 deposing of his inserting in two separate parcels the sample parcels of charas and the bulk parcel of charas whereupon on each he embossed seal impression "I" whereas he did not make any communication therein of his embossing seal impression "I" on either of the parcels holding respectively therein the sample of charas and the bulk of charas at the stage they stood handed over to him by PW-1 renders the existence of seal impression "I" on both the aforesaid parcels enclosed or kept by him in two parcels whereon on each alone he embossed seal impression "I" at the stage whereat they stood produced by the learned P.P. before the learned trial Court for theirs standing shown to PW-1 to hence hold no congruity with the disclosures made by PW-9. As a corollary this Court is constrained to foist a conclusion of the prosecution evidence qua any connectivity existing inter-se the purported efficacious effectuation of recovery of charas from the purported conscious and exclusive possession of the accused as espoused in the FIR vis-à-vis the production by the learned P.P. concerned before the learned trial Court of the relevant item of contraband being grossly infirm for hence sustaining a firm conclusion qua relevant connectivity or congruity existing vis-à-vis the relevant item of contraband recovered under Memo Ext.PW-12/C with the purported case property as stood produced in Court. In sequel, the findings recorded by the learned trial Court suffer from an infirmity awakened by its overlooking the aforesaid evidence, personificatory of lack of connectivity inter-se the effectuation of recovery of the relevant item of contraband in the manner propagated by the prosecution vis-à vis its production in Court by the learned PP concerned for its being shown to PW-1.

11. Further more a perusal of Ex.PB, the relevant abstract of Malkhana register makes a disclosure therein of the relevant items of contraband standing dispatched to the FSL concerned in a wooden box, for the laboratory concerned recording an opinion thereon yet as apparent on a reading of the testimony of PW-1 there occurs no communication therein of at the time the learned PP concerned producing the case property before the learned trial Court for its being shown to PW-1, of its standing carried thereat in a wooden box. In sequel, there also appears an apparent dichotomy inter-se the reflections in Ex.PB vis-à-vis the production of the relevant item of contraband in Court by the PP concerned, dichotomy whereof stands constituted in the fact of Ex.PB carrying reflections qua the case property standing sealed in a wooden box for

its onward transmission to the FSL concerned for the latter recording an opinion thereon vis-à-vis its production in Court by the learned PP concerned for its being shown to PW-1 whereat it did not come to be retrieved from a wooden box wherein earlier thereto it stood enclosed. The effect of the aforesaid incongruity is of the production of the relevant item of contraband by the learned PP concerned before the learned trial Court holding no connectivity with the relevant reflections qua it carried in Ex.PB also it enhances an inference underscored hereinabove of the prosecution not adducing firm evidence for connecting besides linking the relevant item of contraband, recovery whereof stood effectuated by the Investigating Officer from the purported, conscious and exclusive possession of the accused at the site of occurrence vis-à-vis its production before the learned trial Court by the learned PP concerned. Consequently, the effectuation of recovery, if any, of the relevant item of contraband by the Investigating Officer at the site of occurrence from the conscious and exclusive possession of the accused though may for reasons aforesaid stand proved yet with the prosecution not linking the prime factum of the relevant item of contraband recovered by the Investigating Officer at the site of occurrence from the conscious and exclusive possession of the accused vis-à-vis the production in Court of the item of contraband no capitalization can stand secured by the prosecution from the mere factum of its proving the factum of its holding an efficacious recovery of the relevant item of contraband from the purported, conscious and exclusive possession of the accused in the manner espoused in the FIR comprised in Ex. PW-9/A.

12. Be that as it may PW-4 has in his deposition disclosed, of his on 4.7.2006 transmitting the case property through C Hem Singh to CTL Kandaghat, for the latter recording its opinion thereon whereat the sample could not be deposited as the CTL concerned refused to accept it hence concomitantly no opinion thereon stood recorded by the CTL concerned. He also proceeds to divulge in his deposition of his on 9.7.2006 sending the case property to CFSL, Hyderabad vide RC No. 78 of 2006 through C Hem Singh and Shiv Ram whereat also the sample could not be deposited as the CFSL concerned refused to accept it. Hence concomitantly no opinion thereon stood recorded by the CFSL concerned. However the apposite abstract of Malkhana register comprised in Ex.PB does not contain any recital *(a) of* PW-4 *(Malkhana Incharge)* depositing it in the *Malkhana* concerned(b) of PW-4 on 4.7.2006 and 27.9.2006 respectively sending the case property respectively to CTL Kandaghat and CFSL Hyderabad, both Laboratories whereof purportedly refused to accept it.

13. Omission of the aforesaid recitals in Ex.PB though mandatorily enjoined to occur therein for dispelling any inference qua the case property whereon an opinion stood recorded by the FSL concerned holding no connectivity with effectuation of recovery of case property by the investigating Officer at the site of occurrence from the conscious and exclusive possession of the accused in the manner espoused by the prosecution, contrarily with no apposite recital in conformity with the deposition of PW-4 or in conformity with the deposition of PW-9 wherein he echoes of his, on his receiving the relevant item of contraband from PW-1 his delivering it to PW-4 for depositing it in the malkhana concerned, occurring therein, constrains an inference from this Court of the relevant item of contraband as stood produced in Court by the learned PP for its being shown to PW-1 not holding any connectivity with the effectuation of recovery of the item of contraband by the Investigating Officer in the manner espoused by the prosecution rather the aforesaid omission accentuates an inference recorded hereinabove of for the aforesaid infirmities displaying incongruity qua the seal impression borne respectively on the sample parcels and the bulk parcel of charas vis-à-vis the deposition of PW-9, of hence the relevant item of contraband produced in Court not holding any connectivity qua its recovery standing effectuated in the manner espoused by the prosecution in the FIR.

14. Lastly the prosecution was enjoined to adduce emphatic evidence in portrayal of the report of the FSL concerned comprised in Ex.PW-9/E also being linkable with Ex.P-2 especially when for reasons aforesaid it holds no connectivity with the relevant item of contraband purportedly recovered by the Investigating Officer at the site of occurrence from the conscious and exclusive possession of the accused. The factum of its standing examined thereat

by a Jr. scientist officer (Explosive) obviously when he is to be hence concluded to be holding no expertise to hold examination of charas, with greater vigor constrains this Court to conclude of the prosecution abysmally failing to prove even the factum of the opinion recorded by the expert concerned even if assumingly recorded qua the relevant item of contraband recovered at the site of occurrence by the investigating Office from the conscious and exclusive possession of the accused holding any force for this Court to hold with formidability of it being qua the relevant item of contraband, recovery whereof stood effectuated in the manner espoused by the prosecution.

15. A wholesome analysis of the evidence on record portrays that the appreciation of evidence as done by the learned trial Court suffers from a gross perversity and absurdity or it can be said that the learned trial Court in recording findings of conviction has committed a legal misdemeanor, in as much, as, its mis-appreciating the evidence on record or its omitting to appreciate relevant and admissible evidence. In aftermath this Court deems it fit and appropriate that the findings of conviction recorded by the learned trial Court merit interference.

16. In view of the above discussion, I find merit in this appeal, which is accordingly allowed and the judgment of conviction and sentence recorded by the learned trial Court is set aside. Accused stand acquitted of the charge. Bail bonds stand discharged. Fine amount be refunded. Record of the learned trial Court be sent back forthwith.

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

United India Insurance Company Ltd. ....Appellant.
Versus
Prakasho Devi & Others ....Respondents.

FAO (WCA) No. 86 of 2009.
Decided on: 27th June, 2016

Workmen Compensation Act, 1923- Section 4- Son of the petitioner was employed as driver of the truck - tractor met with an accident- driver died at the spot- petitioner claimed compensation for the death- petition was allowed and compensation of Rs. 2,85,973/- was awarded- however, Commissioner declined the interest- it was contended by insurer that driver did not have a valid driving licence and the tractor was not being used for agricultural purposes- hence, it is not liable- held, that son of the petitioner was being carried in the tractor at the time of accident- driving licence was not produced as tractor fell into a muddy and slushy rivulet due to which R.C. and D.L. could not be recovered- it was specifically stated that licence was issued from Delhi- no inquiry was made from Delhi about the issuance of the license to the driver - it was not proved that tractor was being used for non-agricultural purpose- therefore, breach of terms and conditions of the policy was not proved- appeal dismissed. (Para-9 to 13)

Case referred:

Fahim Ahmad vs. United India Insurance Company Ltd., 2014 ACJ 1254

For the appellant : Dr. Lalit K. Sharma, Advocate.
For the Respondents : Mr. Ajay Sharma, Advocate for respondent No.1.
Mr. Amit Jamwal, Advocate for respondents No.2 and 3.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

The Insurer, United India Insurance Company, is in second appeal before this Court. The Company is aggrieved with the order passed by learned Commissioner under Workmen's Compensation Act, Hamirpur on 15.12.2008 in case No.01/2003 allowing thereby the

petition filed for award of compensation by respondent No.1 (hereinafter referred to as the 'petitioner') and awarded her the compensation to the tune of Rs.2,85,973/- against the appellant-insurer (hereinafter referred to as 'respondent No.2').

2. Rakesh Kumar son of the petitioner was employed as driver with tractor No.HP 22-6983 belonging to respondents No.1 and 3. The tractor met with an accident on 23.3.2002 near Pratap Nagar, Hamirpur. Its driver Rakesh Kumar was driving the tractor at the relevant time. He died on the spot.

3. The petitioner has claimed the compensation amounting to Rs.5,00,000/- on account of the loss she sustained due to the death of her son in the accident. She has claimed his age at the relevant time 30 years and the wages Rs.2000-Rs.2500 per month.

4. In reply, the insured, respondents No.1 and 3 have not denied the factum of deceased Rakesh Kumar was employed as driver by them with ill-fated tractor. They admit the wages of the deceased as Rs.2000/- per month. It is also their stand that the deceased was having a valid and effective driving licence when employed as driver and at the time of accident. The ill-fated tractor, according to them, was insured with respondent No.2. At the time of its accident sand was being transported therein.

5. The insurer-respondent No.2 has not disputed the insurance of the tractor with it, however, in preliminary, the following submissions were made:-

> "A That the Driver/deceased was not having valid Driving License to drive the impugned tractor at the time of accident
>
> That the tractor being plied against the insurance contract, hence the insurance company is not liable.
>
> That in case the Court comes to the conclusion that Prakasho Devi is entitled for the compensation the replying respondent can not be ordered to deposit either interest or penalty."

6. It is also denied that the wages of the deceased was Rs.2500/- per month.

7. On the pleadings of the parties, the following issues were framed:-

> "1. Whether the applicant is a workman within the meaning of the Act? OPP
>
> 2. Whether the accident arose out of or in the course of the deceased Employment? OPP
>
> 3. Whether the opposite party is liable to pay such compensation as is due? PR
>
> 4. Whether the driver is not having any valid or effective driving licence, as alleged?OPR
>
> 5. Relief

8. The petitioner has herself stepped into the witness box as PW-1 and also examined Shri Jiwan Lal in support of her case. Respondent No.1 has also stepped into the witness box as RW-1 and Shri Rattan Singh, respondent No.3 as RW-2.

9. Learned Commissioner on appreciation of the evidence available on record has assessed the compensation payable to the petitioner as Rs.2,85,973/- however, declined the interest. Taking into consideration, the submissions made on behalf of the insurer–respondent No.2, that the claims could not be settled within time on account of the petitioner and respondents No.1 and 3 failed to produce the driving licence and source of issuance of driving licence to them.

10. Since it is the insurer, who has been held liable to pay the compensation to the petitioner, hence this appeal on the ground inter alia that neither the deceased was having a valid and effective driving licence at the time of the accident nor the tractor was being used for agriculture purposes at the relevant time and as such there being breach of conditions of the

insurance policy Ex.RX, no compensation could have been awarded to the petitioner against the respondent-insurer.

11. On hearing Dr. Lalit Sharma, Advocate learned counsel for the respondent-appellant and Shri Ajay Sharma, Advocate for claimant respondent No.1 whereas Shri Amit Jamwal, Advocate for respondents No.2 and 3 and appreciating the evidence available on record, admittedly the tractor has met with an accident near Pratap Nagar at Hamirpur on 25.3.2002. The tractor fell into a muddy and slushy rivulet (Nallah), as a result thereof, the person on its wheel namely Rakesh Kumar, the son of the petitioner, has died on the spot itself. The perusal of the FIR Ex.PW-2/A reveals that sand was being carried into the tractor at the time of accident. The driving licence of course has not been produced in evidence by the petitioner, however, not only she, but the owner RW-1 and RW-2 have stated, while in the witness box, that the deceased was holding a valid and effective driving licence, however, since the tractor fell into a muddy and slushy rivulet, therefore, its documents i.e. Registration Certificate and driving licence of the deceased could not be traced out. They all have stated in one voice that the licence was issued by a Licencing Authority at Delhi to the accused. RW-1 has further stated that when the deceased was employed as driver with the tractor he had an opportunity to see his driving licence, which, according to him, was issued by some Licencing Authority at Delhi and was valid and effective. The petitioner and the ensured respondents No.1 and 3 have, therefore, satisfactorily proved that the deceased though was having a valid and effective driving licence, however, the same could not be traced out, in view of the documents of the tractor and the same submerged in the slushy and muddy rivulet. They by producing such evidence had shifted the onus to prove otherwise on the respondent-insurer. It was for the respondent-insurer to have inquired into through its evaluator from the office(s) of Licencing Authority situate at Delhi as to whether the driving Licence was issued to deceased Rakesh Kumar or not. However, no such effort has been made and as such it would not be improper to conclude that the deceased driver of the tractor was having a valid and effective driving licence at the time of accident.

12. Now if coming to the question that the tractor was being used for the purpose other than agricultural, no doubt, the FIR reveals that sand was being carried in the trolley of the tractor at the time of accident. There is, however, no evidence that the sand was being transported for commercial purposes. A specific suggestion made to RW-2 Rattan Chand in this regard on behalf of the insurer-respondent No.2, has been denied by the said witness being wrong. Merely that the sand was being transported in the trolley of the ill-fated tractor is not enough to arrive at a conclusion that the same was being plied for commercial purposes for the reasons that the sand sometime is required to carry out agricultural operation also such as construction of tube well, tunnel, underground tank etc. etc.

13. The apex Court in ***Fahim Ahmad*** vs. ***United India Insurance Company Ltd., 2014 ACJ 1254***, a case having more or less similar facts has held that without there being any proof that the sand was being transported in the ill-fated tractor for commercial purpose, there is no question of breach of the insurance policy.

14. Therefore, in view of what has been said hereinabove, I find no merits in this appeal and the same is accordingly dismissed. Pending application(s) if any shall also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE SANDEEP SHARMA, J

Upender Kumar ....Petitioner.

Versus

State of H.P. and Ors. ....Respondents.

CWP No. 2474 of 2009.
Date of Decision: 27.6.2016.

Constitution of India, 1950- Article 226- Respondent constructed a road using the land of the petitioner without paying any compensation- petitioner made request to pay the amount but no action was taken- respondents admitted that land of the petitioner was utilized for construction of the road- however, it was asserted that petition is barred by delay and latches – held, that notification was issued on 28.5.2007 - similarly situated persons were paid compensation- it was not explained as to why petitioner was singled out - it was not pleaded that petitioner had donated the land , therefore, he is entitled to receive compensation- petition allowed and respondents directed to start acquisition proceedings and to pay compensation to the petitioner.

(Para-8 to 10)

For the petitioner: Ms. Shashi Kiran, Advocate.
For the respondents: Mr. Rajat Chauhan, Law Officer.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

By way of present writ petition, petitioner has prayed for following reliefs:

*"**(i)** That the respondents may kindly be directed to produce the entire record pertaining to the case for the kind perusal of this Hon'ble Court.*

***(ii)** That appropriate orders and directions may kindly be issued, requiring the respondents to pay suitable compensation/damages on account of occupation and use of the land pertaining to the petitioner from the date of actual taking over the possession, after initiating the proceedings under Section 4 of the Land Acquisition Act. Time Bound directions may kindly be issued to the respondents to initiate the acquisition proceedings to finalize the same and pay the amount of compensation with respect to the land and properties/land/valuable trees as per the rate prevalent in the market alongwith interest @18% per annum from the acquisition of the land of the petitioners for the purpose of construction of road.*

***(iii)** That the petition may kindly be allowed with costs throughout.*

***(iv)** Any such other or further orders which this Hon'ble Court may deem just and proper in the light of facts and circumstances of the case may also kindly be passed."*

2. Facts as emerge from the record are that the petitioner is the owner of land comprising Khata Khatauni No. 23 min Khasra No. 26 area measuring 1-4 bighas (over Kahdi). The petitioner has also placed on record, copies of Jamabandi for the years, 2006-07 along with spot tatima and certificate to demonstrate the existence of road and aforesaid land of the petitioner. Petitioner has averred that respondents constructed a motorable "Maryog Narang Dharyar Marg" road in the year, 1975-76 at Mauza Badut, Tehsil Pachhad, District Sirmaur, H.P. and for the purpose of construction of the aforesaid road, the land comprising Khata Khatauni No. 23 min Khasra No. 26 area measuring 1-4 bighas (over Kahdi) has been taken/used for construction of the road to the extent of his share in the aforesaid khasra number of the petitioner.

3. It is specifically alleged that the respondents utilized the aforesaid valuable land of the petitioner for the purpose of construction without paying him any compensation qua the land used by them. The petitioner by way of Annexure-P4 also placed on record copy of the notification issued by respondents intimating therein acquisition of land of certain people/villagers for construction of the Maryog Narang Dharyar Marg. The petitioner has specifically averred that despite there being several requests made to the respondents to initiate steps for acquisition of his land, used by the respondents for the construction of aforesaid road by issuing notification under Section 4 of the Land Acquisition Act, no steps, whatsoever, have been taken till date to issue notification to acquire the land and thereafter, pay compensation as is required under the Act. Petitioner has also averred that he has been discriminated because

admittedly as emerges from the perusal of the Annexure P-4, land of the people belonging to adjoining villages Narang, Maryog, Chewla, Bakanag have been acquired in accordance with law and due and admissible compensation has been paid to them. It is also contended that land of the petitioner falls in middle of villages Narang and Maryog and road in question passes through same and, as such, he is also entitled to compensation on account of use and occupation of the land used by the respondents for construction of the Narang, Maryog, Chewla, Bakanag Marg.

4. Respondents by way of detailed reply to the petition have prayed for dismissal on the ground of delay and latches but fact remains that respondents have admitted that some part of the suit land situate on Khasra No. 26 in Mauza Badut, Pargana Girinwar Tehsil Pachhad, Distict Sirmour, HP, has been utilized by the respondent department for construction of road namely Maryog Narang Dharyar Road, which was given administrative approval and expenditure sanction during the year 1970 for the construction of the said road with the average width of 5 -7 meters. It is also stated in the reply that land owners including the petitioners as well as their predecessor-in-interest represented to the State for construction of link road so as to provide them benefits of connectivity by volunteering to construct road through their land without raising any objection. It is also depicted in the reply that suit land is situated in KM 17/0 to 18/0 KM where construction of said link road was completed by the respondents during the year 1975-76 itself. Respondents have refuted the claim of the compensation, if any, put forth by the petitioner solely on the ground of delay and latches.

5. Ms. Shashi Kiran, Advocate, appearing for the petitioner vehemently argued that the petitioner is entitled to be compensated in accordance with law for use and occupation charges of the land, which has been admittedly used by respondents for the construction of the road in question. During arguments having been made by her, she specifically invited attention of this Court to the reply filed by the respondents to demonstrate that factum with regard to use of land pertaining to the petitioner has been duly admitted by the respondents. She forcefully contended that once other similarly situate persons, whose land was also used by respondents for construction, have been paid due compensation, no authority, whatsoever, lies with the respondents to deny/defeat the claim of the petitioner on the ground of delay and latches.

6. On the other hand, Mr. Rajat Chauhan, Law Officer, appearing for the State refuted the claim put forth by the petitioner and prayed that no relief, whatsoever, as prayed for, in the present petition can be granted at this belated stage that too after 35 years. He contended that road was constructed 35 years back and at that time, no objection, whatsoever, was over raised by the occupants/owners of the land. He forcefully contended that road in question was constructed for general public in public interest and no objection was raised till filing of the present petition, meaning thereby, there was an implied consent of the petitioner to construct road without determining any compensation. However, Mr. Chauhan, while arguing on behalf of respondents failed to refute the claim of the petitioner with regard to payment of compensation to other similarly situate persons for the construction of the same and similar road.

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

8. Perusal of the pleadings available on file clearly suggests that in the year, 1974-75, respondents constructed the road known as “Maryog Narang Dharyar Marg” and for that purpose, some part of the land of the villagers, was used by the respondent-State. Perusal of Annexure-P4 leaves no doubt in the mind of this Court that respondent- state had issued notification (Annexure P-4) dated 28.5.2007 under Section 4 of the land Acquisition Act, 1894 proposing acquisition of land for construction of “Maryog Narang Dharyar Marg”. Admittedly aforesaid notification suggests that respondent-State proposed to acquire the land of persons in village Narang but it may be pointed out at this stage that road in question starts from village Narang to Maryag and in between from Narang to Dharyar, there are number of villages including the village of the petitioner. Further perusal of AnnexureP-6 placed on record by way of rejoinder suggests that persons from village Narang were paid compensation by the Court of Additional

District Judge, Sirmour for the land used for construction of road in question. Perusal of award passed by the learned Additional District Judge suggests that similarly situate persons, whose land was acquired for the construction of aforesaid road, were paid compensation. After perusing reply filed by the respondents-State, it is clearly established that land of the petitioner has been used by the respondent for construction of the aforesaid road and as such state cannot be allowed to take hyper technical objections with regard to delay, if any, to deny the legitimate compensation of the petitioner, whose land has been also utilized in the construction of road in question. It also stands proved on record that respondents have already granted compensation to the similarly situate persons whose land had been utilized for the purpose of construction of road in question. Though, Mr. Chauhan had argued that since no objection for construction of road was ever raised by the petitioner at the time of construction and as such, it can be concluded that there was implied consent on the part of the petitioner to construct the road without getting any compensation, but aforesaid contention of Mr. Chauhan, cannot be accepted for the reason that it is not the case of the respondent State that land in question was voluntarily donated by the petitioner. Had it been the case of the respondents that petitioner had voluntarily donated the land for construction of road, certainly, plea of delay or implied consent as raised by the respondent would have come in the way of the petitioner, But once it stands proved, rather, admitted by the respondents that the other similarly situate persons whose lands were duly acquired by the respondent for construction of same and similar road were paid due and admissible compensation, action of respondent in denying the compensation, if any, to the petitioner cannot be held to be justifiable and the same deserves to be rectified in accordance with law since it is the violation of Article 300(A) of the Constitution of India.

9. The Hon'ble Coordinate Bench of this Court while dealing with the similar issue in CWP No. 128 of 2003 decided on 25.7.2007, titled *"Mathu Ram v. State of HP and Ors."*, wherein land was used for construction of road and compensation was paid to the similar situate persons, directed the respondents to initiate acquisition proceedings for acquisition of land of the persons and to pay compensation in accordance with law. As far as contention put forth by the respondents with regard to the inordinate delay in maintaining the petition as well as compensation is concerned, the Hon'ble Apex Court in case title Raj Kumar v. State of HP and Ors. in SLA(C) No. 2373 of 2014 decided on 29.10.2015, held as under:-

> *"There is in our opinion considerable merit in the submission made by Mr. Nag. It is true that the appellant had approached the High Court rather belatedly inasmuch the land had been utilized sometime in the year 1985-86 while the writ petition was filed by the appellant in the year 2009. At the same time it is clear from the pleadings in the case at hand that the user of the land owned by the appellant is not denied by the State in the counter affidavit filed before the High Court of that filed before us. It is also evident from the averments made in the counter affidavit that the state has not sought any donation in its favour either by the appellant or his predecessor in interest during whose life time the road in question was constructed. All that is stated in the counter affidavit is that the erstwhile owner of the land "might have donated" the land to the State Government. In the absence of any specific assertion regarding any such donation or documentary evidence to support the same, we are not inclined to accept the ipsit dixit suggesting any such donation. If that be so as it indeed it, we fail to appreciate why the State should have given up the land acquisition proceedings initiated by it in relation to the land of the appellant herein. The fact that the State Government had initiated such proceedings is not in dispute nor is it disputed that the same were allowed to lapse just because the road had in the meantime been taken under the Pradhan Mantri Gram Sadak Yojna. It is also not in dispute that for the very same road the land owned by Kanwar Singh another owner had not only been notified for acquisition but duly paid for in terms of Award No. 10 of 2008.*

In the totality of the above circumstances, the offer made by Mr. Nag to the effect that the appellant would be satisfied if he is paid compensation at the rate determined and paid to Kanwar Singh under Award No. 10 of 2008 appears to be reasonable. That is so especially when the compensation in terms of Award No. 10 of 2008 was determined by reference to a Notification issued nearly 10 years ago The fact that the appellant is giving up his claim for any compensation for wrongful utilization of land and to the payment of interest which is otherwise statutorily prescribed makes the offer still more attractive for the State."

10. Consequently, in view of the aforesaid discussion as well as decision rendered by this Court as well as the Hon'ble Apex Court in the case referred above, it would be in the interest of justice to issue directions to the respondents to start acquisition proceedings qua the land in question immediately and pay compensation to the petitioner in terms of the land acquisition act. Needless, to say that petitioner would be paid compensation in similar lines as have been paid to the other similar persons vide AnnexureP-6. Accordingly, the present petition is disposed of with the direction to the respondents to complete acquisition proceedings in the aforesaid terms, as discussed above, within a period of six months.

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

Balwant Singh and Ors. ....Petitioners.
Versus
Director Consolidation and Ors. ....Respondents.

CWP No. 1447 of 2009.
Date of Decision: 28.6.2016.

Constitution of India, 1950- Article 226- Respondents No. 3 and 4 filed an application pleading that they were not given any passage during the consolidation – Director Consolidation directed the Consolidation Officer, Hamirpur to visit the spot and submit report- Case was remanded to provide passage to the respondents- aggrieved from the order, present writ petition has been filed- held, that Consolidation Officer after visiting the spot had held that respondents required passage to approach their land- subsequently a notification was issued- Consolidation Officer had no jurisdiction to pass the order after issuance of the notification- order passed by the Consolidation Officer set aside. (Para-8 to 11)

For the petitioners: Mr. Y.P. Sood, Advocate..
For the respondents: Mr. Rupinder Singh Thakur, Additional Advocate General, with Mr. Rajat Chauhan, Law Officer, for respondents No.1 and 2.
Mr. Vivek Singh Thakur, Advocate, for respondents No. 3 and 4.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

By way of present writ petition, petitioner has invoked extraordinary jurisdiction of this court under Article 226 of the Constitution of India praying therein that writ of certiorari may be issued and orders (Annexures P-2 and P-3) may be quashed and set aside.

2. Briefly stated facts necessary for the adjudication of the case are that respondents No. 3 and 4 filed an application under section 54 of the Himachal Pradesh (Consolidation and Prevention of fragmentation) Act, 1971 (in short the Act of 1971) averring

therein that when consolidation operations were completed in Village Chownki Mauza Milkh, Tehsil Nurpur, District Kangra, in the Year, 2000-01, they were not given any passage to approach their land comprised in Khasra No.472. The Director Consolidation, taking cognizance of the averments contained in the application filed under Section 54 of the Act of 1971, issued notices to the petitioners and during the pendency of the application, respondent No.1 directed the Consolidation Officer, Hamirpur, HP, to reach/visit the spot and submit his report. Record further reveals that Director Consolidation after receipt of the record from the field Agency allowed the revision petition of the respondents vide order dated 27.12.2008 and remanded the case back to Consolidation Officer, Hamirpur, with the directions to visit the spot and provide passage to the respondents by showing the same in red line. Consolidation Officer, pursuant to the order supra visited the spot and passed order dated 13.3.2009.

3. Feeling aggrieved and dis-satisfied with the order dated 13.3.2009, the petitioners approached this Court by way of present writ petition seeking quashment of the aforesaid orders passed by Director Consolidation as well as Consolidation Officer, Hamirpur.

4. Mr. Y.P. Sood, Advocate, appearing for the petitioners vehemently argued that orders dated 28.1.2009 and 13.3.2009 passed by the Director, Consolidation of Holdings as well as Consolidation Officer, Consolidation of Holdings, HP are illegal and without any jurisdiction and as such, same are required to be quashed and set-aside. He vehemently contended that application preferred under Section 54 by the present respondents No.3 and 4, could not be entertained as same was not maintainable after a delay of 7-8 years. He also contended that keeping in view the nature of dispute raised by respondents No. 3 and 4 in their application filed under Section 54 of the Act, 1971, matter could not be decided by respondent No.1 while exercising the powers under Section 54, since he had no jurisdiction to go into the question of providing any passage by passing any order of providing passage to the respondents in exercise of power under Section 54 of the Act. He forcefully contended that respondent No.2 has in fact exercised the jurisdiction, which was not vested in him and as such order passed by him deserves to be quashed and set-aside.

5. During arguments having been made by him, he invited attention of this Court to Annexure P-4 to demonstrate that w.e.f. 2.3.2009, Consolidation Officer had no power to deal with the cases of Consolidations. He contended that w.e.f. 2.3.2009, all the powers of Consolidation Officer had been delegated upon the Tehsildar concerned of the respective jurisdiction for disposal of the cases pending for disposal with the Consolidation Officer under the provisions of the Act with immediate effect. In view of the aforesaid background, he prayed that petition may be allowed and AnnexureP-2 may be quashed and set-aside.

6. Mr. Rajat Chauhan, Law Officer, representing the State supported the orders passed by the Courts below. He forcefully contended that the Director, Consolidation of Holdings has got full powers under Section 54 of the Act to decide the case and since the revenue village was not denotified at the time of filing any revision petition, it was rightly entertained by the Director, Consolidation of Holdings in terms of the provisions of the Act and rules. He strenuously argued that since matter qua the hindrance of path to the land of respondents was brought to the notice of concerned authorities, authorities while exercising powers under the Rules, rightly directed the Consolidation Officer to visit the spot to mark the path with red line.

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

8. It is undisputed that respondents No.3 and 4 by way of application filed under Section 54 of the Act, approached the Director, Consolidation of Holdings stating therein that in the Year, 2001 consolidation took place at Village Chowni Mauza Milkh, Tehsil Nurpur District Kangra, which was subsequently confirmed. Respondent No.1 specifically pleaded before the Director Consolidation that prior to the consolidation, respondent as well as present petitioners were joint owner in possession of the land comprised in Khasra No. 399 old.

9. The petitioners prayed that they have been deprived of their valuable right of passage by Respondent No.1. Director Consolidation vide order dated 27.12.2008 allowed the revision petition preferred by respondents No. 3 and 4. Operative part of order passed by Director Consolidation is reproduced herein-below:

> *"The request of the petitioner to grant him 4 to 5 meters passage cannot be considered nor any amendment is required to provide approach road from the land of the respondents. The case is remanded back to the C.O. Hamirpur with the directions that in case there is no other approach to the land of the petitioner the same may be provided to him by showing the same in "red line" as per the provisions of the scheme in the presence of both the parties. The C.O. should also take into consideration that it does not have any affect on the permanent structure constructed by the petitioner and others."*

Further perusal of the record suggests that pursuant to the order dated 28.2.2009, Consolidation Officer, Hamirpur, after visiting the spot held that respondent applicant require passage to approach their land and accordingly, passage measuring 34+21+10 meters showed in red Ink on the north side of Khasra No. 473 and 472. Now the question, which needs to be determined by this Court is whether Consolidation Officer, Hamirpur was competent to pass orders dated 13.3.2009 or not, especially in the light of notification dated 2.3.2009 issued by Govt. of Himachal Pradesh, Department of Reveune. It would be apt to reproduce notification herein-below

> *"…………..In supersession of all previous notification issued in this behalf and in exercise of the powers conferred upon him under Section 52 of the Himachal Pradesh (Consolidation and Prevention of Fragmentation) Act, 1971, the Governor, Himachal Pradesh is pleased to delegate the powers of Consolidation Officer upon Tehsildars concerned in their respective jurisdiction for disposal of cases pending for disposal with the Consolidation Officer under the provisions Act, ibid, with immediate effect………"*

Perusal of the notification (supra) clearly suggests that w.e.f. 2.3.2009, all the powers of Consolidation Officers were ordered to be conferred upon the Tehsildars concerned of their respective jurisdiction for disposal of cases pending for disposal with the Consolidation Officer under the provisions of the Act.

10. Admittedly, in the present case, Consolidation Officer to whom, Director Consolidation, respondent No.1 vide order dated 27.12.2008 remanded the case back with the direction to visit the spot and grant 4-5 meters passage to the respondents did not decide the case on or before 2.3.2009 i.e. date of notification. Since matter was pending for disposal with the concerned Consolidation Officer under the Act on 2.3.2009, this Court is of the view that Consolidation Officer had no authority/jurisdiction to adjudicate the matter on 13.3.2009 after issuance of aforesaid notification. Since after 2.3.2009, all powers of Consolidation Officers were conferred upon the Tehsildar in their respective jurisdiction for disposal of case pending for disposal before the Consolidation Officer under the Act, the Consolidation Officer, Hamirpur, had no jurisdiction, whatsoever, to decide the matter at hand and, as such, any order passed by Consolidation Officer in pending matters after 2.3.2009, deserves to be quashed and set-aside.

11. Consequently, in view of the discussion made hereinabove, this Court is of the view that order dated 13.3.2009 passed by Consolidation Officer in the present case, was without any jurisdiction and, as such, same is quashed and set aside. Needless to say that Tehsildar concerned is competent to pass orders, if any, in the present case, in terms of notification dated 2.3.2009. Accordingly, the writ petition is disposed of with pending applications, if any.

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

Des Deepak Khanna ....Appellant

Versus

Smt. Sharda Devi Kanwar ....Respondent

RSA No. 131/2016
Decided on June 28, 2016

Specific Relief Act, 1963- Section 34 and 38- Plaintiff filed a civil suit for declaration and permanent prohibitory injunction pleading that plaintiff is Director of Private Limited Company- she is owner in possession of the suit land- land was transferred by T in favour of the company- defendant was appointed as Manager by D to look after the affairs of the company- plaintiff inducted one of her sons as Director- she came to know that defendant was posing himself as Director of Company and was going to alienate the suit land to some other persons- suit was decreed by the trial Court- an appeal was preferred, which was dismissed- held, in second appeal that according to the meeting 50% share worth Rs. 10/- of the husband of the plaintiff were transferred in favour of the defendant, his father and his brother- no notice of intention to transfer share was given to Registrar of the Company –no intimation of his appointment was given- defendant had not led any evidence to prove that suit was time barred- appeal dismissed.
(Para- 10 to 15)

For the Appellant : Mr. G.D. Verma, Senior Advocate with Mr. Anil K. Aggarwal and Mr. B.C. Verma, Advocates.

For the Respondent : Mr. G.C. Gupta, Senior Advocate with Ms. Meera Devi, Advocate.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge

This Regular Second Appeal has been instituted against Judgment and Decree dated 24.11.2015 rendered by the learned Additional District Judge-I, Solan, District Solan, Himachal Pradesh in Civil Appeal no. 123-S/13 of 2012.

2. "Key facts" necessary for the adjudication of the present appeal are that the respondent-plaintiff (hereinafter referred to as 'plaintiff' for convenience sake) filed a suit for declaration and permanent prohibitory injunction under Sections 34 and 38 of the Specific Reliefs Act, against the appellant-defendant (hereinafter referred to as 'defendant' for convenience sake). According to the averments as made in the plaint, M/s Chander Tal Hotel is a private limited concern. Plaintiff is the Director of the same. Plaintiff is owner-in-possession of the suit land as detailed in plaint, in the capacity of Director of the company. Shri Devinder Singh Kanwar, husband of the plaintiff transferred the above said land in the name of M/s Chander Tal Hotel Company after seeking due permission from the State Government. Defendant was a good friend of the husband of the plaintiff. He approached for employment, therefore, Devinder Singh Kanwar appointed him as a Manager of the Company to look after affairs of M/s Chander Tal Hotel. Shri Devinder Singh was suffering from cancer. He could not recover from the ailment. He died in the year 2004. After the death of Devinder Singh Kanwar, plaintiff inducted her son as one of the Directors of the Company. Plaintiff became suspicious and asked about the progress of work from the defendant. Plaintiff was surprised that no development work was done on the site and defendant pretended himself to be the Director of the company. He was going to alienate the suit land to some other person. Defendant did not have any lawful authority to deal with the affairs of the company. It was in these circumstances that the civil suit was filed.

3. Suit was contested by the defendant. Defendant admitted that Shri Devinder Singh Kanwar was one of the Directors of the Company. Suit land was in his name before

transferring in the name of the Company. Company was formed on 29.4.1992. Devinder Singh transferred the suit land in the name of M/s Chander Tal Hotel after obtaining permission of the State Government. It was decided in the meeting of the Company held on 2.5.1992 that land was to be purchased by the Company from Devinder Singh Kanwar. The value of land was assessed at Rs.7.00 Lakh and consideration was paid. On 4.5.1992, meeting of the Company was held and resolution was passed that Additional Directors were to be appointed alongwith defendant as one of the Additional Directors. Husband of the plaintiff transferred the entire share of Rs.70,000/- to the defendant. He denied that the defendant came for employment. It is also denied that on 11.5.1992, defendant was appointed as Manager of the Company and authorised to sign documents on behalf of the Company. It is averred that Shri Devinder Singh has sold his entire shares to defendant and other Directors of the Company, and has retired from the company. He was not pretending to be the Director of the Company.

4. Replication was filed by the plaintiff. Issues were framed by the learned Civil Judge (Junior Division) on 28.10.2010. Learned trial Court decreed the suit as per judgment and decree dated 19.11.2012. Defendant filed an appeal before the Additional District Judge-I, Solan. He also dismissed the appeal on 24.11.2015. Hence, this Regular Second Appeal.

5. The Regular Second Appeal was taken for final hearing at the admission stage.

6. Mr. G.D. Verma, learned Senior Advocate on the basis of substantial questions of law framed has vehemently argued that the suit was barred by limitation. Learned Courts below have misconstrued oral as well as documentary evidence and have failed to consider the minutes of the meetings dated 2.5.1992, 4.5.1992 and 11.5.1992. He has also argued that his client was a bonafide purchaser of the shares from plaintiff and her husband. First appellate Court has misread the Memorandum and Articles of Association and sale deed executed and registered on 25.8.2000.

7. Mr. G.C. Gupta, learned Senior Advocate has supported the judgments and decrees passed by both the learned Courts below.

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

9. Since all the substantial question of law are interconnected, hence, are taken up together for discussion in order to avoid repetition of evidence.

10. M/s Chander Tal Hotel was registered with the Registrar of Companies. Ext. PX is the certificate of incorporation issued by the Registrar of Companies. Memorandum and Articles of Association of the Company is Ext. PW-1/C. The share capital of company was fixed at Rs.10.00 Lakh divided into Rs.1.00 Lakh equity shares of face value of Rs.10/- each. Articles No. 7 and 8 of the Articles of Association read as under:

> "7. Any member desiring to sell any of his shares must notify to the Board of Directors the number of shares, the fair value and the name of the proposed transferee and the Board must offer to the other share holders the shares offered at the fair value and if the offer is accepted the shares shall be transferred to the acceptors and if the shares or any of them are not so accepted within one month, from the date of notice to the Board, the members proposing transfer shall at any time within two months afterward, be at liberty, subject to Articles 8 and 9 hereof, to sell and transfer the shares to any person at the same or at the higher price.
>
> 8. No transfer of shares shall be made or registered without the previous sanction of the Directors, except when the transfer is made by any member of the Company to another member or to the member's wife or child or children or his heirs and the Directors may decline to give such sanction without assigning any reason subject to Section 111 of the Act."

11. It is apparent from a plain reading of Article 7 of the Articles of Association that any member desiring to sell any of his shares must notify it to the Board of Directors, the number of shares, fair value and name of the proposed transferee and the Board must offer to the other shareholders the shares offered, at the fair value and if the offer is accepted the shares shall be transferred to the acceptors and if the shares or any of them are not so accepted within one month, from the date of notice to the Board, the members proposing transfer shall at any time within two months afterward, be at liberty, subject to Articles 8 and 9, to sell and transfer the shares to any person at the same or at the higher price.

12. Meeting was held under the Chairmanship of the husband of the plaintiff on 2.5.1992 at 3.30 PM. Value of the suit land belonging to the husband of the plaintiff was assessed at Rs.7.00 Lakh. He agreed to transfer it to the company in lieu of Rs.70,000/- shares of company each of the value of Rs.10/-. Subsequent meeting was held on 4.5.1992 at 11 AM under the Chairmanship of the husband of the plaintiff. This meeting was attended by the plaintiff as a Director. Meeting was also convened on 11.5.1992 at 10 AM under the chairmanship of the husband of the plaintiff. According to this meeting, 50,000 shares each of value of Rs.10/- of the husband of the plaintiff were shown to have been transferred in favour of the defendant, his father OP Khanna and his brother K.D. Khanna. There is no tangible evidence on record to establish that the Board of Directors had been informed by the husband of the plaintiff with respect to intention of transferring shares and a period of one month had been given to remaining shareholders to purchase these shares and that after expiry thereof, shares have been sold/transferred in favour of the defendant and his relatives as per Article 7 of the Articles of Association. Moreover, there is no tangible evidence on record to prove that intimation of transfer of the shares was sent to the Registrar of Companies. Even, the annual return / balance sheet has not been placed on record.

13. Now, the Court will advert to the fact whether defendant was appointed as one of the Directors of the Company. According to the proceedings of the minutes book dated 4.5.1992, proposal was placed before the Board of Directors to appoint Additional Directors. Defendant was one of them. On 4.5.1992, only the proposal was placed before the Board of Directors to appoint Additional Directors, However, fact of the matter is that the defendant was not appointed as Additional Director of the Company. Intimation of the appointment of Additional Directors was required to be given to the office of Registrar of Companies to confirm the appointment of the Additional Director(s) in the annual meeting. Defendant while appearing as DW-1 has admitted categorically that no such intimation has been placed on record nor the intimation was sent to the Registrar of Companies regarding appointment of Additional Directors. Even in the meeting held on 11.5.1992, there is no mention of confirmation of the defendant as Additional Director. Form-32 was required to be sent to the Registrar of Companies.

14. Mr. G.D. Verma, learned Senior Advocate has argued that the plaintiff and her husband have resigned from the Company and resignation was accepted in the meeting by the Board of Directors after transferring their shares. Neither the defendant nor any other person was appointed as Additional Director. There is no question of submitting resignation before them. Defendant has not placed on record resignation letters of the plaintiff and her husband. Land has been transferred by Shri Devinder Singh in the name of the plaintiff in the capacity of Director. Proceedings dated 25.8.2000 have not been signed by the plaintiff. Defendant in his cross-examination admitted that intimation of the transfer of shares is required to be sent to Registrar of Companies office. It is also required to be mentioned in annual return. The annual return/balance sheet of the company has not been placed on record and no document or mode of transfer of shares has been placed on record.

15. Learned trial Court has specifically framed issue that whether the suit was time barred. However, the defendant has not led any evidence that how the suit was time barred. Learned Courts below have correctly appreciated Articles 7 and 8 of the Articles of Association. Learned Courts below have also correctly appreciated the minutes of the meetings held on 2.5.1992, 4.5.1992 and 11.5.1992 as well as sale deed dated 25.8.2000 (Ext. PW-1/D) and the

minutes of the meeting held on 25.8.2000. Defendant has failed to prove that he was inducted as Additional Director of the Company. Transfer of shares in his name is also not in accordance with the Articles of Association. Resignation letters of the plaintiff and her husband have not been placed on record. No intimation has been given to the Registrar of Companies. Annual return has also not been placed on record to prove transfer of the shares. Appointment of the defendant as an Additional Director of the Company was never confirmed in the subsequent meetings.

16. The substantial questions of law are answered accordingly.

Accordingly, in view of the discussions and analysis made hereinabove, the present appeal has no merits 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 RAJIV SHARMA, J.

Cr. Appeal No. 182/2015 with
Cr. Appeal No. 164/2016
Reserved on: June 27, 2016
Decided on: June 28, 2016

1. Cr. Appeal No. 182/2015

Govind Kumar and another …… Appellants
Versus
State of Himachal Pradesh ……..Respondent

2. Cr. Appeal No. 164/2016

Hemant Soni …… Appellant
Versus
State of Himachal Pradesh ……..Respondent

N.D.P.S. Act, 1985- Section 20 and 29- A car was signaled to stop by the police, which was checked and was found to be containing 540 grams charas- accused were tried and convicted by the trial Court- held, in appeal that all the codal formalities were completed at the spot- case property was produced before PW-6 for resealing who re-sealed the same and handed it over to MHC- minor contradictions in the statements of witnesses are not sufficient to doubt the prosecution version- all the witnesses stated unanimously that charas was recovered from the backseat of the car- recovery was effected from the car- there was no requirement of complying with Section 50 of N.D.P.S. Act- car was stopped at an isolated place- therefore, independent witnesses could not have been associated- prosecution version was proved beyond reasonable doubt- accused were rightly convicted- appeal dismissed. (Para-15 to 17)

For the appellants : Mr. Vivek Sharma, Advocate, in both the appeals.
For the respondent : Mr. Parmod Thakur, Additional Advocate General, in both the appeals.

The following judgment of the Court was delivered:

<u>Rajiv Sharma, Judge</u>:

Both the appeals arise out of one and the same judgment and common questions of law and facts are involved in the same, hence, both the appeals were taken up for hearing together and are being disposed of by this common judgment.

2. The present appeals have been filed against Judgment dated 1.5.2015 rendered by the learned Special Judge (Additional Sessions Judge-II), Shimla, Himachal Pradesh, whereby

appellants-accused (hereinafter referred to as 'accused' for convenience sake), who were charged with and tried for offence under Sections 20 and 29 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'Act' for convenience sake) have been convicted to undergo rigorous imprisonment for a period of five years and to pay a fine of Rs.20,000/- each, and, in default of payment of fine, to further undergo simple imprisonment for a period of six months.

3. Case of the prosecution, in a nutshell, is that on 16.2.2011, a police party headed by SI Phool Singh (PW-10) alongwith Dulu Ram, HC Shiv Kumar, HHC Tek Singh and Constable Naresh Kumar in a private vehicle No. HP-09-1499 was present at place Kadog in connection with their routine patrolling and *Nakabandi* duty. At about 4.30 AM, one Maruti car bearing registration No. HP-01K-1365 appeared from Kingal side. Vehicle was stopped and checked. Accused Hemant was sitting on the driver seat and Govind Kumar was sitting in the front seat. Accused Jia Lal and Naresh Kumar were found sitting in the back seat. On checking of the vehicle, a packet was recovered from the back seat where accused Jia Lal and Naresh Kumar were found sitting. Packet was Khaki in colour and was duly sealed with Khaki tape. On opening the packet, black substance in round shapes was recovered. It was found to be *Charas*. It weighed 540 grams. It was put back inside packet and then sealed in a packet with six seal impressions of 'D'. NCB form in triplicate was filled in. Seal impression was handed over to Shiv Kumar. *Charas* was taken into possession. Site plan was prepared. Case property was produced before SHO Police Station Dhalli, who resealed the same with three seal impressions of 'S' and issued resealing certificate Ext. PW-6/D. Case property was deposited with MHC Police Station, Dhalli. He entered the same at Sr. No. 649 of the Malkhana Register. Case property was sent to FSL Junga through MHC Rattan Pal. Chemical Examination report is Ext. PW-10/D. Investigation was completed. Challan was put up in the Court after completing all the codal formalities. Accused Naresh Kumar sitting in the back seat of the vehicle in question was a minor. His date of birth is 8.5.1993.

4. Prosecution has examined as many as eleven witnesses. Accused were also examined under Section 313 CrPC. They pleaded innocence. Learned trial Court convicted the accused as noticed above. Hence, these appeals.

5. Mr. Vivek Sharma, Advocate has vehemently argued that the prosecution has failed to prove its case against the accused.

6. Mr. Parmod Thakur, Additional Advocate General, has supported Judgment dated 1.5.2015.

7. HC Shiv Kumar (PW-1) testified that on 16.2.2011, he alongwith HC Dilu Ram No. 132 and Constable Tek Singh, Constable Naresh in a private vehicle No. HP-09A-1499, was present in connection with routine patrolling duty at village Kadog. A Maruti Car bearing registration No. HP-01K-1365 appeared from Kingal side at about 4.30 AM. The vehicle was stopped. Four persons were sitting inside the vehicle. Hemant Kumar was on driver seat. Govind Ram was in the front seat and Jia Lal and Naresh Kumar were sitting in the rear seats. On checking, a *Khaki* parcel was found from beneath the rear seat, occupied by Naresh and Jia Lal. On opening the parcel, black round shaped substance was found. It was found to be *Charas*. It was weighed with electronic scale. It weighed 540 grams. It was put back into the packet and sealed with six seal impressions of 'D'. Seal impression was taken on a separate piece of cloth. NCB form in triplicate was filled in. *Charas* was taken into custody. He identified his signatures on Ext. PW-1/B. In his cross-examination, he has admitted that only one team left for patrolling from police post Sunni. He could not narrate whether there was a gap between the floor and the front seat of the vehicle and whether there is no gap between rear seats and the floor. Recovery was effected from the back seat where Naresh Kumar and Jia Lal were sitting. Recovery was effected after removing entire rear seat. He admitted that army personnel remained on duty around the clock at Kadog. He denied the suggestion that they had prior information about the offending vehicle.

8. HHC Tek Singh (PW-2) also corroborated the statement of PW-1 Shiv Kumar, about the manner in which *Charas* was recovered from the car. *Rukka* was handed over to him at 6.30 AM for registration of case in Police Station, Dhalli. Thereafter, FIR No. 28/11 was registered. He carried the FIR to the spot and handed over the same to IO. In his cross-examination, he has admitted that there was a gap between the rear seat and the floor of the vehicle from where they effected recovery. He did not remember whether Investigating Officer removed the seat or seat cover. They checked 2-3 vehicles at Basantpur and thereafter left for Kadog. Entire proceedings were conducted in search light in his presence.

9. HC Shiv Kumar No. 172 (PW-3) testified that at about 6.30 PM, Inspector/ SHO Balbir Singh handed over to him a sealed parcel with six seal impressions of 'D' and five seal impressions of 'S' contained 540 grams *Charas* in round shape. He was handed over seal sample 'D' and 'S' alongwith NCB form in triplicate. He made entry in the Malkhana Register at Sr. No. 649 on 16.2.2011. On 19.2.2011, he handed over the case property to HHC Rattan Pal vide RC No. 27/11. On return, HHC Rattan Pal handed over the receipt to him.

10. Constable Naresh (PW-5) also deposed the manner in which *Charas* was recovered from the car. Search, seizure and sampling proceedings were completed at the spot. In his cross-examination, he has admitted that there was gap of 6 inches between the front seat and the floor of the Maruti car but there was no gap between the rear seat and the floor of the car. Accused were taken out of the vehicle at the time of removing rear seat. Accused were given option either to be searched before a Magistrate or a Gazetted Officer. He did not remember who conducted the search of the SI Phool Singh.

11. Inspector Balbir Singh (PW-6) deposed that on 16.2.2011, SI Phool Singh produced one sealed parcel sealed with six seal impressions of 'D' containing 540 grams *Charas*, which was resealed by him after using seal impression 'S', five times. He also appended seal impression 'S' on the NCB form. He deposited the sealed parcel alongwith NCB form with MHC Shiv Kumar.

12. HHC Rattan Pal (PW-8) carried case property to FSL Junga, on the basis of RC No. 27/11.

13. Lal Singh (PW-9) issued birth certificate of Naresh Kumar vide Ext. PW-9/B. Date of birth of Naresh Kumar was 8.5.1993.

14. SI Phool Singh (PW-10) deposed the manner in which accused were found travelling in the car and 540 gram *Charas* was recovered from the car. He filled in NCB form. He also prepared *Rukka* Ext. PW-10/A, on the basis of which FIR Ext. PW-6/A was registered against accused. Accused were produced before the Court. Accused Naresh Kumar was produced before the Juvenile Justice Board. Case property was sent for chemical analysis. In his cross-examination, he has admitted that in Maruti car, there is gap between the floor and the front seat whereas it is not so in rear seat. They recovered the *Charas* by removing the seat. He himself removed the seat and effected recovery. Personal search of accused was also effected after their arrest. No option was given to the accused that they were free to exercise option to be searched before a Magistrate or a Gazetted Officer.

15. Accused were travelling in Maruti car bearing No. HP-01K-1365. Car was signalled to stop. *Charas* was recovered from the rear seat of car. It weighed 540 grams. All the codal formalities were completed at the spot including filling up NCB form. *Rukka* was prepared vide Ext. PW-6/A, on the basis of which FIR Ext. PW-10/A was registered. Case property was produced before PW-6 Inspector Balbir Singh for resealing. He resealed the same and handed over to MHC Shiv Kumar. He entered the same in Malkhana Register at Sr. No. 649. Case property was sent by Shiv Kumar to FSL Junga vide RC No. 27/11 through PW-8 Rattan Pal. He deposited the same with FSL Junga. According to Ext. PW-10/D, contraband was found to be *Charas*.

16. Mr. Vivek Sharma, Advocate has vehemently argued that there are minor contradictions as to whether there was a gap between the floor of the vehicle and rear seats. According to him, PW-10 Balbir Singh deposed that recovery was effected after removing entire seat. PW-2 HHC Tek Singh deposed that there was gap between floor and rear seat of the vehicle from where recovery was effected. PW-5 Constable Naresh deposed that there is a gap of 6 inches between front seat and floor of Maruti 800. PW-10 Balbir Singh deposed that there was a gap between floor and front seat. It was not so in the case of rear seat. Recovery was effected after removing the seat of the car itself. However, fact of the matter is that *Charas* has been recovered from the rear seat of car occupied by the accused. Recovery was effected as per PW-10 Balbir Singh, after removing rear seat partially. *Charas* was hidden below seat. Minor contradiction that whether there was gap between rear seat and floor is not material. All the official witnesses have stated in unison that *Charas* was recovered from the back seat of car.

17. Mr. Vivek Sharma, Advocate, has also vehemently argued that the Section 50 of the Act has not been complied. PW-10 Balbir Singh has categorically deposed that personal search of accused was carried only after their arrest. Moreover, since *Charas* was recovered from the vehicle, Section 50 of the Act was not required to be complied with. Recovery was made at 4.30 AM from the place which was isolated. Thus, there was no possibility of finding any independent witnesses at 4.30 AM on 16.2.2011.

18. Prosecution has proved its case against the accused beyond doubt.

19. Accordingly, there is no merit in both the appeals and the same are dismissed, so also the pending applications, if any.

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

CWP No.1525 of 2016 alongwith CWP Nos.1503, 1526, 1527, 1528, 1562 and 1563 of 2016
Judgment Reserved on: 17.06.2016
Date of decision: 28.06.2016

1. <u>CWP No.1525 of 2016</u>

Himalayan Wine & Others ….Petitioners
Versus
State of H.P. & Others ….Respondents

2. <u>CWP No.1503 of 2016</u>

M/s. Neelkanth Wine ….Petitioner
Versus
State of H.P. & Others ….Respondents

3. <u>CWP No.1526 of 2016</u>

M/s.Kundlas Wines ….Petitioner
Versus
State of H.P. & Others ….Respondents

4. <u>CWP No.1527 of 2016</u>

Neelkanth Contractors & Builders Pvt.Ltd. ….Petitioner
Versus
State of H.P. & Others ….Respondents

5. <u>CWP No.1528 of 2016</u>

M/s.Aradhana Wines & Others ….Petitioners
Versus
State of H.P. & Others ….Respondents

6. CWP No.1562 of 2016

M/s.G.S. Liquor ....Petitioner

Versus

State of H.P. & Others ....Respondents

7. CWP No.1563 of 2016

M/s.Rana Wines ....Petitioner

Versus

State of H.P. & Others ....Respondents

Constitution of India, 1950- Article 226- Petitioners are engaged in the business of liquor and are holders of L-1 Licence- Government approved Liquor Sourcing Policy and Liquor Sales Policy for 2016-17- aggrieved from the policy, present writ petition has been filed contending that the petitioners had deposited money for renewal of the licence granted to them and had invested huge amount for running their business- Government has created a Company namely H.P. Beverage Corporation Limited and it wants to monopolize the entire business – respondents contended that petitioners did not have any right to carry on the liquor business and the decision was taken in the public interest- held, that State Government had made its intention clear to create company/corporation to replace the old system of L-1 wholesale dealers – State Government is competent to make rules for regulating manufacture, supply, storage or sale of liquor- State has power to control the trade of liquor- therefore, decision of the State Government to create Corporation/company for carrying liquor business cannot be held to be illegal or unjustifiable- there is no fundamental right to trade in intoxicants like liquor- State Government is within its right to establish a company/corporation replacing the old system of issuance of licenses to the wholesalers - decision to create a corporation was a policy decision and Courts should not interfere with the same- mere fact that licence fee has been deposited is not sufficient to prove that licence stood renewed in absence of an order to this effect - there cannot be any legitimate expectation when it was made known that a corporation will be created for carrying out wholesale liquor business- petition dismissed. (Para- 19 to 59)

Cases referred:

Har Shankar and others etc. v. The Deputy Excise and Taxation Commissioner and others etc, AIR 1975 SC 1121

M/s Ugar Sugar Works limited vs. Delhi Administration and others, (2001) 3 SCC 635

Khoday Distilleries Limited and others vs. State of Karnataka and others, (1995) 1 SCC 574

Maharashtra State Board of Secondary and Higher Secondary Education and Another vs. Paritosh Bhupeshkumar Sheth and Others and Alpana V.Mehta vs. Maharashtra State Board of Secondary Education and Another, (1984)4 SCC 27

Parisons Agrotech Private Limited and Another vs. Union of India and Others, (2015)9 SCC 657

Census Commissioner and Others vs. R.Krishnamurthy, (2015)2 SCC 796

State of Kerala and Another vs. B.Six Holiday Resorts Private Limited and Others, (2010)5 SCC 186

Arun Kumar Agrawal vs. Union of India and Others, (2013)7 SCC 1

Delhi Development Authority v. M/s.Anant Raj Agencies Pvt.Ltd., AIR 2016 SCC 1806

Kuldeep Singh vs. Govt.of NCT of Delhi, (2006)5 SCC 702

For the Petitioners:	Mr.B.C. Negi, Mr.Sanjeev Bhushan and Mr.Ramakant Sharma, Senior Advocates with Mr.Arvind Sharma, Mr.Basant Thakur and Mr.Satish Kumar Awasthi, Advocates.
For the Respondents-State:	Mr.Shrawan Dogra, Advocate General with Mr.Anup Rattan, Additional Advocate General and Mr.R.N. Sharma, Advocate.
For Respondent-Himachal Pradesh Beverages Limited:	Mr.Dilip Sharma, Senior Advocate with Mr.Munish Sharma, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

With the consent of learned counsel representing the petitioners in the aforesaid writ petitions, all the cases are being taken together for final adjudication since issues involved in abovementioned petitions are identical. Moreover, in all the petitions similar relief has been claimed by the petitioners.

2. At the time of final hearing of the aforesaid matters, case bearing ***CWP No.1525 of 2016, titled: M/s.Himalayan Wines vs. State of Himachal Pradesh and Others***, has been taken as lead case, since pleadings in that case are complete.

3. Briefly stated facts necessary for the just and proper adjudication of the controversy at hands, as narrated in CWP No.1525 of 2016, are that the petitioners are engaged in the business of Liquor for the last so many years in the State of Himachal Pradesh. It is further averred in the writ petition that all the writ petitioners are holders of L-1 Licence granted to them under the H.P. Liquor Licensing Rules, 1986 *(for short Rules, 1986)* for the sale of liquor including Indian made Foreign liquor in the whole sale trade only. Perusal of the averments contained in the writ petition suggests that the petitioners are aggrieved with the issuance of letter dated 3rd June, 2016 by respondent No.2 to all the Assistant Excise & Taxation Commissioners in the State of Himachal Pradesh, conveying therein the approval of the Government for the "***Liquor Sourcing Policy for 2016-17 and Liquor Sales Policy for 2016-17".*** Accordingly, in the backdrop of issuance of aforesaid communication, petitioners by way of present petition laid challenge to Annexures P-3, P-4 and P-5 annexed with all the writ petitions. By way of Annexures P-3 and P-4, all the concerned person including petitioners as well as authorities envisaged under H.P. Excise Act,2011 *(for short `Excise Act')* have been informed with regard to approval of the Government for Liquor Sourcing Policy, 2016-17 and Liquor Sales Policy, 2016-17 with further information that w.e.f. 8th June, 2016 Corporation constituted in terms of Clause 2.38 of Announcements of Excise Allotments/Tender for the year 2016-17 *(for short `Excise Announcements')* shall commence the business of wholesale and licenses of existing wholesale dealers would be discontinued w.e.f. 15th June, 2016.

4. By way of Annexure P-5, communication dated 4.6.2016 all the persons, engaged in the liquor business/ trade on the strength of L-1 License, have been directed to exhaust the stock, if any, on or before 14.6.2016. Petitioners contended that they, being the license holders of wholesale vend of Indian made foreign liquor trade only *(for short `L-1')*, were issued license from time to time, copies whereof are also placed on record as Annexure P-1. Petitioners by way of Annexure P-1 have placed on record documents/receipts suggesting that license for carrying wholesale vends of L-1 have been renewed by the respondents on year to year basis and lastly petitioners have been granted license in March, 2015 up to 31st March, 2016 after taking prescribed license fee. Petitioners also averred that since license was to expire on 31st March, 2016, they made an application before the competent authority for renewal in accordance with the Himachal Pradesh Liquor Licensing Rules, 1986 *(for short `Rules, 1986')* and their applications were accepted by the respondents for renewal by receiving the license fee amounting to Rs.6 lacs as renewal fee for the year 2016-17.

5. Petitioners have also placed on record receipt/copy of challan on record to substantiate their claim with regard to deposit of license fee for renewal of license. It is also contended on behalf of the petitioners that after renewal of license they are continuing as L-1 licensee and have been selling Indian made foreign liquor to various retail sale licenses as per the provision of Act, Rules and Announcements of Excise Allotment/Tenders. Petitioners have also contended that after renewal of license for the year 2016-17, they mobilized all the financial resources for entire year and invested huge amount with a view to run the business as wholesalers in the capacity of L-1 till 31st March, 2017.

6. All the petitioners have averred that to their utter chagrin and surprise, respondents issued letter dated 3.6.2016 (Annexure P-3), conveying therein approval of the Government for Liquor Sourcing Policy, 2016-17 and Liquor Sales Policy, 2016-17**.** It is stated by the petitioners that the respondents have formulated a Company/Corporation; namely; H.P. Beverage Corporation Limited *(for short `HPBL')* appointing respondent No.2 as its Managing Director, but factum with regard to start of operation/business by the aforesaid newly constituted Company came to their notice when a meeting was convened by Assistant Excise & Taxation Commissioner, Solan on 4.6.2016 (Annexure P-4). According to the petitioners, unilateral action has been taken by respondents that too in complete violation of Act and Rules occupying the field and moreover, decision, as referred above, is contrary to the Excise Announcements for the year 2016-17. All the petitioners have stated in their petitions that the respondents are estopped by their own act and conduct to initiate any action in terms of letter dated 3.6.2016 (Annexure P-3) especially when renewal of licence has been made in their favour after accepting renewal fee for the entire year, more particularly, when renewal is in terms of Rule 12 of the Rules, 1986. Petitioners also submitted that as per Section 81 of the Excise Act, it is/was incumbent upon the respondent No.2, the Excise & Taxation Commissioner (who also has been designated as Financial Commissioner (Excise) under the H.P. Power and Appeal Orders, issued by the Government to make Rules by notification for regulating the manufacture, supply, storage or sale of any liquor and imposing any restrictions and the conditions for the conduct of business of liquor by newly constituted HPBL, hence any action taken contrary to the Rules and Regulations deserves to be held invalid being contrary to the provisions of the Act. It is also averred in the petitions that great prejudice would be caused to the petitioners in case respondents are allowed to act/proceed in terms of Annexure P-3. It is also submitted that once respondents have renewed the licenses by taking license fee in terms of Rules, petitioners being licensees cannot be stopped from carrying out their business till 31st March, 2017 since they have paid license fee for the whole year.

7. It is further submitted that new mechanism has been devolved by the respondents to monopolize the required trade by eliminating the petitioners who at present are the major stake-holders in the liquor license in the State of Himachal Pradesh. Petitioners averred that there is no power with Excise Department to add or cancel any classification in the licensee in the Excise Policy without amending the Rules. It is averred by the petitioners that once they were acting as L-1 licencee, any action of respondents to provide for another license to warehouse certainly demonstrates bad and malafide intention of the respondents. According to the petitioners, no object is sought to be achieved by formulation of any Corporation/Company rather respondents solely with a view to harass them have issued Annexure P-3 asking them to exhaust their stock on or before 14.6.2016 and in case stock remains, unsold/unexhausted, Licensee will have to return the same back to the manufacturer, which is totally impracticable.

8. In the aforesaid background, the petitioners averred that respondents should have allowed them to continue for the entire financial year especially when renewal fee of whole of the year has been accepted by the respondents.

9. A detailed reply has been filed by respondents No. 1 to 12 on the affidavit of Additional Chief Secretary to the Government of Himachal Pradesh, wherein it has been *interalia* stated that petitioners did not have any fundamental right to carry on any trade in liquor and the State Government enjoys exclusive privilege in respect of dealings in liquor trade. Respondents have stated that under Section 5 of the Excise Act, State Government is empowered to appoint an Excise & Taxation Commissioner, who shall exercise all the powers of Financial Commissioner and subject to the control of State Government, the general superintendence and administration of all matters of excise shall vest in him. Accordingly, the State Government vide letter No.EXN.F(1)/2016 approved that, "***existing system of whole sale licensing system of liquor as it exists during the year 2015-16 be continued for one month for the Financial Year 2016-17 commencing on 01.04.2016 till the proposed company/Corporation become***

operational for the purpose. The license fee be in proportionate with the fee of Financial Year 2016-17 for the period of 1 month."

10. It is also averred in the reply filed by the respondents that on 2.5.2016, the State Government approved continuation of the existing system till 31.5.2016, which was subsequently extended till 14.6.2016. As such, the petitioners have no right to continue the business beyond that date since they do not have any vested right in any aspect of trade in liquor and to continue to do so, contrary to the directions of the State Government, which is exclusive domain of the respondent State, especially in trade of liquor. Respondents solely with a view to demonstrate that no sudden decision has been taken by them with regard to formation of proposed Company/Corporation, furnished chronological detail indicating therein the steps taken by it to implement the decision regarding switch-over from the existing system of wholesale trade in liquor by L-1 and L-13 licensees to the approved system of wholesale trade in liquor by a new Company which is reproduced hereinbelow:-

"Date	***Steps taken***
11.03.2016	*Council of Minister Meeting approved the Excise Policy 2016-17 in the Cabinet Meeting held on 11.03.2016.*
15.03.2016	*Approval of the Government was conveyed by the Additional Chief Secretary (Excise and Taxation) to the Excise and Taxation Commissioner regarding establishing a new Company to exclusively handle all wholesale liquor trade throughout the state.*
26.03.2016	*Approval of the Government was conveyed by the Additional Chief Secretary (Excise and Taxation) to the Excise and Taxation Commissioner for the Memorandum of Association and Articles of Association of the proposed company.*
01.04.2016	*Approval of the Government was conveyed by the Additional Chief Secretary (Excise and Taxation) to the Excise and Taxation Commissioner regarding continuation of existing system for one month till the proposed Company becomes operations for the purpose and to charge the license fee on proportionate basis.*
20.04.2016	*Certificate of incorporation was issued by the Ministry of Corporate Affairs, Government of India.*
26.04.2016	*In its first meeting of the Board of Directors, Board of Directors of HPBL considered the issues related to appointment of statutory functionaries like Chairman, Managing Director, Company Secretary, Auditors in additional to other legal requirements like registered office of the company, adoption of common seal, application for PAN, TAN, TIN, Bank Account, Logo and financial year of the company. Board of Directors also discussed proposed organizational structure, hiring warehouses, liquor sourcing and liquor sales arrangements.*
02.05.2016	*Approval of the Government was conveyed by the Additional Chief Secretary (Excise and Taxation) to the Excise and Taxation Commissioner regarding continuation of existing system till 31.05.2016.* *In its second meeting of Board of Directors, Board of*

	Directors of HPBL further deliberated on the issues related to organization structure, liquor sourcing and liquor sales arrangements and hiring of warehouses in addition to confirming the minutes of first meeting.
03.05.2016	*Field offices were informed about the decision for extension of existing system for a month by the Excise and Taxation Commissioner.*
06.05.2016	*PAN Number of HPBL was issued by the Income Tax Department.*
13.05.2016	*TAN number was issued by the Income Tax Department.*
20.05.2016	*TIN number for CST was issued by the Excise and Taxation Department to the HPBL.*
23.05.2016	*TIN number for VAT was issued by the Excise and Taxation Department to the HPBL.*
24.05.2016	*In its third meeting of Board of Directors, Board of Directors of HPBL again considered the organization structure, liquor sourcing policy and liquor sales policy and approved with some modification. Discussions regarding hiring of warehouses and other operational aspects were also discussed in the meeting.*
01.06.2016	*Approval of Government for the Liquor Sourcing Policy for 2016-17 and Liquor Sales Policy 2016-17 were conveyed by the Additional Chief Secretary (Excise and Taxation) to the Excise and Taxation Commissioner.* *Approval of Government was conveyed regarding continuation of existing system only till 14th June and starting the wholesale business of the HPBL by 8th June.*
03.06.2016	*Field offices were informed about the decision for extension of existing system till 14th June by the Excise and Taxation Commissioner.*
08.06.2016	*In its fourth meeting of Board of Directors, Board of Directors of HPBL considered various operational issues like hiring of warehouses, providing manpower for IT, printing of stationary and posting of required manpower in the HPBL immediately.*
09.06.2016	*Approval of the Government was conveyed by the Additional Chief Secretary (Excise and Taxation) to the Excise and Taxation Commissioner regarding creating and filling of the posts in the HPBL.*
16.06.2016	*New required licenses have been notified with amendments in the H.P. Liquor License Rules, 1986.* *Fifth meeting of the Board of Directors of HPBL has been scheduled.*

Perusal of the above events would show that government has acted consciously and vigorously to implement its announcement of excise policy made under condition 2.38. Relevant original record will be produced for kind perusal of this Hon'ble Court."

11. Respondents also stated in their reply that licenses for the wholesale vend of foreign liquor (L-1) and also wholesale vend for Country Liquor (L-13) are issued under the Excise

Act and in terms of Section 81(a) of the said Act the Financial Commissioner, by issuing notification, is competent to make rules ***regulating the manufacture, supply, storage or sale of any liquor including the character, erection, alternation, repair, inspection, supervision, management and control of any place for the manufacture, supply, storage or sale of such article and the fittings, implements, apparatus and registers to be maintained therein***. In the year 2016-17 also relevant conditions relating to licenses for supply, storage or sale of the Country Liquor, Indian Made Foreign Spirit, Beer, Wine and Ready to Drink Liquor etc. have been framed by the Financial Commissioner which stands published vide notice No.7-635/2015-EXN-6194-6219, dated 19.3.2016. It is further averred by the respondents that detailed terms and condition relating to Allotment of Excise Licence for the year 2016-17 were issued in terms of Excise Announcements for the year 2016-17, wherein as per clause 2.38 it was clearly mentioned/declared that:

> ***"A Company will be set up under the Himachal Pradesh Excise and Taxation Department which shall be exclusively responsible for the procurement of all kinds of liquor i.e. Country Liquor, IMFS, Beer, Wine and RTD etc. In the State and shall further supply liquor so procured as wholesale-licensee to all the retail vends i.e. L-2, L-14 & L-14A etc. during the year 2016-17. After the Company starts its operation, the retail licensees shall lift liquor i.e. Country Liquor, IMFS, Beer, Wine and RTD etc. only from the Company's licensed and prescribed premises."***

12. Respondents-State in their reply have admitted that the petitioners voluntarily deposited an amount of Rs.6 lacs for renewal of their licenses but in view of Condition No.2.38 of the Excise Announcements for the year 2016-17 authority concerned, did not renew the licenses of the petitioners but only permitted them to continue till necessary arrangements as per Condition No.2.38 of Chapter-II of the Excise Announcements are made. Respondents have also mentioned that as per Rules, 1986, the licencee in addition to the provisions of the Excise Act and Rules framed their under from time to time are also under obligation to comply with the instructions/directions/orders/notifications issued by the Excise & Taxation Commissioner from time to time. As per respondents all the licensees are bound to comply with all directions and orders of the Excise and Taxation Commissioner & Taxation Commissioner-cum-Financial Commissioner(Excise), Himachal Pradesh and all other Excise Officers, which may be issued from time to time by them strictly in terms of specific Condition No.1.4 contained in Excise Announcements for the year 2016-17. Respondents have also stated that licensees were well aware of the Excise Announcements made for year 2016-17 and as such they have no ground to raise any grievance as being put forth in the present writ petition. It is also stated in the reply filed by the respondents that the petitioners without availing alternative remedy available to them under Section 68 of the Excise Act, wherein a provision of appeal has been provided, have approached this Court and as such petitions deserve to be quashed and set aside.

13. After perusing averments contained in the writ petition as well as reply filed by the respondents, it emerges that the petitioners are aggrieved with the action of the respondents, whereby a conscious decision has been taken by the respondent-State to replace the existing system of granting wholesale licenses for trading (L-1) Liquor by creating Company/Corporation in terms of Excise Announcements made for year 2016-17. Since respondents vide Annexure P-3 conveyed the decision of the Government for granting approval to Liquor Sourcing Policy and Liquor Sales Policy for 2016-17 and start the business by newly constituted `HPBL' w.e.f. 18.6.2016, petitioners being aggrieved have approached this Court. Since the decision to replace old license system by constituting Company/Corporation has been taken after 31.3.2016, especially when the petitioners have deposited the amount of Rs.6 lacs for renewal of their licenses for the period of 2016-17, petitioners being materially affected with the decision of the respondents to discontinue their licenses after 14.6.2016, have filed petitions before this Court.

14. Shri B.C. Negi and Shri Sanjeev Bhushan, learned Senior Counsel, appearing for the petitioners, vehemently argued that action of respondents in issuing Annexures P-3, P-4 and

P-5 is totally unsustainable in the facts and circumstances of the case and as such same deserves to be quashed and set aside. The aforesaid learned Senior Counsel while advancing their arguments, reiterated the averments contained in the writ petitions, which have been taken note of above and as such same are not reproduced here for the sake of brevity. However, few of the relevant submissions made on behalf of the petitioners by aforesaid Senior Counsel are noticed here.

15. Learned Senior Counsel representing the petitioners stated that action of the respondents in creating Company/Corporation in terms of clause 2.38 of the Excise Announcements for the year 2016-17 cannot be held justifiable because same has been taken after commencement of the new financial year i.e. 2016-17. They also contended that all the petitioners have deposited an amount of Rs.6 lacs on account of renewal fee, which has been duly accepted by the respondents, meaning thereby that their licenses stand renewed till 2016-17 and as such any decision of respondents to start the operation of Company/Corporation body created in terms of clause 2.38 of the Excise Announcements for 2016-17 itself speaks of malafide intention of the respondents. It is forcefully contended by the learned Senior Counsel appearing on behalf of the petitioners that Corporation in terms of clause 2.38 has only been created on papers and there is no infrastructure available to provide necessary support for effective working of the newly created Corporation. It is also contended by the learned Senior Counsel that without making any amendments in the Rules, 1986 (L-1) any action taken by the respondents to start functioning of the Corporation in terms of clause 2.38 cannot be held justifiable, rather same would create confusion in the mind of the people, who are involved in the business of liquor. During arguments having been made by the aforesaid learned Senior Counsel, attention of this Court was invited to the various provisions of the Excise Announcements for the year 2016-17, Liquor Sourcing Policy for the year 2016-17 and Liquor Sales Policy for the year 2016-17, to demonstrate that attempt is being made by the respondents to create further category of licenses for private operators solely with a view to eliminate the existing L-1 licenses (petitioners) without there being any clear objective. Learned Counsel vehemently argued that decision, if any, to accept or suspend the license issued in terms of Section 27 and 28 of the Excise Act can only be taken in terms of Section 29 of the Excise Act, wherein cancellation or suspension can only be done in exigencies as referred in clause 8 (a) to (f) of Section 29 of the Excise Act. Though under Section 32(1)(a) Government has power to withdraw license permit or passes after expiry of 15 days notice in writing, but in the present case no notice, whatsoever, has been issued to the present petitioners and as such any action to discontinue the license of the petitioners after 14.6.2016 is in complete violation of the Rules as well as principle of natural justice and as such the same cannot be allowed to sustain. Both the learned Senior Counsel forcefully contended that once license fee was accepted by the respondent beyond 31.3.2016 in terms of Rule 12 of the Rules, 1986, respondent-State has no authority/power to issue order of discontinuation of the license issued in favour of the petitioners w.e.f. 14.6.2016. It is contended on behalf of the petitioners that being a welfare State it is/was expected of the respondents State to protect the interest of petitioners, who have been contributing in the liquor trade for years together as L-1 licencee. It is also contended that once respondents accepted the license fee for whole year till March, 2017, petitioners are/were entitled to continue their business as L-1 license till March, 2017.

16. Shri Shrawan Dogra, learned Advocate General, representing the respondents, supported the decision of the respondents-State to start the wholesale liquor business by the Company/Corporation in terms of clause 2.38 of Chapter-II of Excise Announcements made for the year 2016-17. Mr.Dogra strenuously argued that Section 5 of the Excise Act empowers the respondents to appoint an Excise and Taxation Commissioner, who shall exercise the powers of Financial Commissioner and subject to control of State Government, general superintendence and administration of all matters shall vest in him. Accordingly, State Government gave its approval for setting up a Company/Corporation as indicated in the Excise Announcements for the year 2016-17.

17. Mr.Dogra, at the time of advancing his arguments, referred to documents annexed with the petition as well as reply to demonstrate that the petitioners were fully aware of the conscious decision taken by the Government to set up a Corporation/Company for carrying out wholesale liquor business by the Corporation/Company to be constituted under clause 2.38 of Excise Announcements made for the year 2016-17 and as such they cannot be allowed to rake up this issue at this stage by filing present petitions. It is contended on behalf of the respondents-State that decision taken by Government to set up a Corporation/Private Company for carrying out wholesale business is strictly in terms of implementation of Excise Announcements made in the Excise Policy for the year 2016-17, wherein it is specifically provided in clause 2.38 Chapter-II, that the Company would be set up under the Himachal Pradesh Excise and Taxation Department for procurement of all kinds of liquor i.e. Country Liquor, IMFS, Beer, Wine and RTD etc in the State. He also contended that it has been made clear in the aforesaid provisions that once Company starts operation, the retail licensees shall lift liquor only from the Company's licensed and prescribed premises. He also refuted the submission on behalf of the petitioners that no amendments, whatsoever, have been carried out in Rules, 1986 in this regard. Therefore, he made available copy of the Notification regarding amendment made in H.P. Liquor Licence Rules, 1986, perusal whereof suggests that necessary amendments have been carried out by the respondent-State for giving effect to the clause 2.38, as referred hereinabove. At this stage, he forcefully refuted the arguments advanced on behalf of the petitioners that since license fee in the shape of amount of Rs. 6 lacs has been received by the respondents-State, petitioners are entitled to continue their business on the strength of license (L-1) till March, 2017. In this regard, Mr.Dogra, strenuously argued that since respondents had already taken conscious decision to set up a Corporation/Company in terms of clause 2.38, no license, whatsoever, for whole of the year was issued in favour of any person for carrying liquor business, rather license/permit, if any, was issued for short term, but definitely not for a period beyond 31.5.2016.

18. Mr.Dogra forcefully contended that bare perusal of the Policies framed by the respondents-State for implementation of Excise Announcements made for the year 2016-17 suggests that decision has been taken by the Government in public interest and as such allegation, if any, of malafide as alleged by the petitioners is totally baseless and deserves outright rejection. Mr.Dogra also contended that petitioners have no vested right, whatsoever, to claim license to carry out the liquor trade, merely on the basis of deposit of renewal fee.

19. Having heard the learned counsel for the parties and gone through the record, this Court, after careful perusal of the pleadings available on the record as well as arguments having been made by the learned counsel representing the parties to lis, is of the view that following two questions are required to be answered for just and fair decision in the matter:-

(a) ***"Whether decision/approval of the respondents for creating Company/Corporation in terms of clause 2.38 of the Excise Announcements for the year 2016-17 is in accordance with law",*** and ***"whether respondents are empowered to eliminate individual license holder for carrying liquor business as in the present case or not?***

(b) ***"Whether any vested right has accrued in favour of the present petitioners after depositing of Rs.6 lacs for renewal of their licenses or whether after receipt of amount licensees/petitioners are entitled to continue their business for whole year i.e. 2016-17 or not?***

20. Careful perusal of clause 2.38 to Chapter-II of Excise Announcements for the year 2016-17, as reproduced in para supra, clearly demonstrates that at the time of Announcement of Excise Policy for the year 2016-17, respondents-State made its intention clear that it intends to create Company/Corporation, which will replace the old system of L-1 wholesale dealer. Rather, later part of clause 2.38 makes it ample clear that once the Company starts its operation, retail licenses shall lift liquor i.e. Country liquor, IMFS, Beer, Wine and RTD etc. only from the Company's licensed and prescribed premises.

21. It is undisputed that vide Section 5 of the Excise Act, State Government is competent/empowered to appoint Excise & Taxation Commissioner who shall exercise powers of Financial Commissioner, subject to control of the State Government. Section 81 of Excise Act provides ample powers to respondents to make Rules for regulating the manufacture, supply, storage or sale any liquor including the character, erection, alternation, repair, inspection, supervision, management and control of any place for the manufacture, supply, storage or sale of such article and the fittings, implements, apparatus and registers to be maintain therein.

22. Section 81(a) of the Act clearly provides that the Excise & Taxation Commissioner (who also has been designated as Financial Commissioner (Excise) under the H.P. Power and Appeal Orders, issued by the Government is empowered to make Rules by notification for regulating the manufacture, supply, storage or sale of any liquor and imposing any restrictions.

23. In this regard reference is made to Section 81(a) of the Act, which is reproduced hereinbelow:

> ***"81(a) Regulating the manufacture, supply, storage or sale of any liquor including the character, erection, alternation, repair, inspection, supervision, management and control of any place for the manufacture, supply, storage or sale of such article and the fittings, implements, apparatus and registers to be maintained therein."***

It is crystal clear from the reading of aforesaid provisions that State Government alone is competent to regulate the manufacturer, supply, storage or sale of any liquor by making requisite terms and conditions for the same.

24. Facts narrated above as well as provisions of law mentioned hereinabove, leaves no doubt that respondents-State has exclusive power to control the trade of liquor, as such, decision of respondents-State to create Corporation/ Company for carrying out liquor business cannot be held illegal and unjustifiable. Admittedly, as has been held in catena of cases, it is the exclusive domain of the Government to control the trade of liquor and no individual can claim any right to trade in liquor.

25. Moreover, issue with regard to competence of Government in creating another category of licensee by creating Company/Corporation requires no elaborate discussion by this Court, as issue is no longer *res integra.*

26. In ***Har Shankar and others etc. v. The Deputy Excise and Taxation Commissioner and others etc, AIR 1975 SC 1121,*** it was observed by the Hon'ble Apex Court:-

> *"53.In our opinion, the true position governing dealings in intoxicants is as stated and reflected in the Constitution bench decisions of this Court in* ***Balsara's case 1951 SCR 682 = (AIR 1951 SC 318); Cooverjee's case 1954 SCR 873 = (AIR 1954 SC 220); Kidwai's case 1957 SCR 295 = (AIR 1957 SC 414); Nagendra Nath's case 1958 SCR 1240 = (AIR 1958 SC 398); Amar Chakraborty's case (1973) 1SCR 533 = (AIR 1972 SC 1863) and the RM DC case 1957 SCR 874 = (AIR 1957 SC 699) as interpreted in Harinarayan Jaiswal's case (1972) 3 SCR 784 = (AIR 1972 SC 1816) and Nashirwar's case (AIR 1975 SC 360).*** *There is no fundamental right to do trade or business in intoxicants. The State, under its regulatory powers, has the right to prohibit absolutely every form of activity in relation to intoxicants its manufacture, storage, export, import, sale and possession. In all their manifestations, these rights are vested in the state and indeed without such vesting these can be no effective regulation of various forms* of activities in relation to intoxicants...."

27. The question before the three Judges Bench of the Hon'ble Apex Court in ***M/s Ugar Sugar Works limited vs. Delhi Administration and others, (2001) 3 SCC 635*** arose regarding the validity of notification issued laying down terms and conditions for registration of

different brands of Indian Made Foreign Liquor (IMFL) for supply within the territory of Delhi during 2000-01 and laying down Minimum Sales Figures (MSF) as a criteria of eligibility for grant of license in Form L-1, whether it was violative of Articles 14, 16 and 19(1)(g) of the Constitution of India. Considering the law on the issue, it was again expressed that there is no fundamental right to trade in intoxicants like liquor and the plea of the petitioner therein to the contrary was emphatically repelled with the following observations:-

> ***"The contention that a citizen of this country has a fundamental right to trade in intoxicating liquors refuses to die in spite of the recent Constitution Bench decision in Khoday Distilleries, [1995] 1 SCC 574. It is raised before us again. In Khoday Distilleries, this Court reviewed the entire case-law on the subject and concluded that a citizen has no fundamental right to trade or business in intoxicating liquors and that trade or business in such liquor can be completely prohibited. It held that because of its vicious and pernicious nature, dealing in intoxicating liquors is considered to be res extra commercium (outside commerce).Article 47 of the Constitution, it pointed out, requires the State to endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and all drugs which are injurious to health. For the same reason, the Bench held, the State can treat a monopoly either in itself or in an agency created by it for the manufacture, possession, sale and distribution of liquor as a beverage. The holding is emphatic and unambiguous. Yet an argument is sought to be built upon certain words occurring in clauses (e) and (f) of the summary contained in para 60 of the decision. In these clauses, it was observed that creation of a monopoly in the State to deal in intoxicating liquors and the power to impose restrictions, limitations and even prohibition thereon can be imposed both under clause (6) of Article 19 or even otherwise. Seizing upon these observations, Shri Ganguly argued that this decision implicitly recognises that business in liquor is a fundamental right under Article 19(l)(g). If it were not so, asked the learned counsel, reference to Article 19(6) has no meaning. We do not think that any such argument can be built upon the said observations. In clause (e), the Bench held, a monopoly in the State or its agency can be created "under Article 19(6) or even otherwise". Similarly, in clause (f), while speaking of imposition of restrictions and limitations on this business, it held that they can be imposed "both under Article 19(6) or otherwise". The said words cannot be read as militating against the express propositions enunciated in clauses (b), (c), (d), (e) and (f) of the said summary. The said decision, as a matter of fact, emphatically reiterates the holding in Har Shanker, [1975] 1 SCC 737, that a citizen has no fundamental right to trade in intoxicating liquors. In this view of the matter, any argument based upon Article 19(l)(g) is out of place".***

It was concluded thus:-

> ***"15. In view of this settled position of law, any argument impugning the policy decision of the State Government, as reflected in the impugned notification, based upon Article 19(l)(g) is totally out of place and merits outright rejection and we have no hesitation in doing so most emphatically."***

28. Subsequently, another Constitution Bench of the Hon'ble Supreme Court in ***Khoday Distilleries Limited and others vs. State of Karnataka and others, (1995) 1 SCC 574*** delving into the issue, whether the citizen has a fundamental right to carry on trade in liquor, upon referring to a large number of decisions, answered the issue in the negative and very succinctly summarized the legal position as under:-

"60.We may now summarize the law on the subject as culled from the aforesaid decisions.

(a) The rights protected by Article 19(1) are not absolute but qualified. The qualifications are stated in clauses (2) to (6) of Article 19. The fundamental rights guaranteed in Article 19(1)(a) to (g) are, therefore, to be read along with the said qualifications. Even the rights guaranteed under the Constitutions of the other civilized countries are not absolute but are read subject to the implied limitations on them. Those implied limitations are made explicit by clauses (2) to (6) of Article 19 of our Constitution.

(b) The right to practise any profession or to carry on any occupation, trade or business does not extend to practising a profession or carrying on an occupation, trade or business which is inherently vicious and pernicious, and is condemned by all civilised societies. It does not entitle citizens to carry on trade or business in activities which are immoral and criminal and in articles or goods which are obnoxious and injurious to health, safety and welfare of the general public, i.e., res extra commercium, (outside commerce). There cannot be business in crime.

(c) Potable liquor as a beverage is an intoxicating and depressant drink which is dangerous and injurious to health and is, therefore, an article which is res extra commerce being inherently harmful. A citizen has, therefore, no fundamental right to do trade or business in liquor. Hence the trade or business in liquor can be completely prohibited.

(d) Article 47 of the Constitution considers intoxicating drinks and drugs as injurious to health and impeding the raising of level of nutrition and the standard of living of the people and improvement of the public health. It, therefore, ordains the State to bring about prohibition of the consumption of intoxicating drinks which obviously include liquor, except for medicinal purposes. Article 47 is one of the directive principles which is fundamental in the governance of the country. The State has, therefore, the power to completely prohibit the manufacture, sale, possession, distribution and consumption of potable liquor as a beverage, both because it is inherently a dangerous article of consumption and also because of the directive principle contained in Article 47, except when it is used and consumed for medicinal purposes.

(e) For the same reason, the State can create a monopoly either in itself or in the agency created by it for the manufacture, possession, sale and distribution of the liquor as a beverage and also sell the licences to the citizens for the said purpose by charging fees. This can be done under Article 19(6) or even otherwise.

(f) For the same reason, again, the State can impose limitations and restrictions on the trade or business in potable liquor as a beverage which restrictions are in nature different from those imposed on the trade or business in legitimate activities and goods and articles which are res commercium. The restrictions and limitations on the trade or business in potable liquor can again be both. under Article 19(6) or otherwise. The restrictions and limitations can extend to the State carrying on the trade or business itself to the exclusion of and elimination of others and/or to preserving to itself the right to sell licences to do trade or business in the same, to others.

(g) When the State permits trade or business in the potable liquor with or without limitation, the citizen has the right to carry on trade or business subject to the limitations, if any, and the State cannot make

discrimination between the citizens who are qualified to carry on the trade or business.

(h) The State can adopt any mode of selling the licences for trade or business with a view to maximise its revenue so long as the method adopted is not discriminatory.

(i) The State can carry on trade or business in potable liquor notwithstanding that it is an intoxicating drink and Article 47 enjoins it to prohibit its consumption. When the State carries on such business, it does so to restrict and regulate production, supply and consumption of liquor which is also an aspect of reasonable restriction in the interest of general public. The State cannot on that account be said to be carrying on an illegitimate business.

(j) The mere fact that the State levies taxes or fees on the production, sale and income derived from potable liquor whether the production, sale or income is legitimate or illegitimate, does not make the State a party to the said activities. The power of the State to raise revenue by levying taxes and fees should not be confused with the power of the State to prohibit or regulate the trade or business in question. The State exercises its two different powers on such occasions. Hence the mere fact that the State levies taxes and fees on trade or business in liquor or income derived from it, does not make the right to carry on trade or business in liquor a fundamental right, or even a legal right when such trade or business is completely prohibited.

(k) The State cannot prohibit trade or business in medicinal and toilet preparations containing liquor or alcohol. The State can, however, under Article 19(6) place reasonable restrictions on the right to trade or business in the same in the interests of general public.

(l) Likewise, the State cannot prohibit trade or business in industrial alcohol which is not used as a beverage but used legitimately for industrial purposes. The State, however, can place reasonable restrictions on the said trade or business in the interests of the general public under Article 19(6) of the Constitution.

(m) The restrictions placed on the trade or business in industrial alcohol or in medicinal and toilet preparations containing liquor or alcohol may also be for the purposes of preventing their abuse or diversion for use as or in beverage."

29. In view of the discussion made hereinabove as well as law laid down by Hon'ble Apex Court in the judgments referred above, this Court has no hesitation to conclude that State Government is well within its rights to create Company/Corporation replacing the old system of issuance of licenses to the wholesalers as L-1 and as such no fault can be found with the same. Law laid down by the Hon'ble Apex Court makes it clear that no individual can claim to carry out liquor business as a fundamental right and it is the exclusive domain of the State Government to regulate the business of liquor trade by formulating/announcing policies from time to time.

30. Apart from the legal position, as has been discussed above, if we view this case from another angle, it can be safely concluded that respondents-State, by taking policy decision, has decided to set up Corporation/Company in terms of clause 2.38 of Chapter-II of Excise Announcements for the year 2016-17. Needless to say that while making aforesaid Announcements Government/ Authority declares its Policy with regard to dealing with the particular subject and it has been repeatedly held by the Hon'ble Apex Court that Courts should desist from making interference in Policy decisions taken by the Government.

31. In this regard reliance is placed upon ***Maharashtra State Board of Secondary and Higher Secondary Education and Another vs. Paritosh Bhupeshkumar Sheth and Others and Alpana V.Mehta vs. Maharashtra State Board of Secondary Education and Another, (1984)4 SCC 27,*** wherein the Hon'ble Supreme Court held:

> ***"16. In our opinion, the aforesaid approach made by the High Court is wholly incorrect and fallacious. The Court cannot sit in judgment over the wisdom of the policy evolved by the Legislature and the subordinate regulation-making body. It may be a wise policy which will fully effectuate the purpose of the enactment or it may be lacking in effectiveness and hence calling for revision and improvement. But any drawbacks in the policy incorporated in a rule or regulation will not render it ultra vires and the Court cannot strike it down on the ground that, in its opinion, it is not a wise or prudent policy, but is even a foolish one, and that it will not really serve to effectuate the purposes of the Act. The Legislature and its delegate are the sole repositories of the power to decide what policy should be pursued in relation to matters covered by the Act and there is no scope for interference by the Court unless the particular provision impugned before it can be said to suffer from any legal infirmity, in the sense of its being wholly beyond the scope of the regulation-making power or its being inconsistent with any of the provisions of the parent enactment or in violation of any of the limitations imposed by the Constitution. None of these vitiating factors are shown to exist in the present case and hence there was no scope at all for the High Court to invalidate the provision contained in clause (3) of Regulation 104 as ultra vires on the grounds of its being in excess of the regulation-making power conferred on the Board. Equally untenable, in our opinion, is the next and last ground by the High Court for striking down clause (3) of Regulation 104 as unreasonable, namely, that it is in the nature of a bye-law and is ultra vires on the ground of its being an unreasonable provision. It is clear from the scheme of the Act and more particularly, Sections 18, 19 and 34 that the Legislature has laid down in broad terms its policy to provide for the establishment of a State Board and Divisional Boards to regulate matters pertaining to secondary and higher secondary education in the State and it has authorised the State Government in the first instance and subsequently the Board to enunciate the details for carrying into effect the purposes of the Act by framing regulations. It is a common legislative practice that the Legislature may choose to lay down only the general policy and leave to its delegate to make detailed provisions for carrying into effect the said policy and effectuate the purposes of the Statute by framing rules/regulations which are in the nature of subordinate legislation. Section 3(39) of the Bombay General Clauses Act, 1904, which defines the expression 'rule' states: Rule shall mean a rule made in exercise of the power under any enactment and shall include any regulation made under a rule or under any enactment." It is important to notice that a distinct power of making bye-laws has been conferred by the Act on the State Board under Section 38. The Legislature has thus maintained in the Statute in question a clear distinction between 'bye-laws' and 'regulations'. The bye-laws to be framed under Section 38 are to relate only to procedural matters concerning the holding of meetings of State Board, Divisional Boards and the Committee, the quorum required, etc. More important matters affecting the rights of parties and laying down the manner in which the provisions of the Act are to be carried into effect have been reserved to be provided for by regulations made under Section 36. The Legislature, while enacting Sections 36 and 38, must be***

assumed to have been fully aware of the niceties of the legal position governing the distinction between rules/regulations properly so called and bye-laws. When the statute contains a clear indication that the distinct regulation-making power conferred under Section 36 was not intended as a power merely to frame bye-laws, it is not open to the Court to ignore the same and treat the regulations made under Section 36 as mere bye-laws in order to bring them within the scope of justiciability by applying the test of reasonableness.

21. The legal position is now well-established that even a bye-law cannot be struck down by the Court on the ground of unreasonableness merely because the Court thinks that it goes further than "is necessary" or that it does not incorporate certain provisions which, in the opinion of the court, would have been fair and wholesome. The Court cannot say that a bye-law is unreasonable merely because the judges do not approve of it. Unless it can be said that a bye law is manifestly unjust, capricious, inequitable, or partial in its operation, it cannot be invalidated by the Court on the ground of unreasonableness. The responsible representative body entrusted with the power to make by laws must ordinarily be presumed to know what is necessary, reasonable, just and fair. In this connection we may usefully extract the following off-quoted observations of Lord Russell of Killowen in Kruse v. Johnson, (1898) 2 QB 91, 98, 99 (quoted in Trustees of the Port of Madras v. Adminchand Pyarelal, (1976)! SCR 721, 733) (SCC p.178, para 23):

> ***(1) "When the Court is called upon to consider the byelaws of public representative bodies clothed with the ample authority which I have described, accompanied by the checks and safeguards which I have mentioned, I think the consideration of such bye-laws ought to be approached from a different standpoint. They ought to be supported if possible. They ought to be, as has been said, 'benevolently interpreted' and credit ought to be given to those who have to administer them that they will be reasonably administered."***
>
> ***"The learned Chief Justice said further that there may be cases in which it would be the duty of the court to condemn by-laws made under such authority as these were made (by a county council) as invalid because unreasonable. But unreasonable in what sense? If for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the court might well say, 'Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires.' But it is in this and this sense only, as I conceive, that the question of reasonableness or unreasonableness can properly be regarded. A bye-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient or because it is not accompanied by an exception which some judges may think ought to be there'.***
>
> ***" We may also refer with advantage to the well-known decision of the Privy Council in Slattery v. Naylor, (1988) 13 AC 446, where it has been laid down that when considering whether a bye-law is reasonable or not, the Court would need a strong case to be made against it and would decline to determine whether it would have***

been wiser or more prudent to make the bye-law less absolute or will it hold the bye-law to be unreasonable because considerations which the court would itself have regarded in framing such a bye-law have been over looked or reflected by its framers. The principles laid down as aforesaid in Kruse v. Johnson, (1898) 2 QB 91, 98, 99 and Stattery v. Naylor, (1988) 13 AC 446 have been cited with approval and applied by this Court in Trustees of the Port of Madras v. Aminchand Pyarelal & Ors.,(1976) 1 SCR 721, 733."

32. In ***Parisons Agrotech Private Limited and Another vs. Union of India and Others, (2015)9 SCC 657,*** the Hon'ble Supreme Court held:

"14. No doubt, the writ court has adequate power of judicial review in respect of such decisions. However, once it is found that there is sufficient material for taking a particular policy decision, bringing it within the four corners of Article 14 of the Constitution, power of judicial review would not extend to determine the correctness of such a policy decision or to indulge into the exercise of finding out whether there could be more appropriate or better alternatives. Once we find that parameters of Article 14 are satisfied; there was due application of mind in arriving at the decision which is backed by cogent material; the decision is not arbitrary or irrational and; it is taken in public interest, the Court has to respect such a decision of the Executive as the policy making is the domain of the Executive and the decision in question has passed the test of the judicial review.

15. In Union of India v. Dinesh Engg. Corpn., (2001)8 SCC 491, this Court delineated the aforesaid principle of judicial review in the following manner: (SCC pp.498-99, para 12)

"12. There is no doubt that this Court has held in more than one case that where the decision of the authority is in regard to the policy matter, this Court will not ordinarily interfere since these policy matters are taken based on expert knowledge of the persons concerned and courts are normally not equipped to question the correctness of a policy decision. But then this does not mean that the courts have to abdicate their right to scrutinise whether the policy in question is formulated keeping in mind all the relevant facts and the said policy can be held to be beyond the pale of discrimination or unreasonableness, bearing in mind the material on record. ..... Any decision be it a simple administrative decision or policy decision, if taken without considering the relevant facts, can only be termed as an arbitrary decision. If it is so, then be it a policy decision or otherwise, it will be violative of the mandate of Article 14 of the Constitution."

16. The power of the Court under writ jurisdiction has been discussed in Asif Hameed. v. State of J&K, 1989 Supp.(2) SCC 364: 1 SCEC 358 in paras 17 and 19, which read as under: (SCC pp. 373-74)

"17. Before adverting to the controversy directly involved in these appeals we may have a fresh look on the inter se functioning of the three organs of democracy under our Constitution. Although the doctrine of separation of powers has not been recognised under the Constitution in its absolute rigidity but the Constitution makers have meticulously defined the functions of various organs of the State. Legislature, executive and judiciary have to function within their own spheres demarcated under the Constitution. No organ can usurp the functions assigned to another. The Constitution trusts to the judgment

of these organs to function and exercise their discretion by strictly following the procedure prescribed therein. The functioning of democracy depends upon the strength and independence of each of its organs. Legislature and executive, the two facets of people's will, they have all the powers including that of finance. Judiciary has no power over sword or the purse nonetheless it has power to ensure that the aforesaid two main organs of State function within the constitutional limits. It is the sentinel of democracy. Judicial review is a powerful weapon to restrain unconstitutional exercise of power by the legislature and executive. The expanding horizon of judicial review has taken in its fold the concept of social and economic justice. While exercise of powers by the legislature and executive is subject to judicial restraint, the only check on our own exercise of power is the self-imposed discipline of judicial restraint.

* * *

19. When a State action is challenged, the function of the court is to examine the action in accordance with law and to determine whether the legislature or the executive has acted within the powers and functions assigned under the Constitution and if not, the court must strike down the action. While doing so the court must remain within its self-imposed limits. The court sits in judgment on the action of a coordinate branch of the government. While exercising power of judicial review of administrative action, the court is not an appellate authority. The Constitution does not permit the court to direct or advise the executive in matters of policy or to sermonize qua any matter which under the Constitution lies within the sphere of legislature or executive, provided these authorities do not transgress their constitutional limits or statutory powers."

17. The aforesaid doctrine of separation of power and limited scope of judicial review in policy matters is reiterated in State of Orissa v. Gopinath Dash, (2005) 13 SCC 495 : (SCC p.497, paras 5-7)

"5. While exercising the power of judicial review of administrative action, the Court is not the Appellate Authority and the Constitution does not permit the Court to direct or advise the executive in the matter of policy or to sermonise qua any matter which under the Constitution lies within the sphere of the legislature or the executive, provided these authorities do not transgress their constitutional limits or statutory power. (See Asif Hameed v. State of J&K; 1989 Supp (2) SCC 364 and Shri Sitaram Sugar Co. Ltd. v. Union of India; (1990) 3 SCC 223). The scope of judicial enquiry is confined to the question whether the decision taken by the Government is against any statutory provisions or it violates the fundamental rights of the citizens or is opposed to the provisions of the Constitution. Thus, the position is that even if the decision taken by the Government does not appear to be agreeable to the Court, it cannot interfere.

6. The correctness of the reasons which prompted the Government in decision-making taking one course of action instead of another is not a matter of concern in judicial review and the Court is not the appropriate forum for such investigation.

7. The policy decision must be left to the Government as it alone can adopt which policy should be adopted after considering all the points from different angles. In the matter of policy decisions or

> ***exercise of discretion by the Government so long as the infringement of fundamental right is not shown the courts will have no occasion to interfere and the Court will not and should not substitute its own judgment for the judgment of the executive in such matters. In assessing the propriety of a decision of the Government the Court cannot interfere even if a second view is possible from that of the Government."***

33. The Hon'ble Apex Court in ***Census Commissioner and Others vs. R.Krishnamurthy, (2015)2 SCC 796*** held:

> ***"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)***
>
> > ***"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 our 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 271it was held that no mandamus can be issued to enforce an Act which has been passed by the legislature."***

34. Reliance is placed upon the judgment of the Hon'ble Supreme Court in ***State of Kerala and Another vs. B.Six Holiday Resorts Private Limited and Others,*** **(2010)5 SCC 186,** wherein it has been held:

> ***"22. Where the rules require grant of a licence subject to fulfillment of certain eligibility criteria either to safeguard public interest or to maintain efficiency in administration, it follows that the application for licence would require consideration and examination as to whether the eligibility conditions have been fulfilled or whether grant of further licences is in public interest. Where the applicant for licence does not have a vested interest for grant of licence and where grant of licence depends on various factors or eligibility criteria and public interest, the consideration should be with reference to the law applicable on the date when the authority considers applications for grant of licences and not with reference to the date of application.***
>
> ***27. It is true that in Kuldeep Singh case, (2006)5 SCC 702, there were no statutory rules and what was considered was with reference to a policy. But the ratio of the decision is that where licence sought related to the business of liquor, as the State has exclusive privilege and its citizens had no fundamental right to carry on business in liquor, there was no vested right in any applicant to claim a FL-3 licence and all applications should be considered with reference to the law prevailing as on the date of consideration and not with reference to the date of application. Whether the issue relates to amendment to Rules or change in policy, there will be no difference in principle. Further the legal position is no different even where the matter is governed by statutory rules, is evident from the decisions in Hind Stone, (1981)2 SCC 205 and Howrah Municipal Corporation, (2004)1 SCC 663.***
>
> ***28. Having regard to the fact that the State has exclusive privilege of manufacture and sale of liquor, and no citizen has a fundamental right to carry on trade or business in liquor, the applicant did not have a vested right to get a licence. Where there is no vested right, the application for licence requires verification, inspection and processing. In such circumstances it has to be held that the consideration of application of FL-3 licence should be only with reference to the rules/law prevailing or in force on the date of consideration of the application by the excise authorities, with reference to the law and not as on the date of application. Consequently the direction by the High Court that the application for licence should be considered with reference to the Rules as they existed on the date of application cannot be sustained.***
>
> ***Re: Question (ii)***

29. The applicants for licence submitted that Rule 13(3) contemplates FL-3 licences being granted on fulfillment of the conditions stipulated therein; and the newly added proviso, by barring grant of new licence had the effect of nullifying the main provision itself. It was contended that the proviso to Rule 13(3) added by way of amendment on 20.2.2002 was null and void as it went beyond the main provision in Rule 13(3) and nullified the main provision contained in Rule 13(3).

30. Rule 13(3) provides for grant of licences to sell foreign liquor in Hotels (Restaurants). It contemplates the Excise Commissioner issuing licences under the orders of the State Government in the interest of promotion of tourism in the State, to hotels and restaurants conforming to standards specified therein. It also provides for the renewal of such licences. The substitution of the last proviso to Rule 13(3) by the notification dated 20.2.2002 provided that no new licences under the said Rule shall be issued. The proviso does not nullify the licences already granted. Nor does it interfere with renewal of the existing licences. It only prohibits grant of further licences. The issue of such licences was to promote tourism in the State. The promotion of tourism should be balanced with the general public interest. If on account of the fact that sufficient licences had already been granted or in public interest, the State takes a policy decision not to grant further licences, it cannot be said to defeat the Rules. It merely gives effect to the policy of the State not to grant fresh licences until further orders. This is evident from the explanatory note to the amendment dated 20.2.2002. The introduction of the proviso enabled the State to assess the situation and reframe the excise policy.

31. It was submitted on behalf of the State Government that Rule 13(3) was again amended with effect from 1.4.2002 to implement a new policy. By the said amendment, the minimum eligibility for licence was increased from Two-star categorization to Three-Star categorization and the ban on issue of fresh licences was removed by deleting the proviso which was inserted by the amendment dated 20.2.2002. It was contended that the amendments merely implemented the policies of the government from time to time. There is considerable force in the contention of the State. If the State on a periodical re-assessment of policy changed the policy, it may amend the Rules by adding, modifying or omitting any rule, to give effect to the policy. If the policy is not open to challenge, the amendments to implement the policy are also not open to challenge. When the amendment was made on 20.2.2002, the object of the newly added proviso was to stop the grant of fresh licences until a policy was finalized.

32. A proviso may either qualify or except certain provisions from the main provision; or it can change the very concept of the intendment of the main provision by incorporating certain mandatory conditions to be fulfilled; or it can temporarily suspend the operation of the main provision. Ultimately the proviso has to be construed upon its terms. Merely because it suspends or stops further operation of the main provision, the proviso does not become invalid. The challenge to the validity of the proviso is therefore rejected.

33. In view of the above, the appeals filed by the State are allowed in part and the appeals filed by the applicants for licences are dismissed, subject to the following clarifications:

(i) If any licences have been granted or regularized in the case of any of the applicants during the pendency of this litigation, on the basis of any

further amendments to the Rules, the same will not be affected by this decision;

(ii) If any licence has been granted in pursuance of any interim order, the licence shall continue till the expiry of the current excise year for which the licence has been granted.

(iii) This decision will not come in the way of any fresh application being made in accordance with law or consideration thereof by the State Government."

35. Reliance is also placed upon ***Arun Kumar Agrawal vs. Union of India and Others, (2013)7 SCC 1,*** wherein the Hon'ble Apex Court held:

> ***"42. Matters relating to economic issues, have always an element of trial and error, so long as a trial and error are bona fide and with best intentions, such decisions cannot be questioned as arbitrary, capricious or illegal. This Court in State of M.P. and others v. Nandlal Jaiswal and others (1986) 4 SCC 566 referring to the Judgment of Frankfurter J. in Morey vs. Dond 354 US 457 held that (Nandlal Jaiswal case, SCC p.605, para 34)***
>
> > ***"34. .....we must not forget that in complex economic matters every decision is necessarily empiric and it is based on experimentation or what one may call "trial and error method" and, therefore, its validity cannot be tested on any rigid "a priori" considerations or on the application of any straight jacket formula."***
>
> ***43. In Metropolis Theatre Co. v. State of Chicago 57 L Ed 730 the Supreme Court of the United States held as follows:***
>
> > ***".....The problem of government are practical ones and may justify, if they do not require, rough accommodation, illogical, if may be, and unscientific. But even such criticism should not be hastily expressed. What is best is not discernible, the wisdom of any choice may be disputed or condemned. Mere errors of government are not subject to our judicial review. It is only its palpably arbitrary exercises which can be declared void....."***
>
> ***44. In LIC v. Escorts Ltd. and others (1986) 1 SCC 264 this Court held that (SCC p.344, para 102)***
>
> > ***"102......The Court will not debate academic matters or concern itself with intricacies or trade and commerce."***
>
> ***The Court held that (SCC p.344, para 102)***
>
> > ***"102.....When the State or its instrumentalities of the State ventures into corporate world and purchases the shares of a company, it assumes to itself the ordinary role of shareholder, and dons the robes of a shareholder, with all the rights available to such a shareholder. There is no reason why the State as a shareholder should be expected to state its reasons when it seeks to change the management by a resolution of the company, like any other shareholder."***

36. Now, adverting to another question that,

> ***"Whether any vested right has accrued in favour of the present petitioners after depositing of Rs.6 lacs for renewal of their licenses or whether after receipt of amount licensees/petitioners are entitled to continue their business for whole year i.e. 2016-17 or not?***

37. Before proceeding to decide the issue, referred above, it would be apt to refer to relevant provisions of the Announcements of Excise and Allotments/Tender for the year 2016-17:

"Announcements of Excise and Allotments/Tender for the year 2016-17.

Excise and Taxation Department Himachal Pradesh

To be made at the time of allotment/tender process of the Excise Licenses for the retain vends of country liquor, foreign liquor and country fermented liquor in Himachal Pradesh for the Financial Year 2016-17

CHAPTER-1 : GENERAL

"1.1 The liquor licenses, shall be granted subject to the provisions of the Himachal Pradesh Excise Act, 2011 and the Rules framed thereunder from time to time. A licensee shall also be himself responsible for fulfilling any other obligation under any other law or Rule not specifically mentioned hereunder in these terms and conditions."

CHAPTER-1I : MAIN PROVISIONS OF THE PROCEDURE FOR BIDDING THROUGH INVITING COMPETITIVE TENDERS:

"2.1 The following licenses will be granted/allotted by way of competitive tenders for the year 2016-17 on the terms and conditions as prescribed in the succeeding paras:-

(i) A license in form L-2 for retail vend of foreign liquor for sale to the public. The licensee will also be eligible to sell foreign liquor in wholesale to the licensees in form L-3, L-4, L-5, L-3A, L-4A, L-5A, L-12A, L-12B, and L-12C for consumption off the premises.

(ii) A license in form L-14 for retail vend of country liquor for consumption on and off the premises. Such licensees are also allowed to sell foreign liquor in the rural areas.

(iii) A license in form L-14-A for retail vend of country liquor for consumption off the premises. They are also allowed to sell foreign liquor in rural areas.

(iv) a license in form L-20B for manufacture and retail sale of Country Fermented Liquor (Jhol)."

"2.38 A Company will be set up under the Himachal Pradesh Excise and Taxation Department which shall be exclusively responsible for the procurement of all kinds of liquor i.e. Country Liquor, IMFS, Beer, Wine and RTD etc. In the State and shall further supply liquor so procured as wholesale-licensee to all the retail vends i.e. L-2, L-14 & L-14A etc. during the year 2016-17. After the Company starts its operation, the retail licensees shall lift liquor i.e. Country Liquor, IMFS, Beer, Wine and RTD etc. only from the Company's licensed and prescribed premises."

38. Bare perusal of clause 2.38, as reproduced above, clearly suggests that while making Excise Announcements for the year 2016-17, decision was taken by the respondents to set up Company under H.P. Excise and Taxation Department for the procurement of all kinds of liquor. Moreover, careful perusal of aforesaid provisions suggests that it was made clear to all concerned that after the Company starts its operation, the retail licensees shall lift liquor from the Company's licensed and prescribed premises, meaning thereby, all concerned were put to notice by the respondents that Company would be set up by the respondent-Department itself for liquor procurement of all kinds of liquor including IMFS and retail licensees would be under obligation to lift liquor from the Company's licensed and prescribed premises.

39. It also emerges from the record that Company; namely; `HPBL' has been created by respondents in terms of clause 2.38, as reproduced hereinabove, and thereafter vide Circular No.HPBL/LSP/2016-17/12682, dated 2nd June, 2016, Liquor Sourcing Policy 2016-17 have been circulated, wherein Manufactures/Suppliers/Importers are requested to take note of the procedure prescribed in the Circular (Annexure P-6).

40. Perusal of both these Polices of 2016-17 suggests that a procedure in detail has been prescribed for procuring liquor Indian Made Foreign Liquor etc. to the HPBL for subsequent delivery to the buyers.

41. Since much emphasis has been laid on the issue of renewal fee, allegedly accepted by the respondents after 31.3.2016, it would be profitable to peruse relevant provisions of Excise Act, 2011 dealing with Licenses, Permits and Passes.

"CHAPTER – IV

LICENSES, PERMITS AND PASSES

27. Grant of leases of manufacture, sale etc.—

(1) The State Government may lease to any person, competent to contract, on payment of such sum in addition to excise duty or countervailing duty, on such conditions and for such period, as it may deem fit, the right–

(a) of manufacturing or of supplying by wholesale, or of both, or

(b) of selling by wholesale or by retail, or

(c) of storing for manufacture or sale, any country liquor, foreign liquor, beer, wine spirit within any specified area.

(2) The State Government may lease to any person, competent to contract, on payment of such fee and on such conditions as the Financial Commissioner may direct under section 28, the right of manufacturing and possessing for home consumption-

(a) country liquor by distillation from specified fruits or grains in tribal areas, or

(b) country fermented liquor from grains in any specified area.

Explanation.— For the purpose of this sub-section 'tribal area' or 'specified area' shall mean such area which stand notified as 'tribal area' or 'notified area' under the repealed Punjab Excise Act, 1914, on the date of commencement of the Himachal Pradesh Excise Act, 2011.

(3) The Financial Commissioner may grant to a lessee, a license for manufacturing or supplying the liquor in accordance with the terms of such lease as may be approved by the State Government under sub-section (1); provided that Collector may grant to a lessee, such licenses for sale of liquor by wholesale or by retail as the Financial Commissioner may prescribe.

(4) The Collector may grant to a lessee under sub-section (2) a permit in such form as the Financial Commissioner may prescribe.

28. Fees and other conditions for grant of licenses, permits and passes.— (1) Every license, permit or pass, under this Act, shall be granted—

(a) on payment of such fees, if any,

(b) in such form and containing such particulars,

(c) subject to such restrictions and on such conditions, and

(d) for such period, as the Financial Commissioner may direct.

(2) For the purposes of sub-section (1), the power of the Financial Commissioner to issue directions shall include the power to direct the licensee of a distillery, brewery, winery or warehouse to-

(a) provide free accommodation to the Excise Officer concerned at or near the licensed premises, failing which to pay to the State Government the rent and other charges for such accommodation as may be fixed by the Financial Commissioner; and

(b) pay to the State Government the costs, charges and expenses, including salaries and allowances of such Excise Officers, which the State Government may incur in connection with the supervision of such distillery, brewery, winery or warehouse.

(3) The authority granting a license under this Act, may require the licensee to give such security for the observance of the terms of his license, or to make such deposit in lieu of security, as such authority may direct.

(4) Subject to the rules made by the Financial Commissioner, the Collector may grant licenses for the sale of any liquor within a district:

Provided that a license for sale in more than one district shall be granted by the Financial Commissioner only.

(5) Before any license is granted in any year for the retail sale of liquor for consumption on any premises which have not been so licensed in the preceding year, the Collector shall take such measures as the State Government may prescribe, as may best enable him to ascertain local public opinion in regard to the licensing of such premises.

29. Power to cancel or suspend licenses etc.—Subject to such restrictions as the State Government may prescribe, the authority granting any lease, license, permit or pass under this Act, may cancel or suspend it—

(a) if it is transferred or sublet by the holder thereof without the permission of the said authority; or

(b) if any excise duty or countervailing duty or, other fee payable by the holder thereof is not duly paid; or

(c) in the event of any breach by the holder of such lease, license, permit or pass or by his servants, or by any one acting on his behalf with his express or implied permission, of any of the terms or conditions of such license, permit or pass; or

(d) if the holder thereof is convicted of any offence punishable under this Act or the Himachal Pradesh Value Added Tax Act, 2005, the Central Sales Tax Act, 1956 or the Himachal Pradesh Prevention of Specific Corrupt Practices Act, 1983 or of any cognizable and non-bailable offence, or any offence punishable under the Narcotic Drugs and Psychotropic Substances Act, 1985, or under the Trade and Merchandise Marks Act, 1958 or under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 or of any offence punishable under sections 482 to 489 (both inclusive) of the Indian Penal Code, 1860 or any offence referred to in section 135 of the Customs Act, 1962 ; or

(e) where a license, permit or pass has been granted on the application of the grantee of a lease under this Act, on the request in writing of such grantee; or

(f) at will, if the conditions of the license, permit or pass provides for such cancellation or suspension.”

42. Section 27 of the Excise Act, 2011, deals with grant of leases of manufacturer and sale etc. Section 27(1), authorized State Government to give lease/contract for manufacture/supply by wholesale on payment of sum fixed, which would be in addition to excise duty.

43. Respondents with a view to regulate the liquor business has also formulated H.P. Liquor Licensing Rules, 1986, wherein, mode of grant and authority empowered to grant and renew as well as fee has been prescribed, which reads as follows:

"THE HIMACHAL PRADESH LIQUOR LICENCE RULES, 1986

PRELIMINARY

(A) These rules may be called the Himachal Pradesh Liquor Licence Rules, 1986 and shall extend to whole of Himachal Pradesh.

(B) These rules shall come into force at once.

A .Class of licences and authorities empowered to grant and renew.

1. There shall be the following classes of licences. Their mode of grant and authorities to grant and renew them shall be noted against each:-

Form	*Nature*	*Mode of grant*	*Authority empowered to Grant*	*Renew*
1	*2*	*3*	*4*	*5*
		1-Foreign Liquor		
L1	*Wholesale vend of foreign liquor to the trade only*	*Fixed fee*	*Collector*	*Collector*
L1-A	*Storage of foreign liquor in bond combined with wholesale vend of foreign liquor to the trade only.*	*Fixed fee*	*Collector*	*Collector*
L1-B	*Wholesale vend of foreign liquor to L1 vends only*	*Fixed fee*	*Financial Commissioner*	*Financial Commissioner*
L1-BB	*Wholesale vend of imported foreign liquor from outside India to L1, L2, L3, L4, L5, L4-A, L5-A, L10-BB, L 12-A, L 12-B and L12-C vends only*	*Fixed fee*	*Financial Commissioner*	*Financial Commissioner*

B. Regulations governing the grant and renewal of licences.

2. The authority given by these rules to grant and renew licences is, in each case subject to the restrictions contained in the Intoxicants Licence and Sale Orders as to the localities in which licences may be granted and the number of licences which may be granted in any local area, and to such reservations from the general superintendence of the Financial Commissioner as the State Government may notify under section 8 of the Punjab Excise Act as applied to Himachal Pradesh.

3. Every license shall be granted to a certain licensee in respect of certain premises.

4. A license may only be granted to :-

(a) an individual;

(b) a body incorporated under the Indian Companies Act;

(c) a society registered under the Himachal Pradesh Co-operative Societies Act;

(d) a partnership or firm;

(e) Hindu undivided family;

(f) Government Department ; and

(g) a Government Undertaking.

5. When a licence is granted to a Company or Society or Hindu undivided family or Government Department or Government Undertaking referred to in clauses (b), (c), (e), (f) and (g) above it must show the name of an individual as agent acting on behalf of the licensee, who is amenable in full to the Criminal Courts in India. On the application of the Company or Society or Hindu undivided family or Government Departments or Government Undertaking, the representative licensee may be changed by the authority competent to grant or renew the licence as the case may be.

6. When a licence is granted to a partnership or firm not incorporated under any Act, all the individuals comprising the partnership of firm should be specified on the licence.

7. On the application in writing of all the original partners, a partner may at any time be added in case of renewable licences, by the authority competent to renew the licence and in case of licences granted by auction or negotiation by the Collector, provided the proposed partner is eligible under the intoxicants Licence and Sale Orders or these rules, in which case he shall be responsible for all obligations incurred or to be incurred under the licence during the period of its currency as if it had originally been granted or renewed in his name.

8. On the application in writing of all the original partners, a partner may at any time be removed, in case of renewable licences , by the authority competent to renew the licence and in case of licences granted by auction or negotiation by the Collector.

9. A licence granted to a partnership or firm is determined by the dissolution of the partnership or firm subject to the liability of the partners jointly and severally, for any loss caused to Government thereby and for the performance of all obligations to Government incurred by the partnership or firm.

10. A licence is said to be renewed when the competent authority allows it to continue after the period of its expiry to the same licensees in respect of the same premises; and whenever a licence has determined by reason of surrender, cancellation or order of non-renewal or other causes, or where it is proposed to issue a licence in respect of premises or persons not previously licenced, a new licence is required:

Provided—

(a) a new licence is not required on account of the addition of or removal of a partner on the application of all the partners or the change of representative of a company or society;

(b) a licence continued to the legal representative of a deceased licensee for the

remaining period of the licence shall not be deemed to be a new licence;

(c) if the premises of a licence are changed during the period of its currency, the authority competent to grant the licence may direct that the licence may be continued for the remaining period of the term on the existing fee;

(d) a licence may be transferred by the authority competent to grant it for the remainder of its currency to a new licensee.

11. All applications for the grant, extension or renewal of licences, which required the orders of the Excise Commissioner under the Intoxicants Licence and Sale Orders or these rules should be received through proper channels in the Excise Commissioner's office before the end of December, each year;

Provided that applications for the grant of licences in forms L-3 , L-3 -A, L-4, L-4-A, L-5, L-5-A or L-12-B may, in pungent case where they do not adversely affect any existing licence be submitted at any time in the year.

12(1) Every application for renewal of a licence, other than a licence governed by rule11, shall be submitted to the Excise Officer incharge of the district by the 31st January, each year. The Excise Officer-in-charge of the district shall lay before the Collector by the 10th day of February each year a list of all licences requiring renewal. The list shall be accompanied in the case of licences on the assessed fee, by a certificate of sales during the current upto 31st December; in the case of bottling licence by a similar certificate showing proof litres bottled upto 31st day of December. Except with the special sanction of the Excise Commissioner, no order for renewal or non-renewal shall be made after 28th day of February in respect of licences for the following financial year :

Provided that no order for renewal of license in form L-1 shall be made if the licensee is in arrears of Excise and Sales Tax dues and undues the applicant furnishes alongwith the application for renewal a certificate to the following effect duly issued in his favour by the Assessing Authority of the District."

44. As per Section 27 of the Excise Act power lies with the State Government to grant lease to any person, competent to contract, on payment of amount which would be in addition to excise duty or countervailing duty. Section 27(b) provides for grant of lease/license for liquor in selling wholesale or by retail.

45. Section 28, deals with conditions for grant of licenses, permit and passes. As per Section 28(1), license, permit, pass can be granted on payment of fee.

46. Section 29 of the Excise Act, 2011 gives the powers to the Government to accept or suspend the licenses in terms of Sections 27 and 28, but such cancellation or suspension can be done in certain exigencies as referred to in Section 29 of the Excise Act from clauses (a) to (f).

47. Section 32 of the Excise Act deals with the power to withdraw licenses, permits or passes on expiration of 15 days' notice in writing to do so, which reads as follows:

"32. Power to withdraw license etc.—(1) Whenever the authority which granted a license, permit or pass under this Act considers that such license, permit or pass should be withdrawn for any cause other than those specified in section 29, it may,-

(a) withdraw the license, permit or pass on the expiration of fifteen days' notice in writing of its intention to do so; or

(b) withdraw any such license, permit or pass forthwith without notice.

(2) If any license, is withdrawn forthwith without notice under clause (b) of sub-section (1), there shall be paid to the licensee such sum, by way of compensation, as the Financial Commissioner may direct.

(3) When a license, permit or pass is withdrawn under this section, any fee paid in advance or deposit made by the licensee in respect thereof shall be refunded to him, after deducting the amount, if any, due to the State Government."

48. In Chapter-V of Announcements of Excise Allotments/Tender for the year 2016-17 provision has been made for fixation of licence fee i.e. Rs.6 lacs. The relevant extract reads as follows:-

"CHAPTER V: DUTIES AND FEES ETC.

5.1 FIXED FEE.

The fixed license fee and renewal fee for various vends of Foreign Liquor, country Liquor and Beer per license for the year 2016-17 shall be as under:

S.No.	***Nature of License***	***Fixed License fee and Renewal fee (in Rupees) per annum.***
1	***L-1 (Wholesale vend of Foreign Liquor, Indian Made Foreign***	***Rs.6.00 lacs excluding such other fee as may be prescribed.***

	Spirit/Beer for trade only.)	
2	***L-1-A (Storage of Foreign Liquor in bond.)***	***Rs.87,000/- excluding such other fee as may be prescribed."***
...	....	....
...	....	...."

49. Learned counsel representing the petitioners, while advancing their arguments, heavily relied upon Sections 28, 29 and 32 of the Act and vehemently argued that decision, if any, to accept or suspend the license issued in terms of Sections 27 and 28 of the Excise Act could only be taken in terms of Section 29 of the Excise Act, wherein specific provision for cancellation or suspension is provided that too in exigencies as referred in clause 8 (a) to (f) of Section 29 of the Excise Act, 2011. Learned counsel also argued that under Section 32(1)(a) of the Excise Act, Government has power to withdraw license, permit or passes after expiry of 15 days notice in writing, but since no notice, whatsoever, has been issued to the present petitioners and as such any action to discontinue the license of the petitioners after 14.6.2016 is in complete violation of the Rules as well as principle of natural justice and as such the same cannot be allowed to sustain.

50. After careful perusal of the provisions of the Act, referred hereinabove, as well as submissions made on behalf of the petitioners, this Court, after examining the issue in whole is of the view that the provisions contained in Sections 27, 28, 29 and 32 of the Excise Act are not applicable in the present case. Permits, licenses and passes, if any, are granted under Sections 27 and 28 of the Excise Act on the payment of fee, whereas Section 29 of the Excise Act gives power to the State Government to accept or cancel/suspend the licenses etc. in certain exigencies as prescribed in clauses (a) to (f) supra.

51. In the present case, admittedly, as it stands proved on record, petitioners have been granted licences/permits to run the wholesale business up to 31st March, 2016, which was further extended on period to period basis, but definitely not beyond 31st May, 2016. Though, as emerges from the record, petitioners deposited an amount of Rs.6 lacs on account of renewal fee but there is no record, whatsoever, to suggest that competent authority envisaged under the Excise Act, renewed their licenses after 31st March, 2016. Mere depositing of amount will not be sufficient to prove that their licenses stand renewed till 31st March, 2017. Respondents in their reply have categorically stated that no permit beyond 31st March, 2016 have been issued and thereafter only passes on period to period basis have been granted to the L-1 licencees. Since respondents have not renewed their licenses beyond 31st March, 2016, there is no question of invoking Sections 27, 28, 29 and 32 of the Excise Act in the present case.

52 Section 29 deals with cancellation or suspension of licenses but in the instant case there is/was no requirement for the State Government to either cancel or suspend the licenses because admittedly after 31st March, 2016 no license, whatsoever, has been renewed. Similarly Section 32 is not applicable in the present case simply for the reasons that there is nothing on record to suggest that the Government withdrew the licenses granted to the petitioners. Rather, as emerges from the record, beyond 31st March, 2016 licenses of the petitioners were never renewed and as such, once it has been proved on record that no license has been granted to the petitioners for the year 2016-17, there is/was no occasion for the respondents-State to withdraw or cancel or suspend the same. Therefore, the plea raised by the petitioners that there is violation of Sections 27, 28, 29 and 32 of the Excise Act deserves to be rejected being baseless.

53. In the present cases, petitioners have heavily relied upon the fact that an amount of Rs.6 lacs on account licence fee has been deposited by them which as per petitioners have

been duly received/accepted by the respondents-State. As per petitioners accepting of aforesaid amount as a license fee for renewal of their licenses has created vested right in their favour to continue as L-1 licensee till whole year i.e. March, 2017.

54. To test the aforesaid submission/contention raised on behalf of the petitioners, this Court while examining the record had an occasion to peruse receipt/challan whereby amount as referred above has been allegedly deposited by the petitioner. Careful perusal of the receipts made available on record itself suggests that it is nothing but challans filled by the petitioners themselves for depositing amount in the Treasury i.e. State Bank of India. It also emerges from the aforesaid challans/receipts that amount stands deposited in the Bank as it bears the stamp of the Bank. Perusal of aforesaid challans/receipts nowhere indicates that licence has been renewed for a year i.e. up to 31st March, 2017. Since petitioners in support of their aforesaid contentions have also placed on record receipts of the previous years, this Court had an opportunity to have a glance over the same. Bare perusal of the receipts pertaining to previous years made available on record by the petitioners suggests that in each and every receipt while accepting renewal fee, Excise authorities have specifically prescribed the period for which licence is granted.

55. In the present case, there is no mention with regard to any period, rather, as has been observed above, it is only a challan submitted by licensees for depositing license fee. Admittedly, petitioners have not placed any documents, whatsoever on the record, which could be suggestive of the fact that their licenses were renewed till 31st March, 2017. Rather, it has been their own case that they have been given permits on period basis. Respondents-State in its reply as well as in arguments having been made by learned Advocate General has brought to the notice of the Court that no license, whatsoever, has been granted to the petitioners for whole year after taking license fee, to the contrary all the L-1 licensees have been given/granted permits on month to month basis. Perusal of the challan/hand receipt placed on record suggests that petitioners voluntarily deposited the money in the bank for renewal of their licenses but infact competent authority nowhere granted licenses to them in terms of Sections 27 & 28 of the Excise Act.

56. Perusal of the record made available to the Court clearly suggests that the respondents have not issued permit/license for whole year after 31st March, 2016 in anticipation of creation of Company/Corporation in terms of clause 2.38 of Chapter-II of the Excise Announcements and petitioners were issued permit to carry out their business on monthly basis. Hence, it cannot be said that petitioners were actually granted L-1 licence to carry on their business till March, 2017. As has been observed above, there is no mention of period**,** whatsoever on the receipt annexed with the petitioners from where it can be informed that they have been granted license, if any, till March, 2017.

57. More over, bare reading of clause 2.38 as reproduced hereinabove clearly suggests that it was made known to everybody that as and when Corporation/Company starts its business, retailer licensees would be lifting liquor from the Corporation directly and as such there was no occasion, whatsoever for the petitioners to deposit fee of Rs. Six lac for renewal of their licenses and as such no right much less vested right can be claimed to have accrued in favour of the petitioners at this stage. Rather, at this stage, this Court is constraint to draw adverse inference that the petitioners voluntarily deposited an amount of Rs.6 lacs to create right/equity in their favour purposely to defeat the decision of the Government, which was in offing pursuant to Announcements made by the Government. Moreover, mere depositing/accepting of amount by authority for renewal of license will not create any right unless it is shown/proved that after depositing/accepting amount, authority renewed the license, petitioner cannot claim any right.

58. Mere depositing/accepting of amount towards renewal of fee of license would not amount to renewal of license in any manner and it will not create any right as is being claimed by the petitioners.

59. In this regard reliance is placed upon ***Delhi Development Authority v. M/s.Anant Raj Agencies Pvt.Ltd., AIR 2016 SCC 1806,*** wherein the Hon'ble Apex Court held:

"23. After careful examination of the material facts and evidence on record it is clear that on the basis of the admitted facts, the lease of the property in question is not renewed by the DDA in favour of the original lessee, in accordance with clause III(b) of the lease deed dated 06.01.1951. From a reading of the said lease deed it becomes very clear that the original lease period was initially for a period 20 years, which period expired on 10.08.1968 as the lease period commenced w.e.f. 11.08.1948. No doubt, the original lessee availed his option of the renewal of lease as provided in the lease deed by making a request to the DDA vide his letter dated 23.2.1967, but the same was not acceded to by the DDA. Before expiry of the original lease period, notices were issued by the office of DDA on 09.02.1968 and 16.02.1968 to the original lessee alleging certain breaches of the terms and conditions (extracted above) of the lease deed. The original lessee was given 15 days time to remedy the said breaches. Though the original lessee made several replies to the aforesaid notices but he had failed to rectify the said breaches notified to him. Therefore, the DDA vide notice dated 01.09.1972 decided not to renew the lease of the property in question and terminated the lease in respect of the same, though in law the same was not even required on the part of the DDA in view of the conditions of the lease deed as after the expiry of the original period of lease it stands terminated by efflux of time.

24. The concurrent findings recorded by the courts below declaring the termination notice dated 01.09.1972, terminating the lease of the property in question granted in favour of the original lessee, served by the DDA to the original lessee, as illegal, arbitrary and without jurisdiction on the erroneous assumption of the non-existent fact that there has been a renewal of the lease for the reason that the original lessee applied for the renewal of the lease within time as stipulated in the clause III(b) (supra) of the lease deed and has been paying rent for the property in question to the office of the DDA. In our view, the said conclusion of the courts below is erroneous in law as it is contrary to the Clause III (b) of the lease deed and also Sections 21(1) and 22 of the Delhi Development Act, 1957 (for short the "DD Act") read with Rule 43 of the Delhi Development Authority (Disposal of Developed Nazul Land) Rules, 1981 (for short the "Nazul Land Rules"). In this regard, it would be necessary for this Court to refer to the decision relied upon by the learned counsel for the appellant, in the case of Shanti Prasad Devi & Anr. v. Shankar Mahto & Ors., (2005)5 SCC 543, wherein this Court, while interpreting Section 116 of the Transfer of Property Act, 1882 with regard to its applicability and the effect of "holding over", held that it is necessary to obtain assent of the landlord for continuation of lease after the expiry of lease period and mere acceptance of rent by the lessor, in absence of agreement to the contrary, for subsequent months where lessee continues to occupy lease premises cannot be said to be conduct signifying assent on its part. The relevant paras 18 and 19 (para 17 and 18 of AIR) of the case are extracted below :-

> *"18. We fully agree with the High Court and the first appellate court below that on expiry of period of lease, mere acceptance of rent for the subsequent months in which the lessee continued to occupy the lease premises cannot be said to be a conduct signifying "assent" to the continuance of the lease even after expiry of lease period. To the legal notice seeking renewal of lease, the lessor gave no reply. The agreement of renewal contained in clause (7) read with clause (9) required fulfilment of two conditions: first, the exercise of option of renewal by the lessee before the expiry of original period of lease and second,*

fixation of terms and conditions for the renewed period of lease by mutual consent and in absence thereof through the mediation of local mukhia or panchas of the village. The aforesaid renewal clauses (7) and (9) in the agreement of lease clearly fell within the expression "agreement to the contrary" used in Section 116 of the Transfer of Property Act. Under the aforesaid clauses option to seek renewal was to be exercised before expiry of the lease and on specified conditions.

19. The lessor in the present case had neither expressly nor impliedly agreed for renewal. The renewal as provided in the original contract was required to be obtained by following a specified procedure i.e. on mutually agreed terms or in the alternative through the mediation of Mukhias and Panchas. In the instant case, there is a renewal clause in the contract prescribing a particular period and mode of renewal which was "an agreement to the contrary" within the meaning of Section 116 of the Transfer of Property Act. In the face of specific clauses (7) and (9) for seeking renewal there could be no implied renewal by "holding over" on mere acceptance of the rent offered by the lessee. In the instant case, option of renewal was exercised not in accordance with the terms of renewal clause that is before the expiry of lease. It was exercised after expiry of lease and the lessee continued to remain in use and occupation of the leased premises. The rent offered was accepted by the lessor for the period the lessee overstayed on the leased premises. The lessee, in the above circumstances, could not claim that he was "holding over" as a lessee within the meaning of Section 116 of the Transfer of Property Act."

(emphasis supplied by this Court)

To the same effect, the learned counsel has further, rightly placed reliance on another decision of this Court in the case of Sarup Singh Gupta v. S. Jagdish Singh & Ors., (2006)4 SCC 205, wherein this Court has held as under:-

"8…In our view, mere acceptance of rent did not by itself constitute an act of the nature envisaged by Section 113, Transfer of Property Act showing an intention to treat the lease as subsisting. The fact remains that even after accepting the rent tendered, the landlord did file a suit for eviction, and even while prosecuting the suit accepted the rent which was being paid to him by the tenant. It cannot, therefore, be said that by accepting rent, he intended to waive the notice to quit and to treat the lease as subsisting. We cannot ignore the fact that in any event, even if rent was neither tendered nor accepted, the landlord in the event of success would be entitled to the payment of the arrears of rent. To avoid any controversy, in the event of termination of lease the practice followed by the courts is to permit the landlord to receive each month by way of compensation for the use and occupation of the premises, an amount equal to the monthly rent payable by the tenant. It cannot, therefore, be said that mere acceptance of rent amounts to waiver of notice to quit unless there be any other evidence to prove or establish that the landlord so intended…" ***(emphasis supplied by this Court)***

60. Learned Senior Counsel representing the petitioners argued that after acceptance of renewal fee by the respondents, vested right accrued in favour of the petitioners and petitioners' legitimately expecting that they have to carry out L-1 whole sale license till March, 2017 mobilized resources and as such any action of respondents to change the existing system in mid way cannot be held justifiable. In this regard it is again reiterated at the cost of repetition that petitioners being old players of the game were fully aware that the respondents are contemplating to create/form company/Corporation to replace the old system of L-1 licencee and hence this Court is unable to accept the aforesaid contention put forth on behalf of the petitioners that mere acceptance of renewal money has created vested right in their favour and

they are entitled to invoke the principle/doctrine of legitimate expectation. In the present case, as clearly emerges from the record petitioners were aware from day one after Excise Announcements for the year 2016-17 that respondents-State is in the process of replacing the old system and especially when they were not granted license for whole year and only short term passes/permit were issued to petitioners as L-1 licennee to carry out their business and as such they cannot be allowed to draw/extract any benefit by depositing of fee, if any. As has been observed above, the petitioners purposely deposited the amount on account of renewal fee to create equity and right in their favour but mere depositing of fee will not create any right in their favour, as has been laid down in the judgment referred above.

61. As far as accrual of vested rights and contention with regard to legitimate expectation, put forth by the petitioners, is concerned, the reliance is placed on ***Kuldeep Singh vs. Govt.of NCT of Delhi, (2006)5 SCC 702,*** wherein the Hon'ble Apex Court held:

> ***"14. Mr. Gopal Subramanaium, learned Additional Solicitor General appearing on behalf of the Respondent, on the other hand, submitted:***
>
> *(i) The Appellants do not have any fundamental right to trade in liquor.*
>
> *(ii) The State having adopted a policy decision, this Court should not exercise its power of judicial review interfering therewith. In any event, no case that the policy decision suffers from any illegality, irrationality or procedural impropriety having been made out nor any malice having been attributed in regard to the policy decision, this Court should not interfere with the judgment of the High Court.*
>
> *(iii) The parties in whose favour licenses have been granted were necessary parties to the writ petitions and in their absence the writ petitions could not have been entertained.*
>
> ***25. It is, however, difficult for us to accept the contention of the learned Senior Counsel, Mr. Soli J. Sorabjee that the doctrine of 'legitimate expectation' is attracted in the instant case. Indisputably, the said doctrine is a source of procedural or substantive right. (See R. v. North and East Devon Health Authority, ex parte Coughlan 2001 Q.B. 213) But, however, the relevance of application of the said doctrine is as to whether the expectation was legitimate. Such legitimate expectation was also required to be determined keeping in view the larger public interest. Claimants' perceptions would not be relevant therefor. The State actions indisputably must be fair and reasonable. Non - arbitrariness on its part is a significant facet in the field of good governance. The discretion conferred upon the State yet again cannot be exercised whimsically or capriciously. But where a change in the policy decision is valid in law, any action taken pursuant thereto or in furtherance thereof, cannot be invalidated.***
>
> ***33. The question again came up for consideration in Howrah Municipal Corpn. and Others v. Ganges Rope Co. Ltd. and Others [(2004) 1 SCC 663] wherein this Court categorically held: (SCC p.680 para 37)***
>
> *"The context in which the respondent Company claims a vested right for sanction and which has been accepted by the Division Bench of the High Court, is not a right in relation to "ownership or possession of any property" for which the expression "vest" is generally used. What we can understand from the claim of a "vested right" set up by the respondent Company is that on the basis of the Building Rules, as applicable to their case on the date of making an application for sanction and the fixed period allotted by the Court for its consideration, it had a "legitimate" or "settled expectation" to obtain the sanction. In our considered opinion, such "settled expectation", if any, did not*

> *create any vested right to obtain sanction. True it is, that the respondent Company which can have no control over the manner of processing of application for sanction by the Corporation cannot be blamed for delay but during pendency of its application for sanction, if the State Government, in exercise of its rule-making power, amended the Building Rules and imposed restrictions on the heights of buildings on G.T. Road and other wards, such "settled expectation" has been rendered impossible of fulfillment due to change in law. The claim based on the alleged "vested right" or "settled expectation" cannot be set up against statutory provisions which were brought into force by the State Government by amending the Building Rules and not by the Corporation against whom such "vested right" or "settled expectation" is being sought to be enforced. The "vested right" or "settled expectation" has been nullified not only by the Corporation but also by the State by amending the Building Rules. Besides this, such a "settled expectation" or the so-called "vested right" cannot be countenanced against public interest and convenience which are sought to be served by amendment of the Building Rules and the resolution of the Corporation issued thereupon."*

62. Consequently, in view of the detailed discussion made hereinabove as well as law laid down by the Hon'ble Apex Court, we are unable to accept the contentions advanced on behalf of the petitioners that the decision of the respondents-State in setting up Corporation/Company for carrying out whole sale liquor business of L-1 and L-13 is bad in law. Exposition of law as discussed above has left no room/scope for this Court to deliberate upon the issue at hand. As of today, it is a law of land that State has an exclusive domain/rigtht to control the Trade of Liquor and in this regard it is free to make Rules and Regulations to regulate the business. It is also crystal clear from the principles laid down by the Hon'ble Apex Court in the judgments referred above that no individual, whatsoever, can claim the right to the business in Liquor Trade as a fundamental right. As far as accrual/creation of vested right in favour of the petitioners by depositing/accepting of renewal fee by then, as they have been unsuccessful to demonstrate that an amount of Rs.6 lacs deposited by them for renewal of their licenses because there is no document on record to show that authority concerned renewed their licenses till 31st March, 2017. Petitioners have also failed to show any provisions of law or law laid down by the Highest Court of law that merely by depositing renewal fee, their licensees for carrying out L-1 business gets automatically renewed.

63. In the present cases where admittedly after 31st March, 2016 passes/permits, if any, were being issued on period basis, petitioners have not placed on record any documents which could convince this Court that their licenses were renewed after depositing of fee in the Treasury. At the cost of repetition it is once again highlighted that in all receipts previously issued by respondents at the time of taking money for renewal, period of renewal has specifically been mentioned. But in the present case there is none. Moreover, as has been held by the Apex Court that nobody/individual can claim to do business of liquor as a fundamental right. Hence**,** no scope whatsoever is left with the Court to deliberate upon the issue of right, if any. Hence, in view of the detailed discussion made hereinabove this Court sees no infirmity, illegality in the decision taken by the respondents-State to replace the old system of issuance of L-1 licences by creating Corporation/Company in terms of clause 2.38 of Chapter-II of the Excise Announcements for the year 2016-17, This Court further also sees no illegality whatsoever in the decision of the respondents-State, whereby all the licensees of L-1 license have been ordered to be discontinued w.e.f. 15th June, 2016 and as such both the aforesaid decisions of State cannot be interfered with by this Court in exercise of its powers under Articles 226/227 of the Constitution of India.

64. It may be noticed that during final arguments held on 17.6.2016, learned Advocate General, appearing for the respondents-State, while rebutting the submissions made on behalf of the petitioners, had made available copy of Notification regarding amendment made in

H.P. Liquor License Rules, 1986 (detail whereof is available in para-17 supra). Though, no specific challenge has been laid to the aforesaid Rules, 1986 by the petitioners but counsel representing the petitioners specifically submitted/argued that in the absence of amendment in the aforesaid Rules, 1986, no Corporation/Company could be set up by the respondents. Accordingly, in view of the submissions made by the counsel representing the petitioners vis-à-vis amendment carried out in the aforesaid Rules, 1986, this Court, before proceeding on the merits, inquired from the petitioners, whether they intend to amend their petitions in light of amendments carried out in the Rules, 1986 or not. But counsel representing the petitioners insisted that petitions may be heard without there being any specific challenge to the amended Rules. Accordingly, since no specific challenge, whatsoever, has been laid to the amended Rules, 1986, this Court has restrained itself from giving findings/observations qua the same.

65. However, while dealing with the another contention/submission put forth on behalf of the petitioners that conditions stipulated in Annexures P-3, P-4 and P-5 whereby all the L-1 licencees have been directed to exhaust their stock by 15th June, 2016, this Court is of the view that the aforesaid stipulations made in annexure P-3 is definitely harsh and if it is allowed to sustain, great prejudice would be caused to the existing L-1 licence holders. Though, as has been held above, it is the domain of the respondents-State to regulate the business of liquor but respondents-State being welfare State is also expected to appreciate/acknowledge the difficulties which would be faced by the petitioners as other similarly situate persons in the process of Implementation of Annexures P-3, P-4 and P-5. Petitioners as well as other similar situate persons admittedly have been engaged in liquor business as L-1 licensees and certainly in that capacity they after mobilizing their resources must have invested huge amount. It is bounden duty of the State to protect their interest also before giving effect to Annexures P-3, P-4 and P-5. Moreover, conditions put forth by the respondents-State that all L-1 licensees should exhaust their stock before 14th June, 2016 appears to be impracticable because admittedly after 14th June, 2016 petitioners as well as other L-1 licencees would not be entitled to carry out their business as L-1 licensee, meaning thereby they will not able to sell their stock to retail licensees. Since they have already procured their stock from manufacturer directly by paying required taxes, it would be impracticable for them to sell their stock to the manufacturer.

66. Hence, in view of the observations made hereinabove, this Court is of the view that the aforesaid condition made in Annexure P-3 by respondents is definitely harsh and would cause great prejudice and financial hardship to the petitioners, as such same needs be rectified/modified. This Court, while appreciating the aforesaid genuine concerns/problems put forth by the petitioners and with a view to mitigate hardship of petitioners, and to balance the equities**,** deems it proper in the facts and circumstances of the cases to pass following directions:-

> Respondents-State in the process of giving effect to Annexures P-3, P-4 and P-5 may offer grace period to the existing L-1 licensees/ petitioners to enable them to exhaust their stocks, if any.
>
> Or
>
> Respondent-State may itself consider purchasing stock lying with the L-1 licencees instead of procuring the same from manufacturer directly;
>
> Or
>
> Allow petitioners as well as L-1 licensees to sell their existing stock to retail licensees.
>
> Or
>
> Apart from above, respondents may refund an amount of Rs.6 lacs, if any, deposited on account of renewal fee for whole year, after making necessary adjustments, if any.

67. In view of the observations and discussions made hereinabove, all these petitions are disposed of, accordingly.

68. Interim direction, if any, is vacated. All miscellaneous applications are disposed of.

A copy of this judgment be placed on each of the connected files.

****

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

Dolma Kumari .....Petitioner.
Versus
State of H.P & others .....Respondents.

CWP No. 10962 of 2011
Decided on : 29.6.2016

Constitution of India, 1950- Article 226- Respondent no. 6 was engaged as a cook by School Management Committee - subsequently she was disengaged on the ground that she resided in a Panchayat other than the one where the school was located-she filed a writ petition which was disposed of with liberty to approach the second respondent – she was re-engaged - aggrieved from the engagement a writ petition was filed – held, that respondent no. 6 has a residence within the domain of Gram Panchayat where the school was located- respondent no. 6 was engaged prior to the petitioner and applying the principle of last come first go, she is entitled to reinstatement – petition dismissed. (Para 1-6)

For the Petitioner: Mr. Naveen K Bhardwaj, Advocate.
For the Respondents: Mr. Vivek Singh Attri, Deputy Advocate General for respondents No. 1 to 3.
Mr. Mehar Chand, Advocate for respondent No.5.
Mr. Ashish Verma, Advocate for respondent No.6.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

Respondent No. 6 stood disengaged as a cook by the SMC concerned. Her disengagement as unfolded by Annexure P-1 stood spurred by the factum of hers purportedly holding residence in a Panchayat other than the Panchayat whereat the school whereat she stood engaged as a cook by the respondent concerned was located. Her disengagement by the respondent concerned on the anvil of clause 6(c) of the apposite guidelines which stands extracted hereinafter standing attracted qua her, stood constituted by the factum of hers purportedly holding her residence in a Panchayat other than the Panchayat whereat the school whereat she stood engaged by the respondent concerned was located, would hold validation only when material hereat stands evinced of though in the Panchayat whereat she holds residence, Panchayat whereof purportedly adjoins the relevant Panchayat whereat she stood engaged yet not holding thereat any GSSS/GHS/GMS/GPS at the time contemporaneous to her engagement.

> "c) The candidates belonging to such adjacent Gram Panchayats where there is no GSSS/GHS/GMS/GPS shall have the opportunity with him/her to apply for the post of Cook cum helper falling vacant in the equivalent school situated in the adjacent Panchayats."

2. The learned Deputy Advocate General has submitted before this Court of at the time contemporaneous to hers standing engaged as a cook, she held residence within the domain of the Gram Panchayat concerned whereat the School concerned wherein she stood appointed

stood located. He with specificity urges of respondent No. 6 holding residence within the territorial domain of Gram Panchayat Udeen within whose territorial domain also the school whereat she stood appointed stands located. Consequently, given hers holding residence in village Udeen which forms part of the territorial limits of Gram Panchayat Udeen besides with the apposite school whereat she stood appointed also standing located within the territorial limits of Gram Panchayat Udeen, unveils of hers satiating the criteria embodied in clause (b) of the apposite guidelines, which stands extracted hereinafter predominantly with hers apparently establishing of hers holding residence within the domain of the Gram Panchayat, concerned whereat the relevant school stands located whereupon concomitantly she stood eligiblised to obtain appointment thereat in the relevant capacity. Consequently, hence the vigor of relevant clause (c) invoked by the respondent concerned for disengaging respondent No. 6, barring any aspirant who holds residence in a Panchayat adjoining the relevant Panchayat to aspire for the coveted post unless in the Panchayat adjoining the apposite Panchayat no GSSS/GHS/GMS/GPS stand located stands diminished rather stands omnibusly eclipsed rendering its attraction qua respondent No. 6 by the SMC concerned to be grossly fallacious.

> *"(b) Permanent resident of the village/Gram Panchayat/ Urban local body of the area, in which the school is located."*

3. The respondent No.6 herein had constituted her challenge to Annexure P-1 by instituting a Civil Writ Petition before this Court which stood disposed of by this Court with the following directions:-

> "*The petitioner may bring her grievance to the notice of the second respondent in which case the second respondent will look into the matter and take appropriate action, in accordance with law, after hearing the affected parties also. In case the due and admissible wages/remunerations have not been paid to the petitioner, the same shall also be paid. This shall be done with a period of four months from the date of the production of a copy of this judgment along with a copy of the writ petition by the petitioner before the second respondent."*

4. In consequence to the decision recorded by this Court in CWP No. 5095 of 2011 the respondent concerned under Annexure R-3 proceeded to reengage respondent No. 6 as a cook in the School concerned. For validating the decision (Ex. R-3) rendered by the respondent concerned, it was incumbent upon it to prior to its re-engaging respondent No.6 afford an opportunity of hearing to the petitioner herein. A perusal of the relevant records reveals of the respondent concerned prior to its recording its decision comprised in Ex. R-3 its affording an opportunity of hearing to the petitioner. Consequently the decision rendered by the respondent concerned comprised in Annexure R-3 whereby respondent No.6 stood reengaged in service does not infract any principle of natural justice nor it can be held of the respondent concerned while recording its decision comprised in Annexure R-3 its condemning unheard the petitioner herein.

5. Even otherwise given the inference drawn hereinabove of the disengagement in service of respondent No. 6 under Annexure P-1 on the purported ground of her initial appointment suffering invalidation arouse-able from hers holding residence in a Panchayat adjoining the relevant Panchayat whereat the apposite school stands located, also preeminently in the Panchayat wherein she purportedly holds residence there being purportedly no GSSS/GHS/GMS/GPS at the time contemporaneous to her engagement in service by the respondent concerned rather not rendering hence her engagement by the respondent concerned in the School concerned to suffer invalidation spurring from any purported infraction of relevant clause (C) of the apposite guidelines standing begotten. Consequently, when this Court has discountenanced the aforesaid submission of the learned counsel for the petitioner for rendering the initial engagement in service of respondent No. 6 by the respondent concerned suffering invalidation, submission whereof stood anchored upon the purported apposite attraction qua respondent No. 6 of the apposite clause © of the apposite guidelines, it appears hence of the decision recorded by the respondent concerned under Annexure R-3 being in consonance with the inference recorded hereinabove besides being in consonance with the decision recorded by

this Court comprised in Annexure R-1. Now the apposite principle constituted in clause (e) of the guidelines concerned which stands extracted hereinafter embodying the principle of Last Come First Go, warrants its application hereat, for rendering valid or invalid the dispensing of the service of the petitioner by the respondent concerned. For applying the principle of "Last Come First Go" constituted in the apposite guidelines, it is imperative to unearth from the apposite records, the prime factum of the petitioner herein or respondent No. 6 herein standing engaged earlier in service by the respondent concerned. An answer thereto stands purveyed by Annexure P-1. An incisive perusal of Annexure P-1 unfolds the factum of respondent No.6 standing disengaged by the SMC concerned from the school concerned whereafter the petitioner herein came to be appointed in her place. Since this Court has recorded an inference hereinabove qua the disengagement of respondent No.6 holding no validity arouse-able from the respondent concerned inappropriately applying the relevant clause of the apposite guidelines which stands extracted hereinabove.

> "e. In case, the cook-cum-helper become surplus due to revision of norms for hiring of cook-cum-helper or decline in the enrollment or merged from school/institution, principle of LAST COME, FIRST GO will apply and the contract of person selection on latter date will be terminated without given any prior notice."

6. In conjunction therewith the further factum of the petitioner herein standing appointed, on respondent No. 6 standing disengaged in service, rests the factum of the petitioner herein coming to be appointed as a cook only after hers replacing respondent No.6 in the School concerned. Since Annexure P-1 suffers the fate of invalidation necessarily hence her appointment as a cook in the school concerned is to relate back to the date of her initial appointment thereupon it is to be conclusively held of with the petitioner herein subsequently replacing her, whereas the respondent No.6 obviously held the relevant post earlier to the post aforesaid standing held by the petitioner herein. Consequently, with the respondent no. 6 standing appointed earlier vis-à-vis the petitioner herein the principle of "Last Come First Go" warrants its application qua the petitioner herein. In view of the above, there is no merit in the petition, the same is accordingly dismissed. All pending applications stand disposed of accordingly.

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

State of H.P. …..Appellant.
Versus
Prem Chand and others …..Respondents.

Cr. Appeal No. 299 of 2006
Decided on : 29.06.2016

Indian Penal Code, 1860- Section 451, 325, 323 read with Section 34- Informant was cutting fuel wood in his court yard- accused tried to take the cattle through the court yard- informant objected to the same, on which accused P inflicted a blow with spade on his face- when wife of the informant tried to rescue him, accused R and S gave blows on the head and other parts of the body with Battans- accused were tried and acquitted by the trial Court- held, in appeal that PW-1 had improved upon his version- presence of PW-4 and PW-5 was doubtful- spade and battans were not connected to the commission of crime- no disclosure statement was made by the accused leading to the recovery of these articles- prosecution version was not proved beyond reasonable doubt- trial Court had appreciated evidence in wholesome and harmonious manner- appeal dismissed. (Para-9 to 11)

For the Appellant: Mr. Vivek Singh Attri, Dy. A.G.
For the Respondents: Mr. Pushpender Kumar vice Mr. Kulbhushan Khajuria, Advocate.

The following judgment of the Court was delivered:

<u>Sureshwar Thakur, Judge (Oral)</u>

The instant appeal is directed by the State of Himachal Pradesh against the impugned judgment rendered on 23.05.2006 by the learned Additional Chief Judicial Magistrate, Palampur, District Kangra, H.P. in Criminal Case No. 170-II/2001, whereby the learned trial Court acquitted the respondents (for short 'accused') for the offences charged.

2. The brief facts of the case are that on 26.11.2000 Ramesh Kumar alongwith his wife Malkan Devi lodged the report at Police Post Panchrukhi, alleging therein that on 25.11.2000 when he returned back home from his fields in the evening at about 5.30 p.m and was cutting fuel wood in his court yard accused Prem Chand, Roshani Devi and Sarla Devi tried to take the cattle through his court yard. On his objecting, accused Prem Chand gave a blow with a spade on his face below the right eye and on his left hand. When the wife of Ramesh Kumar tried to release him, accused Roshani Devi and Sarla Devi who were holding Battans in their hands gave her blows on the head and other parts of the body and as a result of which she sustained injuries. Ramesh Kumar and his wife were rescued from the clutches of the accused by Sita Ram and Bidhi Chand. On the basis of the information given by Ramesh Kumar the investigation was carried out by M.C. Jai Chand, who proceeded to the spot and one spade and two Battans were taken into possession vide separate seizure memo from the possession of accused Prem Chand and accused Sarla Devi. The injured were got medically examined. On such examination the doctor concerned issued MLCs thereby he opined the injuries on the person of Ramesh Kumar to be simple, whereas one of the injury sustained by Malkan Devi was grievous and the others were simple. After completing all codal formalities and on conclusion of the investigation into the offence, allegedly committed by the accused challan was prepared and filed in the Court.

3. Charges stood put to the accused by the learned trial Court for theirs committing offences punishable under Sections 451, 325, 323 read with Section 34 of the Indian Penal Code, to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 12 witnesses. On closure of prosecution evidence, the statements of the accused under Section 313 of the Code of Criminal Procedure, were recorded in which they pleaded innocence and claimed false implication. They did not choose to lead any evidence in defence.

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

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

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

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

9. Qua the ill-fated occurrence, the ocular witnesses thereto corroborated the version rendered qua it by the victim/complainant Ramesh Chand, of his standing struck by accused Prem Chand with a Spade Ext.P-1 recovery whereof stood effectuated under memo Ext.PW-1/B by the Investigating Officer at the purported instance of accused Prem Chand, in sequel whereto the complainant underscores in his deposition of his tooth standing broken

besides his cheek bone also suffering a fracture, injuries whereof stand reflected in Ext.PW-8/A. Reiteratedly, the account aforesaid qua the occurrence deposed by the victim stands corroborated by ocular witnesses thereto. Victim Malkan Devi the wife of the complainant stands deposed by the informant to stand struck with Battans Ext.P-2 and Ext.P-3 by co-accused Roshani Devi and Sarla Devi recoveries whereof stood effectuated under memo Ext.PW-1/C by the Investigating Officer at the purported instance of accused Roshani Devi and Sarla Devi, in sequel whereof she sustained injuries as stand delineated in the apposite MLC prepared qua her person by the doctor concerned, MLC whereof stands comprised in Ext.PK. For testing the veracity of the version rendered qua the occurrence by the purported ocular witnesses thereto predominantly qua the suffering of injuries by victim/complainant Ramesh Chand in sequel to his standing struck with Spade Ext.P-1 by co-accused Prem Chand, an allusion is also imperatively enjoined to be made to the apposite MLC prepared qua him by PW-7, MLCs whereof stand comprised in Ext.PW-8/A and Ext.PW-8/B. The aforesaid allusion is imperative as only in the event of concurrence occurring inter se the ocular account qua the occurrence rendered by the PWs vis.a.vis. reflections embodied in the MLCs aforesaid prepared by the doctor concerned qua victim Ramesh Chand, would beget a firm conclusion from this Court of the ocular account qua the occurrence rendered by the prosecution witnesses standing on a sacrosanct pedestal. However, with reflections in the apposite MLCs prepared qua victim Ramesh Chand comprised in Ext.PW-8/A and Ext.PW-8/B not holding any underlinings therein in conformity with the ocular account qua the occurrence rendered by the prosecution witnesses would dispel the veracity of the version spelt qua the occurrence by the ocular witnesses thereto. In sequel, the ocular account qua the occurrence rendered by the ocular witnesses would thereupon stand tainted whereupon no credence would be imputable.

10. Be that as it may, for the depositions of the complainant besides of PW-4 and PW-5 standing fastened with a virtue of credibility, it was enjoined upon them to depose a version qua the occurrence in harmony viz.a.viz the initial revelations made qua it by the complainant, which stands comprised in report Ext.PW-1/A, especially when each underscore in their respective testimonies of the ill-fated occurrence standing witnessed by Sanjay Kumar and Kumari Anju. Since proclamations occur in the testimonies of all the aforesaid prosecution witnesses of PW-4 and PW-5 witnessing the occurrence, the prosecution was enjoined to empathetically display of both at the relevant time being present thereat whereupon alone credence would stand imputed qua their respective renditions qua the ill fated occurrence. Contrarily, if the evidence adduced by the prosecution dispels their presence thereat, the obvious sequel thereto would of their purported ocular account qua the occurrence being discountable. Apparently, given the non revelation by the complainant in his Report Ext.PW-1/A qua both PW-5 and PW-4 being at the relevant time present thereat, fillips a conclusion from this Court of theirs at the relevant time being not present thereat. Consequently, the deposition of PW-1 wherein he has enunciated of PW-4 and PW-5 witnessing the occurrence constitutes an improved and embellished version qua the occurrence vis.a.vis his previous statement recorded in writing. As a corollary, not only the deposition of PW-1 stands stained with a taint of incredibility besides this Court is coaxed to also discount the testimonies of PW-4 and PW-5. In aftermath, it appears of hence the prosecution as a contrivance for falsely implicating the accused making concerted efforts to communicate before the learned trial Court a version qua the occurrence through PW-4 and PW-5 even when they had not witnessed it. The effect of the aforesaid dispelling by this Court qua veracity of their respective testimonies qua the occurrence is of even if the PWs aforesaid deposed in conformity vis.a.vis. the apposite MLC prepared qua Malkan Devi comprised in Ext.PK, nonetheless with the version qua the occurrence rendered by the complainant, corroboration whereof stood meted thereto by PW-4 and PW-5, version whereof for reasons aforestated stands stained with a vice of improvements and embellishments rendering it hence to be unamenable for credence standing placed thereupon also concomitantly renders the aforesaid concurrence or conformity inter se the MLC qua Malkan Devi comprised in Ext.PK vis.a.vis. the purported ocular account qua the occurrence rendered by the complainant besides by PW-4 and PW-5, to hold no efficacy/truth even qua the incriminatory role ascribed to co-accused Roshani

Devi and Sarla Devi, of theirs by belabouring Malkan Devi with Battans Ext.P-2 and Ext.P-3 inflicting injuries on her person with user thereof.

11. Even otherwise, the prosecution was enjoined to link Spade Ext.P-1 and Battans Ext.P-2 and P-3 recovered respectively under memos Ext.PW-1/B and Ext.PW-1/C with theirs standing used by the accused aforesaid. The efficacious manner of linking their user by the accused on the persons of the victims stood constituted in the prosecution adducing cogent evidence qua the prominent facet of the Investigating Officer concerned securing their efficacious recovery at the instance of each of the accused. The apposite cogent evidence stood comprised in the Investigating Officer prior to his effectuating the apposite recovery of Spade and Battans under apposite recovery memos, his recording the disclosure statements of each of the accused, with revelations therein qua the respective place of their hiding or keeping by each of them. However, no disclosure statements of each of the accused prior to effectuation of their recoveries by the Investigating Officer at the purported instance of each of the accused stood scribed by the Investigating Officer. Lack of recording by the Investigating Officer of the disclosure statements of each of the accused prior to his effectuating recovery of the aforesaid weapons of offence at the purported instance of the accused, stains with a vice of invention, the recovery of the aforesaid weapons of offence by the Investigating Officer at the purported instance of each of the accused. Contrarily, it secures an inference qua effectuation of their respective recovery by the Investigating Officer at the purported instance of the respective accused after 5 days of theirs suffering incarceration, standing made by the Investigating Officer not in the manner as disclosed therein rather reiteratedly his inventing their respective recovery at the purported instance of the respective accused. For reiteration, since the preparation of the disclosure statements of each of the accused by the Investigating Officer prior to his effectuating recovery of weapons of offence at their purported instance under the aforesaid recovery memos, was imperative, whereas the apposite disclosure statements of each of the accused by the Investigating Officer prior to his effectuating recovery of weapons of offence at their purported instance under the aforesaid recovery memos stood not recorded by him also fastens a further inference from this Court of their recovery if any at the instance of the accused by the Investigating Officer under the aforesaid recovery memos being unamenable for any reliance being imputable thereto by this Court. Also the prime factum of the prosecution failing to adduce cogent evidence in display, of the weapons of offence Ext.P-1 to Ext.P-3 user whereof stands purportedly ascribed by it to the accused, of theirs standing hence respectively used by them stands garnered by the factum of PW-3 a recovery witness to both Ext.PW-1/B and Ext.PW-1/C whereunder recovery of Spade and Battans stood effectuated, acquiescing to the suggestion put to him by the learned defence counsel while the latter held him to cross-examination of none of the accused in his presence producing before the Police any of the aforesaid purported weapons of offence also when he deposes in his cross examination qua weapons of offence Ext.P-1 to Ext.P-3 lying in the police station, gives immense momentum to a firm conclusion of the Investigating Officer not recording prior to his effectuating recovery under recovery memos aforesaid of the aforesaid weapons of offence at the purported respective instance of each of the accused, their respective disclosure statements as none of the accused held any knowledge qua the place of their respective hiding or concealment by them besides also of theirs hence not using any of the aforesaid weapons of offence contrarily rather the Investigating Officer for falsely implicating them inventing their recovery in the Police Station concerned at the purported instance of the accused. In sequel, the recovery of weapons of offence is colourable whereupon no reliance is imputable by this Court.

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

13. In view of the above, I find no merit in this appeal which is accordingly dismissed. In sequel, the impugned judgement is affirmed and maintained. Record of the learned trial Court be sent back forthwith.

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

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

Cr. Appeal No. 12 of 2014
Decided on :29.6.2016

N.D.P.S. Act, 1985- Section 22- A vehicle being driven by the accused was stopped and checked – a bag containing vials of Rexcof cough syrup was found in the car- the accused was tried and convicted by the Trial Court- held, in appeal the testimonies of Police Officials prove the recovery – there are no contradictions or improvements in their testimonies- independent witness has also supported the prosecution version- merely because other witnesses were not associated is not sufficient to doubt the prosecution version- Trial Court had rightly convicted the accused- appeal dismissed. (Para 9-12)

For the Appellant: Mr. Servedaman Rathour and Mr. Vishwajeet Panwar, Advocate.
For the Respondent: Mr. Vivek Singh Attri, Deputy Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal stands directed against the impugned judgment of 3.12.2013 rendered by the learned Special Judge-I, Sirmaur, District at Nahan, H.P., in Sessions trial No. 17-ST/7 of 2013, whereby the learned trial Court convicted and sentenced the appellant (hereinafter referred to as "accused") for his committing offence punishable under Section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for shot "the Act"), as follows:-

> "To undergo rigorous imprisonment for two years and to pay a fine of Rs.20,000/- and in default of payment of fine, he shall further undergo simple imprisonment for six months."

2. Brief facts of the case are that on 25.1.2013, police party headed by PW-7 ASI Rajesh Pal was present at Do Sarka Mour in connection with traffic checking. At about 4.30 p.m. the vehicle bearing registration No. CH-04E-9616 being driven by accused Vinod Kumar was stopped. On demand of documents by the police officials, accused only produced the insurance certificate. The car occupied by the accused was checked and during checking one blue black colour bag was found in the dickey of the car containing vials of Rexcof cough syrup. In the meantime tractor bearing registration No. HP-71-1372 reached on the spot in which PW-1 Ram Chander and one Shri Varinder were sitting. They were joined by PW-7 and in their presence the bag was taken out from the dickey of the car. On counting the rexcof cough syrup vials were found to be 270. The accused could not produce any licence/permit for carrying these cough syrup vials in his car. photographs were clicked and thereafter the aforesaid vials were put back into the same bag which was sealed with seal impression V. NCB form was drawn. The case property was taken into possession vide memo Ex.PW-1/A. Rukaa Ex.PW-3/A was prepared, on the basis of which FIR Ex. PW-3/B came to be registered. Report of chemical examiner Ex. PW-

7/C was obtained. After completing all codal formalities and on conclusion of the investigation into the offence, allegedly committed by the accused challan was prepared and filed in the Court.

3. The accused stood charged by the learned trial Court for his committing offence punishable under Section 22 of the Act to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 8 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 examine one witness.

5. On an appraisal of the evidence on record, the learned trial Court returned findings of conviction against the accused for his committing offence punishable under Section 22 of the Act.

6. The learned counsel appearing for the 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 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 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 prosecution case qua effectuation of recovery of 270 vials of Rexcof cough syrup from the dickey of the car bearing registration No. CH-04E-9616 driven at the relevant time by the accused, recovery whereof stood effectuated under memo PW-1/A by the Investigating Officer at the site of occurrence, stands proven by the depositions of official witnesses. The depositions of the official witnesses acquire a hue of veracity, given the non-occurrence of any improvements as well as embellishments in their respective depositions qua the apposite factum probandum disclosed in their respective examinations-in-chief vis-à-vis their previous statements recorded in writing also there occurs no contradiction in their respective depositions comprised in their examinations-in-chief vis-à-vis their respective cross-examinations whereby hence it is tobe firmly held of their respective testimonies qua the factum of effectuation of recovery of the item of psychotropic substance under memo PW-1/A by the investigating Officer at the site of occurrence from the dickey of the car driven by the accused, holding vigor as well as probative tenacity. Apart therefrom when the testimonies of the official witnesses do not suffer from taint of any intra-se contradictions, consequently, their respective testimonies qua effectuation of recovery of item of psychotropic substance under memo PW-1/A by the investigating Officer at the site of occurrence from the dickey of the car driven by the accused are to be amplifyingly concluded to be both credible as well as trustworthy.

10. Be that as it may the independent witness (PW-1) associated by the Investigating Officer in the apposite proceedings commenced and concluded by him at the site of occurrence also lends support besides corroboration to the testimonies of the official witnesses. The independent witness who appeared as PW-1 has disposed in harmony vis-à-vis the testimonies of the official witnesses qua effectuation of recovery of the item of psychotropic substance under memo PW-1/A by the investigating Officer at the site of occurrence from the dickey of the car driven by the accused. Consequently with the independent witness lending corroboration qua the version espoused by the official witnesses qua the effectuation of recovery of the item of psychotropic substance under memo PW-1/A by the investigating Officer at the site of occurrence

from the dickey of the car driven by the accused, a formidable conclusion stands garnered of the prosecution succeeding in proving the genesis of the prosecution case.

11. The only contention addressed before this Court by the learned counsel for the accused for constraining this Court to reverse the findings of conviction and consequent sentence imposed by the learned trial Court upon the accused stands grooved in the factum of the Investigating Officer, though displayed by PW-3 in his testimony comprised in his cross-examination of many vehicles, at the relevant time, crossing the relevant site of occurrence, yet his omitting to associate them as witnesses in the apposite proceedings, omission whereof he contends to be deliberate as well as wilful, for smothering the truth of the prosecution case. He also contends of hence the testimony of PW-3 holding no sway. The aforesaid submission holds no force as the numerical strength of the independent witnesses who stands associated by the Investigating Officer in the apposite proceedings, is insignificant for holding an inference qua an unclouded hue of impartisanship besides transparency not percolating the apposite proceedings held by the investigating Officer at the site of occurrence rather the qualitative creditworthiness of even a solitary independent witness associated by the Investigating Officer in the apposite proceedings held by him at the site of occurrence is sufficient, to lend vigor and strength to the prosecution case unless the testimony of the independent witness stands ridden with any blemish of any improvement or embellishment vis-à-vis his previous statement recorded in writing or stands ingrained with a vice of his contradicting the testimonies of other prosecution witnesses. Also the testimony of the independent witness would be sufficient to constrain this Court to hold of hence with his lending corroboration to the prosecution case, its acquiring an undenuded force unless of course the independent witness associated by the Investigating Officer in the relevant proceedings held by him at the site of occurrence unravels in his testimony of his lending a tutored version qua the occurrence or his being a stock witness also there occurring unfoldments therein of his under duress or compulsion exercised upon him by the Investigating Officer, his coming to corroborate the testimonies of the official witnesses. Contrarily, omission of the aforesaid unfoldments in his deposition personificatory of his testimony standing stained with a blemish of interestedness or bias would give a firm impetus to a conclusion, of his testimony being trustworthy besides inspiring consequently with his corroborating the testimonies of the official witnesses can not render his deposition to be discardable dehors the factum of the Investigating Officer not associating despite availability other independent witnesses especially when for reasons aforestated it is not the numerical strength of the independent witnesses associated by the Investigating Officer in the relevant proceedings rather the credibility of an independent witness, even if singular, holding sinew for concluding therefrom of his testimony being inspiring besides trustworthy. In sequel when this Court holds qua the testimony of PW-1 being creditworthy, as a corollary the lack of association of independent witnesses by the Investigating Officer other than the one associated by him, though available, does not stain the investigations conducted by him. In aftermath, the aforesaid submission stands rejected.

12. A wholesome analysis of the evidence on record portrays that the appreciation of evidence as done by the learned trial Court does not suffer from any perversity and absurdity nor it can be said that the learned trial Court in recording findings of conviction has committed any legal misdemeanor, in as much, as, its mis-appreciating the evidence on record or its omitting to appreciate relevant and admissible evidence. In aftermath this Court does not deem it fit and appropriate that the findings of conviction recorded by the learned trial Court merit interference.

13. In view of the above discussion, I find no merit in this appeal, which is accordingly dismissed and the judgment of the learned trial Court is maintained and affirmed. Record of the learned trial Court be sent back forthwith.

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

CMPMO Nos. 184 & 185 of 2016.
Decided on: 30th June, 2016

1. CMPMO No. 184 of 2016.
M/s New Prem Bus Service ....Petitioner.
Versus
State of H.P. & Others ....Respondents.

2. CMPMO No. 185 of 2016.
M/s New Prem Bus Service ....Petitioner.
Versus
State of H.P. & Others ....Respondents.

Motor Vehicles Act, 1988- Section 190- Appellate Tribunal had disposed of the appeal finally and it has no jurisdiction to revise its own order- proceedings before Appellate Authority quashed and a direction issued to convene the meeting at an early date not beyond 31st August, 2016.
(Para-3 to 10)

For the petitioner : Mr. Ajay Sharma, Advocate in both the petitions
For the Respondents : Mr. D.S. Nainta & Mr. Virender Verma, Addl. A.Gs. for respondents No.1 & 3 in both the petitions.
Ms. Suman Thakur, Advocate for respondents No.2 in both the petitions.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

Heard.

2. This order shall dispose of both the petitions filed against the notice Annexure P-2, issued in revision petitions No.1 & 2 of 2016, filed against order dated 2.7.2015 by one Ritesh Kumar and Joginder Singh in Himachal Pradesh State Transport Appellate Tribunal, Shimla-2.

3. Complaint is that learned Appellate Tribunal has no jurisdiction to revise its own order. The proceedings before the Appellate Tribunal in revision petition have, therefore, been sought to be quashed and set aside.

4. The record reveals that in appeal under Section 90 of the Motor Vehicles Act filed by the petitioner herein before learned appellate Tribunal, the following orders came to be passed on 2.7.2015:

> "The dispute between the parties is about maintaining the frequency of the buses plied by the appellant and respondent No.4 to 6. Let direction be issued to respondent No.2 to hold a meeting of the parties within one month and to resolve the matter. Ordered accordingly. File after needful be consigned to the record room."

5. It is thus seen that the appeals stand disposed of finally. Ritesh Kumar and Joginder Singh, respondent No.2 in these petitions, are also stage carriage transporters. They felt aggrieved by the order Annexure P-1 as their grievances are that if only the petitioner and respondents No.4 to 6 in the appeal before the Appellate Tribunal below are associated by respondent No.2 in the meeting so ordered to be convened and the time schedule of the buses being plied by them is readjusted, the time schedule of the buses being plied by them is likely to be disturbed and in that event they may suffer loss. Therefore, according to them, the meeting comprising the petitioner and respondents No.4 to 6 alone should have not been ordered to be convened, but all the stake holders including them need to be associated in the meeting to be so convened. It is in this backdrop, aforesaid Ritesh Kumar and Joginder Singh have preferred two

separate revision petitions Annexure P-1 to these petitions. Notice Annexure P-2 in both the revision petitions have been issued to the opposite parties on behalf of the petitioner (respondent No.7 in the revision petition), learned counsel has put in appearance and an application, Annexure P-3, with a prayer to prepone the date as was fixed in the revisions and to hear the same at an early date, filed before learned Tribunal below. The records reveal that the applications were disposed of having been turned infructuous vide order passed on 5.5.2016 and rightly so because the next date in the matter before learned Tribunal below was on 24.5.2016.

6. The question of maintainability of the revision petitions is, no doubt, still pending adjudication before learned appellate Tribunal below; however, a bare perusal of the provision contained under Section 90 of the Motor Vehicles Act amply demonstrates that the appellate Tribunal has no jurisdiction to revise its own order. Therefore, allowing the proceedings in the revision petitions to continue further before learned Tribunal may not be in the interest of justice but amount to abuse of process of law. This Court, however, is in agreement with the submissions made on behalf of the petitioners, Ritesh Kumar and Joginder Singh, respondent No.2 in these petitions, that the petitioner herein and respondents No.4 to 6 in appeal alone should not be called upon to attend the meeting, directed to be convened by respondent No.2, Regional Transport Authority, Dharamshala, but all affected persons including respondent No.2 Ritesh Kumar and Joginder Singh in these petitions are also required to be called upon to attend the meeting.

7. Mr. Sharma, Learned counsel submits that the dispute between the petitioner and respondent HRTC in the appeal is qua maintaining the frequency of the buses being plied by the petitioner herein and the HRTC and that there is no dispute of the time schedule. This Court, however, feels that in case any decision to maintain frequency of buses being plied by the petitioner herein and HRTC is taken by respondent No.2 in the joint meeting ordered to be convened vide order Annexure P-1 passed by learned appellate Tribunal, the frequency of the other stage carriage transporters like respondent No.2, in both the petitions, is also likely to be adversely affected. Therefore, Ms. Suman Thakur, Advocate representing them is absolutely justified in submitting that no legal and valid decision qua maintaining frequency of plying the buses by the petitioner and HRTC can be taken in the meeting if scheduled to be held pursuant to the orders Annexure P-1 without associating Ritesh Kumar and Joginder Singh aforesaid, respondents No.2, in these petitions.

8. In the considered opinion of this Court, the dispute can be set at rest by clarifying order Annexure P-1 that besides the petitioner, New Prem Bus Service and HRTC, respondent No.2 Ritesh Kumar and Joginder Singh and other similarly situated persons shall also be associated by respondent No.2 in the meeting to be convened in terms of the order Annexure P-1.

9. There shall be a direction to Regional Transport Authority, Dharamshala to convene the meeting at an early date, however, not beyond 31st August, 2016. The Authority shall convey date to be so fixed well in advance to all concerned including the parties on both sides and take a conscious decision in the matter after affording them due opportunity of being heard.

10. With these observations, the proceedings in revision petitions No.1 and 2 of 2016, before learned Appellate Tribunal below stand quashed and these petitions also stand disposed of.

11. An authenticated copy of this judgment be supplied to learned Additional Advocate General for onward transmission to Regional Transport Authority, Dharamshala for compliance.

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

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

Cr. Appeal No. 178 of 2008
Decided on : 30.06.2016

Indian Penal Code, 1860- Section 279- Accused was driving a bus in a rash and negligent manner, which hit a Mahindra pick up- he was tried and acquitted by the trial Court- aggrieved from the order, an appeal was preferred- held, in appeal that PW-1 and PW-3 had attributed negligence to the accused- accused had swerved his vehicle towards wrong side of the road- he had applied brakes on seeing the Mahindra pick-up while informant had slowed the vehicle- photographs also corroborated the version that accused had taken the vehicle towards wrong side of the road- negligence of the accused was established- trial Court had wrongly acquitted the accused- appeal allowed- accused convicted of the commission of offence punishable under Section 279 of I.P.C. and sentenced to undergo imprisonment for a period of two months and to pay fine of Rs.1,000/- (Para-9 to 13)

For the Appellant: Mr. Vivek Singh Attri, Dy. A.G.
For the Respondent: Mr. Lakshay Thakur, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge *(Oral)*:

The instant appeal is directed by the State of Himachal Pradesh against the impugned judgment rendered on 28.12.2007 by the learned Judicial Magistrate, 1st Class, Court No. VI, Shimla in Criminal Case No. 45-2 of 2007/06, whereby the learned trial Court acquitted the respondent (for short 'accused') for the offences charged.

2. The brief facts of the case are that on 9.9.2006 at about 2.20 p.m. near Goyal Motors, Tara Devi, Shimla, accused Raj Kumar was driving a bus No. HP-63-1446 on public high way in a rash and negligent manner and collided his bus with Mahindra Pick Up No. HP-63-0569. In this regard complainant Ramesh Kumar made a complaint to the police under Section 154 Cr.P.C. Police went to the spot and prepared the spot map. Statements of witnesses under Section 161 Cr.P.C. were recorded and police taken into possession the aforesaid vehicles vide separate memos. The accused was arrested by the police and after that accused was released by the police on bail. After completing all codal formalities and on conclusion of the investigation into the offence, allegedly committed by the accused challan was prepared and filed in the Court.

3. Notice of accusation stood put to the accused by the learned trial Court for his committing offence punishable under Section 279 IPC to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 11 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 did not choose to lead any evidence in defence.

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

6. The learned Deputy Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper

appreciation of evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction.

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

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

9. The complainant/informant Ramesh Kumar while at the relevant time at the site of occurrence driving Mahindra Pick Up No. HP-63-0569 it collided thereat with the vehicle driven by the accused. The learned trial Court in recording findings of acquittal had dispelled the creditworthiness of the testimonies of PW-1 and PW-3 both eye witnesses thereto rather had imputed credence to the testimony of PW-10, an occupant alongwith the accused/respondent in the offending vehicle. Hence it has to be gauged whether the aforesaid dispelling by the learned trial Court of the creditworthiness of the testimonies of PW-1 and PW-3 contrarily its imputing credence to the testimony of PW-10 does or does not suffer from any infirmity of its mis-appreciating or omitting to appreciate, their relevant impact upon the concert of the prosecution in proving the genesis of its case against the respondent/accused. Any dis-imputation by the learned trial Court qua the veracity of the testimonies of PW-1 and PW-3 would hold tenacity only in the event of each of them deposing a version contradictory to the one disclosed by them respectively in their previous statements recorded in writing besides when their occur manifest intra se contradictions in their respective depositions qua the occurrence. Both PW-1 and PW-3 in their respective depositions ascribed negligence to the respondent/ accused in the latter's driving the offending vehicle. Since on the relevant day a land slide had occurred at the site of occurrence hence its occurrence thereat restricted the free movement of the traffic thereat. Uncontrovertedly, given the national highway at the relevant site of occurrence standing hence constricted in width whereupon the traffic thereat could ply only one way, as a corollary, when at the relevant site of occurrence for the reasons ascribed hereinafter there was no opportunity to either the vehicle driven by the complainant or to the vehicle driven by the accused/respondent to proceed ahead of the other unless one adhered to, for obviating the road mishap, the standards of due care and caution by applying the brakes of the relevant vehicle driven by him, hence it was incumbent upon the accused/respondent, given the admitted prime factum of his swerving his vehicle to the inappropriate side of the road thereupon his hence holding an onerous duty, to, given his sighting the vehicle driven by the complainant/victim which arrived thereat from the opposite direction for obviating its colliding with the vehicle driven by the victim/complainant, apply its brakes**.** Also since the vehicle driven by the victim complainant was occupying the appropriate side of the road yet the aforesaid factum alone did not given the factum of the accused respondent standing constrained to with a land slide occurring at the site of occurrence swerve it to the inappropriate side of the road, relieve him also of his duty to slow the pace of his vehicle for obviating its colliding with the vehicle driven by the respondent/accused. PW-1 has in his deposition comprised in his examination in chief deposed of his, at the relevant time on his sighting the vehicle driven by the accused respondent, vehicle whereof had swerved to the inappropriate side of the road, his applying the brakes of the vehicle driven by him. However, the aforesaid deposition is a pure embellishment or an improvement besides contradicts his previous recorded statement qua the occurrence wherein the factum aforesaid stands unenunciated by him. Even when hence the aforesaid factum singularly ingrains his deposition qua it with a vice of embellishment constraining hence this Court to conclude therefrom of the victim/informant also not adhering to the standards of due care and caution constituted in his applying the brakes of his vehicle on sighting the vehicle driven by the accused whereupon hence the road mishap would stand obviated, does not yet shake the edifice of the prosecution story in its entirety, as PW-3 another eye witness to the occurrence has echoed in his deposition

comprised in his examination in chief of the victim/informant driving his vehicle at a slow pace at the relevant time. The aforesaid communication made by him in his examination in chief stands uncontradicted by his previous statement recorded in writing hence credence is imputable to it also when the factum aforesaid deposed by him in his examination in chief though stood concerted to be shred of its efficacy by the learned defence counsel by his putting an apposite suggestion to him yet with the apposite suggestion put to him by the learned defence counsel while holding him to cross-examination standing repulsed by him renders open a firm conclusion, of the victim on sighting the vehicle driven by the accused/respondent, his slowing the pace of the vehicle driven by him. Consequently, it has to be held of even when the accused given the constraint aforesaid besetting him, drove his vehicle on the inappropriate side of the road, of the victim/complainant too standing not yet relieved of his duty to apply the brakes of his vehicle or slow down its pace whereupon hence the collision interse the vehicle driven by the accused with the vehicle driven by the complainant would have not occurred, duty whereof as displayed by the un-shattered testimony of PW-3 an eye witness to the occurrence stood performed by the victim comprised in his at the relevant time slowing the pace of the vehicle driven by him, hence his evidently conforming to his enjoined duty of his adhering to the standards of due care and caution. Consequently, the effect of contradictions if any in the deposition of PW-1 vis.a.vis his previous statement recorded in writing qua his on sighting the vehicle driven by the respondent his applying its brakes would not per se constrain any conclusion, of the accident which occurred at the relevant time standing sequelled by the victim/informant being rash and negligent in driving his vehicle, purported rashness whereof at his instance in driving his vehicle stands purportedly constituted in his purportedly not adhering to standards of due care and caution.

10. Hereat, it is imperative to allude to the bespeakings occurring in the testimony of PW-10, as stood, relied upon by the learned trial Court for recording findings. A thorough reading of his testimony discloses of his in his cross-examination conceding to the factum qua occurrence of land slide at the site of occurrence rendering hence only a part of the road being pliable. In his cross-examination when he further communicates of the victim while driving his vehicle not applying its brakes rather his striking the relevant stationary bus at the site of occurrence does prima facie give impetus to an inference of the entire edifice of the prosecution case collapsing. However, for the aforesaid inference being carried forward, it has to be read in coagulation with further communications occurring in his cross-examination qua the road at the relevant site holding a width sufficient for enabling even the vehicle driven by the respondent moving ahead without its colliding with the vehicle driven by the accused respondent. A reading, of the latter part of his deposition in his cross-examination occurring immediately subsequent to the part therein, wherein he ascribes negligence to the informant while driving his vehicle, in conjunction with the opening part of his cross-examination wherein he discloses qua the side of road which constitutes the inappropriate side of the road vis.a.vis. the vehicle driven by the respondent standing constricted in width hence de-facilitating the movement of each of the vehicles on both sides of the national highway, obviously, manifests his therein concocting the factum qua adequacy of space at the site of occurrence still existing for facilitating the complainant to shift his vehicle thereat predominantly when earlier thereto he bespeaks of the National Highway only holding the capacity qua singular or solitary movement of vehicles thereat. The effect of the aforesaid contradictions is of theirs concomitantly rendering also the factum deposed by him wherein he ascribes negligence to the informant in the latters driving his vehicle, to stand conjured or engineered by him rather also it appears of his deposition standing reared by his holding leanings towards the respondent also hence his interestedness in deposing in his favour given his admittedly holding employment under the respondent. In sequel the discarding of the testimony of PW-1 and PW-3 by the learned trial Court rather its imputing credence to the biased testimony of PW-10 appears to stand sequelled by its misappreciating their respective probative worth. Also the photographic evidence on record, value whereof stood scored off by the learned trial Court merely on a cursory suggestion standing put to him by the learned defence counsel thereat while holding him to cross-examination of theirs standing clicked even when the position of the vehicles stood disturbed, suggestion whereof did not evoke a response in the

affirmative, was not sufficient to dispel the relevant display in the photographs, of the vehicle driven by the accused/respondent occupying the inappropriate side of road also the display occurring therein in contradiction to the deposition of PW-10 constituted in his cross-examination of space yet standing left thereat despite the vehicle driven by the respondent swerving to the inappropriate side of the road, for its standing occupied by the vehicle driven by the informant whereupon hence negligence stands ascribed by him to the informant while driving his vehicle also acquiring an accentuated taint of invention.

11. A wholesome analysis of the evidence on record portrays that the appreciation of evidence as done by the learned trial Court suffers from a gross perversity and absurdity hence it can be held of the learned trial Court in recording findings of acquittal its committing a legal misdemeanor, inasmuch as its mis-appreciating the evidence on record or its omitting to appreciate relevant and admissible evidence. In aftermath this Court deems it fit and appropriate that the findings of acquittal recorded by the learned trial Court merit interference.

12. In view of the above discussion, I find merit in this appeal, which is accordingly allowed and the judgement of acquittal rendered by the learned trial Court is quashed and set-aside. Accordingly, the accused is held guilty for his committing an offence punishable under Section 279 IPC. Taking into consideration the facts and circumstances of the case, he is sentenced to undergo simple imprisonment for a period of two months and also to pay a fine of Rs.1000/-. In default of payment of fine amount he shall further undergo simple imprisonment for a period of 15 days. The Registry is directed to take up follow up action forthwith.

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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
Dinesh Kumar and others ……..Respondents

Cr. Appeal No. 376/2010
Reserved on: June 29, 2016
Decided on: June 30, 2016

Indian Penal Code, 1860- Section 147, 148, 452, 302, 323 and 506 read with Section 149- PW-1 had purchased the land in the year 1991 from D- lands of K and Dinesh were situated on two sides of this land- PW-1 filed an application for partition- land was partitioned in the year 2006- he constructed a house on his land - his mother was in the house- all the accused came in a Maruti- they parked the car on the road side and started beating with stone, danda and fist blows- B came on the spot and she was beaten by the accused - she went inside the room- she was followed by the accused who gave her beatings- she fell down and died- accused were tried and acquitted by the trial Court- held, in appeal that adjacent shopkeepers were not cited as witnesses- PW-1 had improved her version- he stated that he was thrown into the pit by the accused but no pit was found on the spot- PW-2 and PW-5 did not support the prosecution version- injuries could have been caused by way of fall- demarcation was not conducted in the presence of the accused- informant party had tried to raise construction on the disputed land and was asked by the accused to stop construction but the informant did not agree- accused had right to protect their property - death of the mother of the informant had taken place due to fall from stair- trial Court had rightly acquitted the accused- appeal dismissed. (Para-18 to 20)

For the appellant	:	Mr. Parmod Thakur, Additional Advocate General.
For the respondents	:	Mr. Anup Chitkara, Advocate.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

The State has come in appeal against Judgment dated 31.12.2009 rendered by the learned Presiding Officer, Fast Track Court, Mandi, District Mandi, HP, whereby respondents-accused (hereinafter referred to as 'accused' for convenience sake), who were charged with and tried for offences under Sections 147, 148, 452, 302, 323 and 506 read with Section 149 IPC, have been acquitted.

2. Case of the prosecution, in a nutshell, is that on 5.11.2008, complainant Hem Raj informed the police on telephone that his mother was killed by 3-4 persons and this information was entered vide *Rapat* No. 8 in Police Station, Padhar. On this information, SI/SHO Sarif Mohammad alongwith other police personnel visited the residential house of the complainant at village Katipari. On visiting the spot, he found that the dead body of Smt. Bimla Devi, mother of the complainant Hem Raj was lying in the gallery of the room and the complainant gave his statement under Section 154 CrPC before SI/SHO Sarif Mohammad to the effect that PW-1 Hem Raj purchased land in the year 1991 from Duryodhan son of Shri Sita Ram resident of village Katipari and to the one side of his land, there was land of Krishan Chand son of Sita Ram and to the other side of the land of Dinesh Kumar alias Babla son of Jiwan Lal. He had filed partition case and the partition had been effected in the year 2006. He had started the work of construction of shop and house adjoining to his already existing house. He had employed Jagat Ram Mason and Jangli Devi as labourer. Construction work was going on. He alongwith mason was working. His mother Bimla Devi was in the house. At 11.30 Am, all the accused came in a Maruti car. They parked the car on the roadside. They started giving beatings with stones, *Danda* and fist blows. Accused Dinesh Kumar alias Babla was having *Danda* in his hand. Accused Virender and Chander Shekhar were having stones in their hands and Krishan Chand and Amro Devi were giving him beatings with kick and fist blows. On hearing noise, his mother Smt. Bimla Devi after stepping down from the stairs came on the spot to rescue him. On this all the accused also gave kick, fist and stone blows to her on the road. His mother rescued herself from the clutches of the accused and went inside the room. She was followed by the accused. Accused again gave her beatings. His mother fell down and died. Thereafter, all the accused ran away. The incident was seen by Ghan Shyam Dass while accused were fleeing from the spot. He received injuries on his ear, left shoulder and back due to the beatings given by the accused. Case property was taken into possession. Inquest papers were prepared. Post-mortem examination of the deceased was got conducted. According to the opinion given by the Doctor, deceased had died due to head injury leading to subdural haematoma. Investigation was completed. Challan was put in the Court after completing all the codal formalities.

3. Prosecution has examined as many as eighteen witnesses to prove its case against the accused. Accused were also examined under Section 313 CrPC. They pleaded innocence. Trial Court acquitted the accused as noticed above. Hence, this appeal.

4. Mr. Parmod Thakur, Additional Advocate General has vehemently argued that the prosecution has proved its case against the accused persons.

5. Mr. Anup Chitkara, Advocate has supported the judgment of acquittal dated 31.12.2009.

6. We have heard the learned counsel for the parties and also gone through the record carefully.

7. Hem Raj (PW-1) is the complainant. According to him, on 5.11.2008, at about 11.30 AM, he was constructing new house. He had employed Jagat Ram as Mason and Jangli Devi as a labourer. Accused Krishan Chand, Amro Devi, Virender, Chander Shekhar and Dinesh, came in a Maruti 800 car. They warned him to stop the construction work or they would kill them. Accused Krishan Chand asked other accused to kill him and bury him in a pit. On this, all

the accused pounced upon him and accused Chander Shekhar, Dinesh had beaten him with *Danda* on the back side of neck. He received injury on the back side of his neck. They picked him and threw in the pit. Jagat Ram Mason came and rescued him from the clutches of the accused and also pulled him out of the pit. Accused also pounced upon Jagat Ram. On hearing his cries, his mother Bimla Devi came to the spot. He rescued himself from the clutches of Chander Shekhar, Virender and Babla @ Dinesh. His mother was caught hold by Amro Devi and Krishan Chand. He tried to rescue his mother. Other three accused ran after him. He and Jagat Ram rescued his mother, who was laid down on the ground. All the accused pounced upon him and his mother. Accused Dinesh was holding a *Danda* in his hand and another accused was carrying stones in their hands. None was carrying brick. Cemented stone was in the hands of Virender. He was given beatings on his chest, neck and head with *Danda*. His mother Bimla Devi went to the room through stairs. Accused followed his mother and ran towards the room after climbing stairs. All the accused entered the room after his mother. Accused gave beatings to his mother in the room. When they entered the room, his mother was lying dead in the room. Accused were pelting stones on him from the lintel of their house. Accused had killed his mother. He called Jagat Ram. Jagat Ram reached the spot. Accused fled from the spot. No other person except him and Jagat Ram had seen the occurrence. Accused fled from the spot in their car. He informed the police. Police reached the spot. His statement Ext. PW-1/A was recorded. In his cross-examination, he has admitted that adjacent to his land, land belongs to accused party. He also admitted that in front of his house, there were two shops, one was of motor mechanic and other was a printing press of Pawan Kumar. He admitted that both the shops were open at the relevant time and their tenants Pawan Kumar and Ghan Shyam were present at the spot. He told the police that all the accused decided to kill him and then bury him in a pit. (confronted with his statement, Ext. PW-1/A, wherein it is not so recorded). He also told the police that the accused gave beatings with *Danda* on his neck. (confronted with his statement Ext. PW-1/A, wherein it is not so recorded). He has told the police that there was a lacerated wound on his forehead. Same was bleeding. (confronted with his statement Ext. PW-1/A, wherein it is not so recorded). The pit where he was thrown was 5 feet deep and 3 ½ feet wide. He remained in the pit for about 4-5 minutes. He cried. On his cries, Jagat Ram came and pulled him out of the pit. All accused were throwing stones on him during this time. No stone hit his forehead or other parts of the body but the stones were thrown near his feet. He has told the police that all the accused pounced upon Jagat Ram. (confronted with his statement Ext. PW-1/A, wherein it is not so recorded). Scuffle continued for half an hour. He told the police that accused entered the room and after crossing the back door, had gone up to the lintel and from there all started pelting stones. (Confronted with his statement Ext. PW-1/A, wherein it is not so recorded). Many people had assembled on the spot when occurrence took place. Pawan and Ghan Shyam had closed shops after the incident. He told the police that the shops were open and tenants were present. He admitted that all the accused were unarmed. He has told the police that accused Amro Devi and Krishan Chand were carrying stones in their hands. (confronted with his statement Ext. PW-1/A, wherein it is not so recorded). All the accused gave only kick and fist blows. He also admitted that he had inimical relations with the accused.

8. Jagat Ram (PW-2) testified that he was working as a mason for the construction of the house of PW-1 Hem Raj. On 5.11.2008, at about 11.30 AM, all the accused came in a Maruti car to the spot. Accused threw PW-1 Hem Raj in the pit and he cried for help. He went there and pulled him out of the pit. He was given kick and fist blows. He fell on the heap of rock salt. He was crying and his mother came to his rescue. She was given kick and fist blows by the accused. She fell on the stone stairs and sustained injuries on head. Accused Virender, Chander Shekhar and Babla alias Dinesh had given kick and fist blows to Bimla and she sustained injuries on her head while falling on the store stairs. Accused had gone to the side of the house. Bimla Devi died in the gallery of the house. Accused Chander Shekhar had pelted stones in the lintel of the house of PW-1. He had not seen the accused killing Bimla Devi. Hem Raj had given a *Danda* blow on the neck of accused Dinesh alias Babla. He was declared hostile and cross-examined by the learned Public Prosecutor. In his cross-examination, he deposed that the

portions 'A' to 'A', 'B' to 'B' 'C' to 'C', 'D' to 'D' , 'E' to 'E', 'F' to 'F' and 'G' to 'G' were incorrect. He denied the suggestion that due to the beatings of the accused, Bimla Devi sustained injury on head and died. In his cross-examination by the defence counsel, he categorically deposed that the deceased had sustained injuries on the stone stairs after fall. He also admitted that no weapons like stick, *Danda* and stones were used by the accused persons on the body of the deceased. He admitted that two shops were in front of the alleged place of occurrence. One was occupied by Pawan Kumar and other was occupied by Ghan Shyam Dass and both these persons were sitting in the shops. There were more than 30 persons on the spot, who had seen the occurrence. After he separated the deceased and her son, they left for the room and he closed the gate from outside after locking it. He admitted that accused had used no weapon throughout the verbal altercation. He admitted that the deceased after fall had struck with stone *danga* on head side and sustained injury on her head. He admitted that none of the injuries caused by the accused were fatal in nature. He has specifically admitted that the deceased fell from stairs and struck her head against stone *Danga*, resulting in head injury. He admitted that none of the accused entered the house of the complainant.

9. Pankaj Kumar (PW-3) deposed that on 9.11.2008, accused Dinesh Kumar made a disclosure statement to the police that the *Danda* with which he had beaten Hem Raj and Bimla Devi had been concealed by him in the bushes in the field of Krishan Chand. *Danda* was got recovered vide memo Ext. PW-3/A. *Danda* is Ext. P5. In his cross-examination, he has admitted that complainant was son of sister of his father. Ext. PW-3/A was prepared in the house of Hem Raj. He admitted in his cross-examination that on 6.11.2008 to 9.11.2008, no discussion took place regarding Ext. P5. It was only on 9.11.2008, that *Danda* came into picture at the time of arrival of police. He admitted that he had seen such type of *Danda* for the first time in his life. Statement of the accused was not recorded under Section 27 of the Evidence Act by the police.

10. Jangli Devi (PW-5) deposed that she was working as a labourer for the construction work of house of Hem Raj. All the accused came on the spot in a car. Hem Raj was pushed by one of the accused and he fell into a pit. Other accused started filling up the pit. She did not know where the complainant Hem Raj suffered injuries. She was declared hostile and cross-examined by the learned Public Prosecutor. In her cross-examination by the learned Public Prosecutor, she admitted that the accused Dinesh alias Babla had altercation with Hem Raj and accused Virender Kumar and Chander Shekhar pelted stones upon the complainant Hem Raj. Volunteered that the stones were pelted from both the sides but no injury was suffered by the complainant. She denied the suggestion that Hem Raj suffered injuries on his chest, legs and head. She admitted the suggestion that on hearing cries of Hem Raj, Bimla Devi came to the spot to rescue the complainant from the accused. Accused Dinesh was holding *Danda* in his hand and he gave *Danda* blows on the head of Hem Raj and Bimla Devi. Rest of the accused gave kick and fist blows to Hem Raj and Bimla Devi. Accused Dinesh, Chander Shekhar and Virender followed Bimla Devi upto the room and had not entered inside the room. Only three accused had followed deceased Bimla Devi. He denied portions 'B' to 'B', 'C' to 'C', 'D' to 'D', 'E' to 'E', 'F' to 'F' and 'G' to 'G' of his statement recorded under Section 161 CrPC as incorrect. She could not say that due to whose blow/beatings Bimla Devi had died. In her cross-examination by the learned defence Counsel, she admitted that there were about 50-60 persons present on the spot. Bimla Devi came running and had a fall while going back, head downwards. Accused Amro Devi was sitting only at the shop of Ghan Shyam and her husband was standing at a far place. She admitted that altercation had taken place on account of digging of pits. She also admitted that the stones were being pelted by the complainant also. His mother had come by stairs. She also admitted that story of stick and *Danda* blows was told to her in the Court for the first time at the instance of complainant Hem Raj.

11. Duryodhan (PW-7) deposed that he had sold the land to the complainant Hem Raj for a sum of Rs.90,000/-. Land was surrounded by lands of Jiwan and Krishan. In his cross-examination, he has admitted that when he sold the land, land was joint, un-partitioned. He had sold the share and no specific number was shown and no *Tatima* was annexed with the sale deed.

12. Dr. Yamini Vaidya (PW-8) examined the complainant Hem Raj. She issued MLC Ext. PW-8/B. She noticed the following injuries:

"1. Abrasion with contusion size approximately 4x 5 over frontal portion of chest just below the superasternal notch.
2. contution of size 2 x 3 cm over the left side of cheek.
3. Small abrasion with fresh blood over the left side of scalp.
4. A patterned contusion 4 x 1 cm over the back side on both left and right side of infrascapular region.
5. Another contusion obliquely pattern contusion over the lower back both on left and right side.
6. Tenderness over the chest and right side."

13. Dr. Nag Raj Pawar (PW-9) has conducted the post-mortem examination on the body of the deceased Bimla Devi. According to him, he noticed following injuries on the body of the deceased:

"1. Grazed abrasion present over the left knee reddish brown in colour with dried blood over it.
2. Contusion of size 2 x 2 cm present over manubrium sterni, colour is reddish brown, on dissections the area blood and clots present underneath area of contusion over lying the cartilages and adjoining muscles.
3. Supercial laceration of size 1 x 1 cm present over palmer aspect of left hand over lying hypothenar area with reddish brown dried blood present over it.
4. Lacerated wound of the size 2 x 1.5 cm present over right parietal area with contusion of 3 x 3 cm present over the area of lacerated wound. On dissection and opening of cranial cavity there is subdural haematoma of the size 5 x 5 cm present below the injury and about 50 cc of fluid blood present over occipital lobe of right side.
5. Lacerated wound of the size 1 x 0.5 cm present over left frontal area of scalp over lying the area middle of left frontal bone with contusion of reddish brown colour over and around this injury. The size of contusion is 2 x 1.5 cm.
6. Contusion of 2 x 1 cm present over right occipital region of the scalp, linear anterioposterior. On dissection blood present underneath the injury.

Scalp

Injuries already mentioned on page No. 1 & 2 of P.M. report.

Skull and Vertebrae

No fracture of cranial valt seen. Vertifrae are normal.

Membranes-Brain

Subdural Haematoma present over right parietal area and fluid blood over right occipeatl lobe already mentioned in injury No. 4 page 2 of post-mortem reports.

Membranes are intact.

Spinal cord

Normal"

14. In his opinion, the deceased died due to head injury leading to subdural haematoma. The injury due to which deceased died, could be caused with blow of weapon like Ext. P4. In his cross-examination by the learned defence Counsel, he admitted that as per spot

position as reflected in photograph Exts. P6 and P7, the injury suffered by the deceased on her parietal region could be sustained by her after fall from stairs. He admitted that as per photographs Exts. P6 and P7, stones had been stored beneath the staircase. He admitted the suggestion that injury No.1 seemed to be result of fall. In case, deceased had been hit with some substance, then there should have also been associate contusion which was not present in injury No. 1. Injuries No. 2, 3, 5 and 6 were simple in nature and not fatal. The *Danda*/stick Ext. P5 was not shown to him at the time of conducting post-mortem on the body of deceased. No opinion was sought by the police from him to the effect whether injury No.4 could be caused with Ext. P5. He also admitted that as per report of FSL, no blood was detected on Ext. P4.

15. HC Krishan Kumar (PW-14) deposed that on 8.11.2008, accused Dinesh alias Babla disclosed that he had thrown *Danda* in the field of Krishan Chand and could get it recovered as he had the exclusive knowledge of the same. In his cross-examination, he has admitted that accused Dinesh had not told the police that he had concealed the *Danda* at a place which was only known to him. He did not remember the date on which accused Dinesh was associated.

16. Lekh Raj Patwari (PW-15) deposed that he prepared spot map/ Aks *Tatima* Ext. PW-15/A. He had also issued Nakal *Jamabandis* Ext. PW-15/B and Ext. PW-15/C. In his cross-examination, he has admitted that when Ext. PW-15/A was prepared, none of accused or their family members were summoned/associated. He also admitted that *Tatima* as per the nature of Ext. PW-15/A was prepared as per rules in the presence of the owner of the land but this practice was not followed in this case. On the spot, there was a boundary dispute inter se accused and complainant. No notice was served to the accused regarding demarcation. He also admitted that in case of boundary dispute, both the parties are heard on the spot and only then the land is demarcated.

17. Sarif Mohammad (PW-18) has carried out the investigation. He prepared inquest report Ext. PW-18/A. He got post-mortem examination conducted. Case property was taken into possession. Spot map was prepared. In his cross-examination, he has admitted that on arrival on the spot, both the shops in front of place of occurrence being run by the Pawan and Ghan Shyam were closed. He admitted that both Pawan and Ghan Shyam told him during the course of investigation that shops were closed on 5.11.2008. They had not seen the occurrence. It had also come in the investigation that when some trouble started at the spot, both Pawan and Ghan Shyam ran away from the spot. It has come in the investigation that Hem Raj was thrown into the pit and thereafter stones were pelted on him. He has not shown Ext. P5 to the autopsy surgeon since it was recovered on 9.11.2008. He also admitted that the complaint had not told him that the accused alarmed and declared that they would kill them both. Complainant Hem Raj has not told him that accused gave beatings on neck with *Danda* Ext. P5. Complainant had not told that there was a lacerated wound on his forehead and blood was oozing out from that. He had not seen any lacerated wound on the forehead of the complainant on his arrival. It was also not disclosed to him that Hem Raj was pulled out of the pit by Jagat Ram. It was also not disclosed to him by the complainant that all the accused entered the room and after crossing the back door had gone upto the lintel and from there all of them started pelting stones. Complainant had also not told him during the course of investigation that two shops in front of the place of occurrence were open and Ghan Shyam and Pawan Kumar had seen the occurrence. As per spot position, there was steep stair case. Stones, which were pelted on Hem Raj were not taken into possession by him. He admitted that there was no pit at the place of occurrence. Had there been one, he would have shown it in the spot map.

18. According to PW-1 Hem Raj, accused have visited the spot. They have administered beatings to him. His mother came to the spot. She was also beaten up. She went to the room. Accused followed her in the room where she was again given beatings leading to her death. In his cross-examination, PW-2 Jagat Ram has admitted that adjacent to the land of complainant, land of accused party was also there. He admitted that two shops being run by Pawan and Ghan Shyam were open at that time. However, neither Ghan Shyam nor Pawan was

cited as witness. In his examination-in-chief, PW-1 complainant deposed that he received injuries on neck and forehead but in Ext. PW-1/A, it is no so stated. According to him, he was pushed into the pit by the accused. It is not so stated by the Investigating Officer. He has deposed that there was no pit on the spot. Had it been so, he would have shown it in the spot map. PW-1 Hem Raj has not stated in Ext. PW-1/A that he was thrown into the pit. It has come on record that more than thirty persons had assembled on the spot but they were not associated as witnesses. He has also admitted that all the accused were unarmed. All the accused had given only kick and fist blows. He has admitted his inimical relations with the accused. PW-2 Jagat Ram is a material witness. Though initially he supported the case of the prosecution in the opening paras of examination-in-chief but subsequently, he was declared hostile and cross-examined by the learned Public Prosecutor. According to him, portions 'A' to 'A', 'B' to 'B', 'C' to 'C', 'D' to 'D', 'E' to 'E', 'F' to 'F' and 'G' to 'G' of his statement were incorrect. He has categorically deposed that deceased had sustained injury after fall from stairs. No weapons like *Danda* and sticks were used by accused. There were two shops in front of the alleged place of occurrence. One was occupied by Pawan Kumar and other was occupied by Ghan Shyam. Both were sitting in their shops. According to him, he separated the deceased and her son. Both of them left to the room and he had closed the gate from outside after locking it. He also reiterated that deceased died after fall when her head struck with stone Danga on head side and sustained injury on the head. No fatal injury was caused by accused. He also deposed that none of the accused entered the house or verandah of the complainant. PW-5 Jangli Devi is also a material witness. According to her, accused came in a car. Hot words were exchanged. She was declared hostile and cross-examined by the learned Public Prosecutor. In her cross-examination by the Public Prosecutor, she deposed that the accused pelted stones upon the complainant. Stones were pelted from both the sides. No injury was suffered by the complainant. She further deposed in the cross-examination by the Public Prosecutor that accused Dinesh alias Babla, Chander Shekhar and Virender had followed Bimla Devi however, they did not enter the room and only three accused had followed Bimla Devi upto the room. In her cross-examination by the learned defence Counsel, she admitted that the story of *Danda*/sticks was told to her for the first time at the instance of complainant Hem Raj. There was an old dispute between the parties. The land which was sold to the complainant was not partitioned as per statement of PW-7 Duryodhan. No specific number was shown, and no *Tatima* was prepared. According to PW-9, Dr. Nag Raj Pawar, as per spot position, reflected in Exts. P6 and P7, injuries sustained by the deceased on parietal region can be sustained due to fall from stairs. Stones were stored beneath the stair case. Injury No. 4 sustained by the deceased was not fatal injury. He also admitted that injury No. 1 seemed to be result of fall and in case deceased had been hit with some substance then there should have been associate contusions which were not present on injury No. 1 observed by him. Nature of injuries No. 2, 3,5 and 6 was simple. *Danda*, Ext. P5 was not shown to him at the time of post-mortem examination of the body of deceased. No blood was detected on Ext. P4 as per the report of FSL. No opinion was sought by the police from him whether injury No.4 could be caused with Ext. P5. Prosecution case has not been supported by PW-2 Jagat Ram and PW-5 Jangli Devi, who were present at the spot. According to the statement of PW-5 Jangli Devi, deceased had sustained injuries by fall from stair case. Statement of PW-5 Jangli Devi gets credence from the statement of PW-9 Dr. Nag Raj Pawar, who has also opined that injury No. 1 could not suffered by deceased on her parietal region by fall from stairs. PW-1 Hem Raj (complainant) has made various improvements in his statement as discussed herein above, about the manner in which incident has taken place. Ghan Shyam and Pawan Kumar were present on the spot at the time of occurrence and more than thirty people had assembled on the spot. According to PW-1 Hem Raj, Ghan Shyam had seen the accused running away. However, fact of the matter is that neither Pawan Kumar nor Ghan Shyam who were sitting in their shops were examined by the prosecution. According to PW-5, Jangli Devi, only hot words were exchanged. PW-1 Hem Raj admitted that the accused were unarmed.

19. Procedure for conducting demarcation has not been followed. Families of accused were not involved at the time of demarcation. PW-2 Jagat Ram has not seen the accused hitting

Bimla Devi rather his statement is to the effect that deceased has sustained injuries from the stone stair case after fall. PW-2 Jagat Ram has also deposed that he separated the complainant from the accused and thereafter he closed the gate. Thus, there was no possibility for the accused to enter the room or verandah of the house of complainant. It has come on record that the relations between complainant and accused were inimical. Complainant party tried to raise construction on the disputed piece of land. Complainant party was asked by the accused not to raise construction. Complainant refused to stop the construction, which led to the incident on 5.11.2008. Accused had a right to protect their property and injuries inflicted upon complainant were simple in nature. There is sufficient material on record to come to the conclusion that the probable cause of the death of the mother of complainant was falling from the stairs and striking her head against stone wall, resulting in head injury.

20. Thus, the prosecution has failed to prove its case against the accused beyond all reasonable doubt.

21. 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 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
Pawan Kumar ……. Respondent

Cr. Appeal No. 568/2010
Reserved on: June 27, 2016
Decided on: June 30, 2016

Indian Penal Code, 1860- Section 306- Accused came to the house of the informant- he abused and threatened the informant that he would take away his daughter forcibly – earlier, a case for commission of offence punishable under Section 376 of Indian Penal Code was registered against the accused- daughter of the informant committed suicide by pouring kerosene oil on herself and setting herself ablaze- she was referred to PGI but was brought back by the informant as he had no money- accused was acquitted by the trial court- held, in appeal that statement of the deceased was recorded in the presence of Doctor- accused was acquitted on the ground that deceased was not fit to write Ex. PW-2/A and no certificate of mental condition was issued-it is evident from the handwriting that deceased was in tremendous pain and agony- she had written that accused was responsible for her death- PW-2 also admitted that a complaint was lodged with him against the accused and he had asked the accused to mend his ways – accused had threatened the informant in his house- statements of prosecution witnesses are trustworthy- it was duly proved that deceased had committed suicide by pouring kerosene oil on herself - trial Court had wrongly acquitted the accused- appeal allowed and accused convicted of the commission of offence punishable under Section 306 of I.P.C. (Para- 17 to 20)

Case referred:

Gulzari Lal v. State of Haryana (2016) 2 SCC (Crl) 325

For the appellant	:	Mr. M.A. Khan, Additional Advocate General.
For the respondent	:	Mr. Rajesh Mandhotra and Ms. Kanta Thakur, Advocate.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

The State has come in appeal against Judgment dated 16.7.2010 rendered by the learned Sessions Judge, Fast Track Court, Kangra at Dharamshala in S.T. No. 24/10, whereby the 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 by the learned trial Court.

2. Case of the prosecution, in a nutshell, is that the deceased Shalu was daughter of Sukh Dev and earlier upon the complaint of Sukh Dev, a case under Sections 363, 366 and 376 IPC was registered against the accused. After the aforesaid case, the accused used to threaten Shalu that he would again kidnap her. Accused had been teasing Shalu. On 18.7.2008, at 9.00 PM, accused came to the house of complainant and abused the complainant and threatened that he would take away Shalu forcibly. On 19.7.2008, at about 10 AM, when complainant alongwith his wife was working in his fields, Shalu poured kerosene oil on her and set herself ablaze. Fire was extinguished by the complainant and he informed the Pradhan of the Gram Panchayat. Thereafter, Shalu was taken to Daulatpur since she had sustained burn injuries. Shalu was referred to Chandigarh for further medical treatment but complainant brought her back since he had no money to go to Chandigarh. Thereafter, police was informed and statement of complainant was recorded. Medical examination of Shalu was conducted. On 24.7.2008, statement of Shalu was recorded by the police in the presence of medical officer. Shalu expired. Post-mortem examination was conducted. FIR was registered. Investigation was completed. Challan was put in the Court after completing all the codal formalities.

3. Prosecution has examined as many as fourteen witnesses to prove its case against the accused. Accused was also examined under Section 313 CrPC. He pleaded innocence. Trial Court acquitted the accused as noticed 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 persons.

5. Mr. Rajesh Mandhotra and Ms. Kanta Thakur, Advocates have supported the judgment of acquittal dated 16.7.2010.

6. We have heard the learned counsel for the parties and also gone through the record carefully.

7. Sukh Dev (PW-1) testified that he had filed a complaint against the accused under Sections 363, 366 and 376 IPC. Accused remained in jail for eleven months and thereafter, he was released. Accused used to threaten his daughter that he would again kidnap her. Accused also used to tease her by gestures. His daughter used to narrate these facts to him and his wife. In this regard, he had orally made a complaint to President, Gram Panchayat, Bathra. President had asked the accused to mend his ways, 2-3 times. On 18.7.2008, at 9 PM, accused came to their house and gave a letter to his daughter, which was taken into possession by him. Thereafter, accused fled away. later on, he had handed over the letter to the President of the Panchayat. On 19.7.2008, at 10 AM, his daughter poured kerosene oil on her body and set herself on fire. At that time, he was in the fields. When his daughter came outside in burning condition, he went to her to extinguish the fire. He extinguished the fire. His wife had also come. He informed the Pradhan telephonically. He took his daughter to private hospital at Daulatpur Chowk. Shalu was referred to Chandigarh. He did not have sufficient money. He brought her back to house. In the evening, Pradhan came. He inquired from his daughter and she had given in writing to the Pradhan that the accused should be responsible for her death. Then he took his daughter to Dehra Hospital. Police recorded his statement Ext. PW-1/A. In his cross-examination,

he has admitted that they have taken the deceased to Daulatpur Chowk in the vehicle of one Vikram Singh on 24.7.2008.

8. Jai Singh (PW-2) testified that he knew Sukh Dev. He made a complaint to him that accused had been torturing his daughter. He made the accused to understand one/two times. On 19.7.2008, he had gone out and when he came back in the evening, he came to know that daughter of Sukh Dev had set herself on fire after pouring kerosene oil. He went to see her in her house. He inquired from the girl but she was unable to speak. She had given him one written document Ext. PW-2/A. It was written by Shalu in his presence. He telephoned the police. They took Shalu to Dehra. In the night at about 2.30 AM, police had reached the hospital. On 20.7.2008, in his presence, the police had taken into possession the clothes of the deceased. Police also took into possession one plastic canny Ext. P5 vide memo Ext. PW-2/C. Clothes were sealed. He handed over to the police Ext. PW-2/A on 20.7.2008. He has denied the suggestion in cross-examination that Sukh Dev had never lodged any complaint with him. He had not reduced the complaint into writing but had told accused to mend his ways. He denied the suggestion that Ext. PW-2/A was not written by the deceased in his presence.

9. Dr. Kulbhushan Sood (PW-3) deposed that on 19.7.2008, Shalu was brought to the hospital by her father with alleged history of setting on fire after sprinkling kerosene oil at 12 Noon on 19.7.2008. Patient was smelling of kerosene oil. She was disoriented. Her clothes were removed and new clothes were put on. He informed the Police Station. Police moved an application Ext. PW-3/A for issuance of MLC and recorded the statement of witnesses. He certified that the patient was not fit to make statement. He issued MLC Ext. PW-3/B. In his cross-examination, he has admitted that 80% burns are sufficient to affect mental capability of patient. Both the hands of patient were burnt.

10. Sher Singh (PW-4) deposed that in his presence, President of Gram Panchayat produced before the police one letter mark X and documents Ext. PW-2/A which were taken into possession by the police vide recovery memo Ext. PW-2/D.

11. Dr. Ashish Lakhi (PW-5) deposed that in July, 2008, one girl named Shalu from Bathra was brought to him in burnt condition by her father. He had referred her to Chandigarh. In his cross-examination, he has admitted that at that time Shalu was not in a position to speak. He had informed the local police.

12. Roshan Lal (PW-6) deposed that he was owner of a medical store. On 19.7.2008, he received a telephonic information. Sukh Dev asked him to come to his house as a child had burnt. He went to his house and saw his daughter was burnt. He applied Burnol and asked him to take her to Doctor.

13. Smt. Sawarna Devi (PW-9) testified that Shalu was her daughter. They had registered a criminal case against accused. Accused remained in jail for eleven months. After coming out of jail, accused used to threaten her daughter and also used to tell her that he would abduct her. Her daughter used to tell these facts to her. They had reported this matter to the President of Gram Panchayat who had also made the accused understand but accused did not mend his ways. On 18.7.2008, her daughter was given a letter by the accused. Her daughter had given that letter to her father, who had further given it to the President of the Panchayat. On 19.7.2008, they were working in the fields. She heard alarms of her daughter and found that she had burnt herself. Her husband extinguished fire. President of Panchayat was telephonically informed. They took their daughter to Daulatpur Chowk in a private hospital. Doctor there advised them to take Shalu to Chandigarh. They did not have the money so they brought her back. in the evening, President of Panchayat came to their house. He inquired from Shalu. She was unable to speak so she gave in writing Ext. PW-2/A. They took Shalu to Dehra Hospital. From Dehra, she was referred to Chandigarh. Shalu expired on 24.7.2008.

14. Dr. Sanjay (PW-10) was posted as senior resident in the Department of Surgery in RPGMC Tanda. Police had orally requested him to accompany them as the statement of Shalu

was to be recorded, who was admitted in the hospital. On 24.7.2008, he went to ward of Shalu and she was found fit to give statement. Police had recoded the statement of Shalu Ext. PW-10/A in his presence which was attested by him vide endorsement Ext. PW-10/A. Police had written the same version Ext. PW-10/A, which was stated by Shalu. In his cross-examination, he has admitted that he had not issued any certificate that Shalu was mentally fit to make statement. He denied the suggestion that Shalu was not fit to make statement and Ext. PW-10/A was not her statement. He also denied the suggestion that he had later on attested Ext. PW-10/A at the instance of police.

15. SI Surjeet Singh (PW-13) deposed that on 20.7.2008 at 2.30 AM, a telephonic information was given by the doctor from Dehra Hospital that one girl with burn injuries had been brought for treatment. Upon this, he alongwith other police officials reached the hospital. He moved an application Ext. PW-3/A before Medical Officer for recording statement of girl. Girl was unable to speak and write. He obtained MLC of the girl as well as her father. Girl was referred to Tanda hospital. He recorded the statement of father of the girl, vide Ext. PW-1/A. President of Gram Panchayat Jai Singh produced before him one letter mark X written by accused and one document Ext. PW-2/A bearing hand writing of deceased. These were taken into possession vide Ext. PW-2/D. On 24.7.2008, in the hospital he recorded statement of Shalu Ext. PW-10/A as per version of the deceased. He also obtained post-mortem report from the doctor. Report of the FSL is Ext. PX. In his cross-examination, he has admitted that on 24.7.2008, he did not obtain any certificate from the doctor that Shalu was fit to make statement.

16. Dr. Atul Gupta (PW-14) alongwith Dr. D.P. Swamy conducted post-mortem examination of Shalu daughter of Sukh Dev resident of Bathra, Tehsil Dehra, District Kangra. She died on 26.7.2008. Post-mortem report is Ext. PW-14/A. In their opinion, deceased died due to septic shock as a result of 80-85% superficial ante-mortem burns. Probable time that elapsed between injury and death was between 6 to 10 days and probable time between death and post mortem was 12 to 24 hours.

17. FIR was registered against the accused under Sections 363, 366 and 376 IPC at the instance of Sukh Dev Singh. Accused was acquitted. Accused remained in jail for eleven months. Thereafter, accused instead of mending his ways, kept on teasing the deceased. He used to threaten that he would again kidnap her. On 18.7.2008, at 9 PM, he visited the house of the complainant PW-1 Sukh Dev Singh. He handed over a letter to Shalu. He abused PW-1 Sukh Dev Singh and threatened that he would take away Shalu forcibly. On 19.7.2008, deceased put herself on fire. Fire was extinguished by the complainant. Deceased was taken to the hospital. Doctor advised complainant to take her to Chandigarh. However, he did not have enough money to go to Chandigarh. Jai Singh, Pradhan, (PW-2) has visited the house of complainant on 19.7.2008. He was handed over Ext. PW-2/A by the deceased. Statement of the deceased was also recorded vide Ext. PW-10/A on 24.7.2008, in the presence of Dr. Sanjay (PW-10). Cause of death of Shalu was septic shock as a result of 80-85% superficial ante-mortem burns. Accused has been acquitted by the trial Court on the ground that the deceased was not fit to write Ext. PW-2/A and also on the ground that Dr. Sanjay (PW-10) has not issued certificate that the deceased was in a fit mental condition to give statement on 24.7.2008. Incident has taken place at 10 AM on 19.7.2008. PW-2 Jai Singh visited the house of the complainant in the evening. He was handed over Ext. PW-2/A. We have gone through Ext. PW-2/A. It is categorically stated in Ext. PW-2/A that the accused would be responsible for her death. It is evident from the handwriting that Shalu was in tremendous pain and agony when she was writing that accused would be responsible for her death. This was written on 19.7.2008. It is also written in Ext. PW-2/A by the Pradhan that Shalu had received burn injuries and she told him that accused used to tease her. Thus she has taken this extreme step. It has come in the statement of PW-1 Sukh Dev and his wife (PW-9) Sawarna Devi that the accused used to tease their daughter even after his acquittal in criminal case. They had informed this fact to the Pradhan of Gram Panchayat, PW-2 Jai Singh. Jai Singh (PW-2) has also admitted that complaint was lodged with him and he has told the accused to mend his way. In fact, accused had the audacity to visit the house of

complainant Sukh Dev on 18.7.2008 that too at 9 PM, abusing him and threatening to forcibly kidnap Shalu. PW-13 SI Surjeet Singh has recorded the statement of deceased vide Ext. PW-10/A on 24.7.2008. PW-10 Dr. Sanjay has deposed that the police had recorded the statement of Shalu in his presence. He attested the same vide endorsement Ext. PW-10/B. Police has written the same version in Ext. PW-10/A, which was told by Shalu. Statement Ext. PW-10/A would constitute a dying declaration under Section 32 of the Evidence Act. Merely that the Doctor has not issued certificate that Shalu was fit to make statement would not in any way effect the dying declaration made by deceased on 24.7.2008, that too in the presence of PW-10 Dr. Sanjay. It is duly proved by the prosecution that the accused alone was responsible for abetting suicide committed by the deceased. She received 80-85% superficial ante-mortem burns. She might have received 80-85% burns but still she had sufficient strength to write Ext. PW-2/A.

18. Their Lordships of the Hon'ble Supreme Court in **Gulzari Lal v. State of Haryana** reported in (2016) 2 SCC (Crl) 325, have held that a valid dying declaration may be made without obtaining a certificate of fitness of declarant by a medical officer. Their lordships have held as under:

> "21. We find no infirmities with the statements made by the deceased and recorded by the Head Constable Manphool Singh (PW-7). A valid dying declaration may be made without obtaining a certificate of fitness of the declarant by a medical officer. The law regarding the same is well-settled by this Court in the decision of Laxman v. State of Maharashtra[6], wherein this Court observed thus:
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> > "3. There is no requirement of law that a dying declaration must necessarily be made to a magistrate and when such statement is recorded by a magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise."
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> 22. Further, clarity on the issue may be established by the judgment of this Court in the case of Paras Yadav & Ors. v. State of Bihar[7], wherein this Court addressed the question regarding the dying declaration that was not recorded by the doctor and where the doctor had not been examined to say that the injured was fit to give the statement. It has been held by this Court as under :
>
> > "8....In such a situation, the lapse on the part of the Investigating Officer should not be taken in favour of the accused, may be that such lapse is committed designedly or because of negligence. Hence, the prosecution evidence is required to be examined de hors such omissions to find out whether the said evidence is reliable or not."
>
> 23. In reference to the position of law laid down by this Court, we find no reason to question the reliability of the dying declaration of the deceased for the reason that at the time of recording his statement by Head Constable, Manphool Singh (PW-7),he was found to be mentally fit

> to give his statement regarding the occurrence. Further, evidence of Head Constable Manphhol Singh (PW-7) was shown to be trustworthy and has been accepted by the courts below. The view taken by the High Court does not suffer from any infirmity and the same is in order."

19. In this case also, dying declaration was recorded by the Head Constable and endorsement was made on it by PW-10 Dr. Sanjay. Statements of PW-1 Sukh Dev Singh, PW-9 Smt. Sawarna Devi and PW-10 Dr. Sanjay are trustworthy. The deceased has committed suicide by pouring kerosene oil on her and accused has abetted commission of suicide by consistently teasing the deceased. Learned trial Court has manifestly erred by discarding Ext. PW-2/A and Ext. PW-10/A on very flimsy grounds, not borne out of the record.

20. The appeal is allowed. Judgment dated 16.7.2010 rendered by the learned Sessions Judge, Fast Track Court, Kangra at Dharamshala in S.T. No. 24/10 is set aside. Accused is convicted for offence under Section 306 IPC. He be produced to be heard on quantum of sentence on 7.7.2016.

21. Registry is directed to prepare and send the production warrant to the quarter concerned.

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

Ashwani Sood ....Petitioner.
Versus
State of Himachal Pradesh ....Respondent.

Cr. Revision No. 92 of 2010.
Reserved on 24.6.2016
Date of Decision: 01.07. 2016

Prevention of Food Adulteration Act, 1954- Section 16 (1) (a) (ii)- Accused failed to produce licence for selling food articles on demand by Food Inspector- he was tried and convicted by the trial Court- an appeal was preferred, which was dismissed- held, in revision that accused was found selling food articles- he had failed to produce any licence for the same- he claimed that licence was given for renewal but he produced a licence which was valid from 1.4.2005 till 31.3.2005- inspection was made on 4.6.2004 and thus, there was no valid licence on the date of inspection- accused was selling food articles without valid licence- he was rightly convicted by the Court- appeal dismissed. (Para-10 to 23)

Case referred:
Krishnan and another Versus Krishnaveni and another, (1997) 4 Supreme Court Case 241

For the petitioner: Mr. Anoop Chitkara, Advocate.
For the respondents: Mr. Pankaj Negi, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

The instant criminal revision petition filed under Section 397 and 401 Cr.PC is directed against the judgment dated 12.3.2010 passed by learned Additional Sessions Judge, Shimla, in Criminal Appeal No. 41-S/10 of 2006 affirming the judgment of conviction dated 17.6.2006 passed by the learned Judicial Magistrate, Court No.2, Shimla in Criminal Case No. 572/3 of 2004 titled *"State verses Ashwani Sood."*

2. Briefly stated facts as emerge from the record are that on 4th June, 2004 at about 2:00PM, the Food Inspector (the Inspector for the sake of brevity) namely Shri LD Thakur, visited M/s Hotel Varuna, Bawa Market, Shimla and found owner of the aforesaid Hotel, namely Ashwani Sood (in short the accused) to be conducting the business. Since he had kept cold drinks, tea, coffee and mineral water etc., in the shop for sale to the general public, the Inspector asked him to produce the licence for selling food articles but the accused failed to produce the same. Since the accused on demand made by the Inspector failed to provide the valid licence as required under Rule 50 of the Food and Prevention of Adulteration Rules,1956 (in short the Rules), the Inspector prepared the spot map and carried out necessary codal formalities to challan the accused. Record further reveals that the Inspector on the basis of material collected by him sought written consent/sanction from the CMO, Shimla to prosecute the accused, which was accordingly sanctioned. After procuring sanction from the competent authority, complaint was presented in the court of learned Judicial Magistrate, Ist Class, Court No.2, Shimla, HP and after close scrutiny of the documents annexed with the compliant, the accused was summoned.

3. Learned trial Court after satisfying itself that prima-facie case exists against the accused, put a notice of accusation to him under Section 16 (1) (a) (ii) of the Prevention of Food Adulteration Act, 1954, (in short the Act) to which he pleaded not guilty and claimed trial.

4. Learned trial Court, on the basis of material made available on record by the prosecution, concluded the trial and vide judgment dated 17th June, 2006, held the accused guilty for having committed offence under the Act.

5. Subsequently, vide order dated 20.6.2006, learned trial Court sentenced the accused to suffer simple imprisonment till the rising of the Court and to pay fine of Rs. 500/- and in default, further to undergo simple imprisonment of ten days. However, as per aforesaid order, both the sentences were to run concurrently.

6. Being dissatisfied with the judgment passed by the learned trial Court, accused filed an appeal under Section 374 Cr.PC in the court of learned Additional Sessions Judge, which was dismissed vide judgment dated 12.3.2010. Hence, the instant criminal revision petition before this Court.

7. Mr. Anoop Chitkara, Advocate, appearing on behalf of the accused vehemently argued that the judgment passed by both the courts below are not sustainable as the same are not based upon the correct appreciation of evidence available on record. He contended on behalf of the petitioner that both the courts below while holding the accused guilty, failed to acknowledge that licence for the year, 2004-05 was renewed by the Municipal Corporation from retrospective date by levying the compounding fee and as such finding of the court below that accused had no valid licence for the year, 2004-05, deserves to be quashed and set-aside being foreign to the records. He forcefully contended that both the courts below failed to appreciate that CW-2 the Inspector, in his cross-examination categorically submitted that vide document Mark-X, licence fee for the year, 2004-05, was paid for the business of catering in the premises. He also invited attention of this Court to the documents Mark-X and Y to demonstrate that condition No.9 specifically provides that *"licencee shall apply for renewal of licence before the end of period of validity of licence and his previous licence shall remain valid until a fresh licence is issued and specific orders are issued to him on his application."* He forcefully contended that the accused had already renewed the licence of the said period after paying the compounding fee and there was no mens-rea on his part to indulge in such business without there being any valid licence and, as such, the judgments passed by both the Courts below are not correct and same deserve to be quashed and set-aside. He also submitted that there was no valid and proper sanction to prosecute the accused because Dr. Suman Gupta, CMO was never examined and accused had no opportunity to dis-prove her credibility and to verify whether she had actually issued sanction as claimed by the prosecution or not? He also challenged the authority of the Inspector (CW2) to check the premises of the accused because as per him, Municipal Corporation Shimla was not declared a local area under clause (vii) of Section 2 of the Act. During arguments,

he also invited attention of this Court to the statements given by the witnesses as well as statement of the accused recorded under Section 313 Cr.PC to suggest that some of the most material prosecution evidence appearing against the accused were put to the accused under Section 313 Cr.PC and as per Mr. Chitkara, such material could not be used against the accused. At last, he submitted that the conviction and sentence passed against the accused is harsh and, as such, same deserves to be quashed and set-aside.

8. Per contra, Mr. Pankaj Negi, learned Deputy Advocate General, assisted by Mr. Rajat Chauhan, Law Officer, appearing for the respondent-State supported the judgments passed by both the Courts below. Mr. Negi vehemently argued that no interference, whatsoever, of this Court is warranted in the present facts and circumstances, especially, where it stands duly proved that the accused was not having a valid licence as required under Rule 50 of the Rules, to sell the food articles. He also invited attention of this Court to the statement given by the DW under Section 33 Cr.PC, himself to demonstrate that he himself admitted that at the time of inspection, he had no valid licence to sell the food articles. He forcefully contended that bare perusal of the judgments passed by the courts below suggests that same are based upon the correct appreciation of evidence available on record and as such, the present petition deserves to be dismissed. Eventually, he contended that this Court while exercising powers under Section 397, Cr.PC has very limited power to re-apprecaite the evidence, especially, when it stands established on record that both the courts below have very meticulously dealt with each and every aspect of the matter. Mr. Negi prayed for dismissal of the revision petition.

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

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

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

> *8. The object of Section 483 and the purpose behind conferring the revisional power under Section 397 read with Section 401, upon the High Court is to invest continuous supervisory jurisdiction so as to prevent miscarriage of justice or to correct irregularity of the procedure or to mete out justice. In addition, the inherent power of the High Court is preserved by Section 482. The power of the High Court, therefore, is very wide. However, the High Court must exercise such power sparingly and cautiously when the Sessions Judge has simultaneously exercised revisional power under Section 397(1). However, when the High Court notices that there has been failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is but the salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities/ incorrectness committed by inferior criminal court in its judicial process or illegality of sentence or order."*

12. It is undisputed that CW2, the complainant, L.D. Thakur, was duly authorized by State Govt. to inspect the premises to take the samples and to initiate the prosecution under the Act, he visited M/s Hotel Varuna, Bawa Market Shimla on 4.6.2004, wherein he found the

accused conducting business of hotel. It is also not in dispute that at the time of inspection, accused was found selling the food articles and as such CW2 asked the accused to produce the licence as required under Rule 50 of the Rules for selling the food articles. It is also not in dispute that at the time of the inspection, the accused failed to produce any licence for the year, 2004-05 rather, the complainant informed that same has been given for renewal.

13. Prosecution with a view to prove its case, examined two witnesses and learned court below also recorded the statement of the accused under Section 313 Cr.PC, wherein he claimed that he has been falsely implicated, however, in defence, he led one witness.

14. CW1 Naresh Kumar Stated that he is posted as Dealing Assistant in office of CMO, Shimla since December, 2001. He also stated that CMO concerned had seen the documents of this case and gave him the dictation. He also stated that he typed Ext.CW1/A, i.e. sanction obtained by the Inspector to prosecute the accused. He also proved that signature on the Ext.CW1/A is of Dr. Suman Gupta, being CMO. He categorically stated that he recognizes the signatures of the aforementioned CMO. However, in his cross-examination, he admitted that he is not authorized to give sanction nor he had given any sanction.

15. CW2 L.D. Thakur, the complainant (the Inspector) stated that he was posted as Food Inspector in Municipal Corporation since 1999 and he on 4.6.2004, inspected the shop of the accused. It has come in his statement that at the time of inspection the accused was conducting business as an owner. He also stated that the accused had kept food articles for selling to general public. He stated that when he asked the accused to produce the licence as required under the Rules, for the year, 2004-05, the accused failed to produce the licence. He also stated that he prepared the spot map Ext.CW2/A, whereon he, Gian Chand and accused put their signatures. He also proved on record the spot memo, menu card, copy of notification issued by CMO vide letter Ext.CW2/B wherein CMO stated that it is a fit case for prosecution. He also proved the complaint Ext.CW2/C was filed by him and copy of notification is Ext.CW2/D. In his cross-examination, he reiterated that he inspected the hotel of the accused and at that time, two or three persons were sitting inside the hotel but he did not associate them in the proceedings nor he associated any person from the market. However, he admitted that witness Gian Chand belongs to his department since he is posted as Sanitary Inspector but in his cross-examination, he also admitted that previous licence is valid, if it is renewed well in time.

16. Careful perusal of the depositions made by the aforesaid witnesses produced by the complainant suggests that on 4.6.2004, CW2 had inspected the shop of the accused, wherein he was found selling food articles without there being any valid licence as required under Rule 50 of the Rules for the year, 2004-05. There is nothing in the cross-examination of this complainant witness from where it can be inferred that any suggestion worth the name was put to this witness to suggest that at that relevant time, the accused was not found selling food articles without any valid licence. Moreover, there is nothing in the cross examination to suggest that these complainant witnesses had any motive to falsely implicate the accused or they had any prior animosity or enmity, which compelled them to depose against the accused. In view of the above, one thing stands clearly established that accused at that point of time was selling food articles without there being any valid licence and on demand, he failed to produce the same to the Inspector, who had visited the site. From the perusal of the aforesaid statement given by the witnesses, it can be safely concluded that stand taken by the complainant at the time of recording his statement under Section 313 Cr.PC, is not correct as observed above, no suggestion worth the name qua any prior animosity /enmity was put to the accused with a view to extract something that complainant witnesses had some motive to falsely depose against the accused and implicate him in a false case.

17. DW1 Ramkali was produced by the accused in his defence. She is clerk in this licensing Branch of MC Shimla and stated that Ext.DW1/A is a compounding fee receipt of the accused for the period i.e. 2001 to 2006, however, she also stated that it is valid from 26.9.2005 to 31.3.2006. She also brought the copy of licence Ext.DW1/B, which is correct as per the

original and licence is valid from 1.4.2005 to 31.3.2006. In her cross-examination, she specifically admitted that compounding fee is for the period of 2001 to 2006 and same is for the purpose of catering in M.C. area. She also admitted that fee prescribed under the Act is Rs. 10 p.a. It also emerges from the record that she had not brought the record for the year, 2004-05.

18. Bare perusal of the deposition made by defence (DW1) suggests that vide Ext.DW1/A, Municipal Corporation Shimla received compounding licensing fee Mark-X from the accused. This Court had an occasion to see this Ext.DW1/B, which is available at Page-26 of the record, perusal whereof suggests that licensing authority issued licence to the accused under the provisions of the Act and Rules made thereunder for selling/storage/distribution/manufacturing of the certain eatables and beverages. Ext.DW/B also reveals that licencing authority issued the same to the hotel of the accused for lodging and catering. Though it finds mention in this document that license was valid up to 31.3.2006 but this Court was unable to find anything in this document to suggest, from which date it was issued. This document has been issued on 28.9.2005 by the licensing authority of the MC Shimla, but it doesn't disclose the date from which date, it became effective. Similarly, this Court perused the Mark-Y i.e. document available at page 27 of the record, which suggests that accused paid amount of Rs. 12,510/- against the receipt No. 428776 dated 26.9.2005 to the MC for permission to use the premises for lodging and catering. This document clearly suggests that accused was issued licence from 1.4.2005 to 31.3.2006, meaning thereby, the accused had licence under the Rules to sell the food articles as provided under Ext.DW1/B in his hotel, w.e.f. 1.4.2005 to 31.3.2006. There is also a mention of licencing authority @ Rs. 10 against the aforementioned receipt. Same receipt number stands mentioned in document Mark-Y, wherein while renewing the permit/licence w.e.f. 1.4.2005 to 31.3.2006, MC has received an amount of Rs. 12,510/- against that receipt, which finds mention in Ext.DW1/B. It appears that the accused had not paid licence fee for a period prior to 1.4.2005 also and his licence was not renewed till further, which he again by depositing an amount of Rs. 12,510/- on 26.9.2005 got renewed but fact remains that MC while charging fee for previous years renewed his permit from 1.4.2005 to 31.3.2006 only, meaning thereby, the accused was not having any valid licence to sell the food articles on 4.6.2004. Though, accused has placed receipt Ext.DW1/B Mark X and Y to suggest that he was having valid licence w.e.f. 2001 to 2006 but after perusing the aforesaid documents, this Court is convinced that licence of the accused was only renewed from 1.4.2005 to 31 3 2006 by the MC Shimla.

19. In this regard, it would be apt to reproduce Rule 50 of the Rules, which reads as under:-

> ***"50. Conditions for licence:-***
>
> *(1) No person shall manufacture, sell, stock, distribute or exhibit for sale any article of food, including prepared food or ready to serve food 2[or irradiated food] except under a licence:*
>
> *Provided that the fruit products covered under the Fruit Products Order, 1955, solvent extracted oil, deoiled meal and edible flour covered under the Solvent Extracted Oil, De-oiled Meal and Edible Flour (Control) Order, 1967, 3[vanaspati covered under the Vegetable Oil Products (Regulation) Order, 1998], and meat and poultry products covered under the Meat Food Products Order, 1973, shall be exempted from the above rule] ;*
>
> *[Provided further that a producer of milk, who sells milk only to a milk co-operative society which is a member of milk co-operative Union engaged in reconstitution of milk or manufacture of milk products, shall be exempted from this rule.]*
>
> *[Provided also that no person shall manufacture, sell, stock, distribute or exhibit for sale any article of food which has been subjected to the treatment of irradiation, except under a licence from Deptt., of Atomic Energy (Control of Irradiation of Food), under the Atomic Energy Act, 1962 (Act 33 of 1962)]*

[(1-A) One licence may be issued by the licensing authority for one or more articles of food and also for different establishments or premises in the same local area.]

[(1-B) The name and address of the Director or Manager, as the case may be, nominated by the company, under rule 12B shall be mentioned in the licence.]

(2) The State Government or the local authority shall appoint licensing authorities.

(3) A licensing authority may with the approval of the State Government or the local authority by an order in writing delegate the power to sign licenses and such other powers as may be specified in the order to any other person under his control.

[(4) If the articles of food are manufactured, stored or exhibited for sale at different premises situated in more than one local area, separate applications shall be made and a separate licence shall be issued in respect of such premises not falling within the same local area: Provided that the itinerant vendors who have no specified place of business, shall be licensed to conduct business in a particular area within the jurisdiction of the licensing authority.]

(5) Before granting a licence for manufacture, stock or exhibition of any of the articles of food in respect of which a licence is required, the licensing authority shall inspect the premises and satisfy itself that it is free from sanitary defects. The applicant for the licence shall have to make such alteration in the premises as may be required by the licensing authority for the grant of a licence:

[Provided that the licensing authority may for reasons to be recorded in writing, refuse to grant a licence, if it is satisfied that it is necessary to do so in the interest of public health.]

(6)[***]

(7) Proprietors of hotels, restaurants and other food stalls (including mobile and itinerant food stalls) who sell or expose for sale savouries, sweets or other articles of food shall put up a notice board containing separate lists of the articles which have been cooked in ghee, edible oil vanaspati and other fats for the information of the intending purchasers.

(8)[***]

(9) No licensee shall employ in his work any person who is suffering from infectious, contagious or loathsome disease.

(10) No person shall manufacture, store or expose for sale or permit the sale of any article of food in any premises not effectively separated to the satisfaction of the licensing authority from any privy, urinal, sullage, drain or place of storage of foul and waste matter.

(11) All vessels used for the storage or manufacture of the articles intended for sale shall have proper cover to avoid contamination.

(12) Every manufacturer [including ghani operator] or wholesale dealer in butter, ghee, vanaspati, edible oils, and other fats shall maintain a register showing the quantity manufactured, received or sold and the destination of each consignment of the substances sent out from his manufactory or place of business, and shall present such register for inspection whenever required to do so by the licensing authority.

(13) An itinerant vendor granted a licence under these rules shall carry a metallic badge on his arm showing clearly the licence number, the nature of articles for the sale of which the licence has been granted, his name and address and the name, address of the owner, if any, for whom he is working. His containers of food and the vehicle shall also be similarly marked. In addition to the metallic badge the vendor shall, if so required by the State Government or the local authority, carry an

identity card with his photograph and the number of the licence. The identity card shall be renewed every year:]

[Provided that the whole-time employees of the companies shall not be treated as itinerant vendors for the purpose of carrying a metallic badge on their arms or obtaining separate licences if an identity card containing particulars of the valid municipal licence is carried by them.]

(14) The nature of articles of food for the sale of which a licence is required under these rules shall be mentioned in the application for licence. Any objectionable, ambiguous or misleading trade name shall not be approved by the licensing authority.

(15) Every licensee who sells any food, shall display a notice board containing the nature of the articles which he is exposing or offering for sale."

Bare perusal of the rules suggests that no person is authorized to manufacture, sell, stock, distribute or exhibit for sale any article of food, including prepared food or ready to serve food or irradiated food except under a licence.

20. In the present case, as has been discussed above, it stands proved on record that on 4.6.2004, the accused was found selling in his hotel food articles to general public without having valid licence. Accused has nowhere disputed the aforesaid facts as set up by the complainant in their case. Only defence taken by the accused was that he was unable to produce the licence since it was under renewal but fact remains that even during trial, he failed to place on record any valid licence, if he had, qua the period when this inspection was carried out by the complainant. As has been noticed above Ext.DW1/A and documents Mark X and Y nowhere suggests that on 4.6.2004 accused was having valid licence to sell the food articles. Ext.DW1/B clearly suggests that an amount of Rs. 12,510/- was received by MC for the use of the premises for lodging and catering for the period 1.4.2005 to 31 3.2006. Close scrutiny of this document nowhere suggests that any kind of compounding fee for non-renewal of the licence was charged by the MC. Though, there is mention that it was valid up to 2006 but there is no mention with regard to date from which licence became effective. Hence, this court is unable to accept the contention put forth on behalf of the petitioner that he was having valid licence from 2001 to 2006. Rather, after perusing document Mark-Y at Page-27 of the record, this Court is convinced that accused was having a valid licence to use the premise for lodging and catering w.e.f. 4.6.2005 to 31.3.2006. Since accused on 4.6.2004 failed to produce any valid licence authorizing him to sell the food articles, he was rightly challaned by the authority empowered under the Act in this regard. Rule 50 as reproduced above, clearly provides that the sale of articles mentioned therein without having valid licence and, as such for violation of Rule-50, petitioner rendered himself liable for the proseuciton.

21. Section 16 of the Act provides for penalties for non compliance of the provisions contained in the act as follows:-

"**16. Penalties-**

(1) Subject to the provisions of sub-section (1-A) if any person—

(a) whether by himself or by any other person on his behalf, imports into India or manufactures for sales or stores, sells or distributes any article of food—

(i) which is adulterated within the meaning of sub-clause (m) of clause (i-a) of section 2 or misbranded within the meaning of clause (ix) of that section or the sale of which is prohibited under any provision of this Act or any rule made thereunder or by an order of the Food (Health) Authority;

(ii) other than an article of food referred to in sub-clause (i), in contravention of any of the provisions of this Act or of any rule made thereunder; or…………….

………. he shall, in addition to the penalty to which he may be liable under the provisions of section 6, be punishable with imprisonment for a term which shall not be less than six months but which may extend to three years, and with fine which shall not be less than one thousand rupees: Provided that—

(i) if the offence is under sub-clause (i) of clause (a) and is with respect to an article of food, being primary food, which is adulterated due to human agency or is with respect to an article of food which is misbranded within the meaning of sub-clause (k) of clause (ix) of section 2; or

(ii) if the offence is under sub-clause (ii) of clause (a), but not being an offence with respect to the contravention of any rule made under clause (a) or clause (g) of sub-section (1A) of section 23 or under clause (b) of sub-section (2) of section 24,……..”

Section 16 (1) (a) of the Act clearly provides that if any person sells, stores article of food refers to in sub section (i) in contravention of any provisions of this Act or any rule made thereunder, shall be liable to be punished for imprisonment for a term which shall be less than six months and may further extend to three years.

22. In the present case, where it clearly stands proved on record that accused was selling food articles without having any valid licence as required under Rule 50 of the Act, courts below have taken very lenient

view and despite holding accused guilty of having committed offence under Section 16 (1) (a) (ii) of the Act has convicted and sentenced him to suffer simple imprisonment till rising of the court and to pay fine of Rs. 500.

23. This Court, in view of the detailed discussion made hereinabove, does not see any reason to interfere, whatsoever, in the judgment passed by the courts below as same are correctly based upon the proper appreciation of evidence available on record. Accordingly, revision petition is dismissed.

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

Shri Chaman Lal …..Appellant

Versus

Shri Santosh Kumar Rattan & another …Respondents

FAO No. 446 of 2010

Decided on : 1.7.2016

Motor Vehicles Act, 1988- Section 166- Tribunal had awarded Rs. 30,000/- under the head ‘pain and suffering’- claimant had suffered pain and will have to undergo the same throughout his life- thus, he is entitled to Rs. 50,000/- in addition to the amount awarded by the Tribunal. (Para-5)

For the Appellant : Mr. Neeraj Gupta, Advocate.

For the respondents: Nemo 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)*

This appeal is directed against the award dated 7th August, 2010, passed by the Motor Accident Claims Tribunal, Fast Track Court, Solan, District Solan, H.P. (hereinafter referred to as ‘the Tribunal’), in Case No. 10FTC/2 of 2004, titled as Chaman Lal versus Shri

Santosh Kumar Rattan & another, whereby compensation to the tune of Rs. 2,14,240/- with interest @ 7 ½ % per annum from the date of filing of the claim petition till its realization, came to be awarded in favour of the claimant-appellant and the insurer-respondent No. 2 herein, was saddled with liability, (hereinafter referred to as 'the impugned award').

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

3. The foundation of the appeal is on the following two grounds:

"*(i) The appellant-claimant cannot marry;*

(ii) *The Tribunal has not awarded adequate compensation under the head 'pain and suffering'.*

4. On 17.06.2016, learned Counsel for the respondent No. 2 had produced photostat copies of some documents, which do disclose that the claimant is already married and having three children. In terms of the said order, learned Counsel for the appellant-claimant was asked to seek instructions to this effect. Today, he frankly conceded that the claimant is already married and having three children.

5. The Tribunal has fallen in an error in awarding compensation to the tune of Rs. 30,000/- under the head 'pain and suffering'. The claimant had suffered pain and suffering and has to undergo the same throughout his life. Accordingly, the claimant is held entitled to Rs. 50,000/-, in addition to the amount already awarded by the Tribunal, under the said head.

6. Having said so, it is held that the claimant is entitled to compensation to the tune of Rs. 2,14,240/- + Rs. 50,000/- total amounting to Rs. 2,64,240/- with interest @ 7.5% per annum from the date of filing of the claim petition till realization.

7. The amount of compensation is enhanced and the impugned award is modified, as indicated above.

8. 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 claimant, strictly in terms of conditions contained in the impugned award, through payees' account cheque or by depositing the same in his account.

9. The appeal is accordingly disposed of.

10. Send down the records after placing a copy of the judgment on the Tribunal's file.

Copy **Dasti.**

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

Desh Raj & others .....Appellants.
Versus
State of H.P. ....Respondent.

Cr. Appeal No. 175 of 2007.
Date of Decision: 1st July, 2016.

Indian Penal Code, 1860- Section 498-A, 323 and 307 read with Section 34- Prosecutrix was married to accused P- she was harassed by her husband, father-in-law and mother-in-law for bringing less dowry- accused P stated that prosecutrix was not good looking and he wanted to marry some other person- she was tortured physically and mentally- accused had given beating

and a rope was tied around her neck with intention to kill her- matter was reported to police- accused were tried and convicted by the trial Court- aggrieved from the order, present appeal was preferred- held, in appeal that Medical Officer had specifically stated that abrasion on the back side of the neck is not possible if a person tries to strangulate herself with a rope, which corroborates the version of the prosecutrix that accused had tied a rope around her neck to kill her- prosecutrix admitted in cross-examination that she and her husband were present in the room at the time of incident, therefore, only husband is to be held liable for the same- further, prosecutrix had not mentioned date and time when she was subjected to harassment- matter was also not reported to police, panchayat or any other authorities - appeal partly allowed- mother-in-law and father-in-law acquitted while husband of the prosecutrix was convicted. (Para-9 to 13)

For the Appellants: Mr. R.K.Sharma, Senior Advocate with Ms. Anita Parmar, Advocate.
For the Respondent: Mr. Vivek Singh Attri, Dy. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral).

The instant appeal stands directed by the accused/convicts against the judgment of the learned Presiding Officer, Fast Track Court, Hamirpur rendered on 16.06.2007 in Sessions Trial 1 of 2007, whereby, he returned findings of conviction against the accused/convicts for theirs committing offences punishable under Sections 498-A and 323 read with Section 34 of the Indian Penal Code (for short "IPC"). The learned trial Court proceeded to hence sentence each of them to undergo rigorous imprisonment for three years for commission of offence punishable under Section 498-A/34 of the IPC besides sentenced each of them to pay a fine of Rs.5,000/-, in default of payment of fine they were sentenced to undergo further rigorous imprisonment for six months. The learned trial Court further proceeded to sentence each of them to undergo rigorous imprisonment for one year and to pay fine of Rs.1000/- each for the commission of offence punishable under Section 323/34 of the IPC, in default of payment of fine they stood sentenced to undergo further rigorous imprisonment for three months. All the sentences were ordered to run concurrently.

2. The facts relevant to decide the instant case are that on 27.4.2006, Medical Officer, CHC, Bhoranj informed the Police Station Bhoranj on telephone that Smt. Shakuntla Devi, the prosecutrix had been admitted in the hospital in an injured condition. Upon this information, a report No.12 was entered in the Police Station and H.C. Pardeep Kumar, No.26 and LHC Karam Chand, No. 190 rushed to CHC, Bhoranj. The aforesaid HC Pardeep Kumar moved an application to Medical Officer for recording the statement of the prosecutrix. However, the prosecutrix was not in a position to make a statement on that day. On 28.4.2006, when the prosecutrix was able to make a statement, she recorded her statement under Section 154, Cr.P.C. before H.C. Pardeep Kumar, NO.26 stating therein that she was married to accused Pawan Kumar about four months back at Village Chandruhi, Tehsil Bhoranj, District Hamirpur, H.P., according to Hindu rites. For about three months after the marriage, accused Pawan Kumar, husband, Desh Raj, father-in-law and Sandhya Devi, mother-in-law of the prosecutrix treated her nicely, but thereafter all these accused started taunting her for bringing less dowry. Accused Pawan Kumar levelled the allegations against her that she was not a good looking lady and that he wanted to marry some other woman. Accused Pawan Kumar also used to send her out of his bedroom in the night on several occasions. It was further reported that accused Desh Raj and Sandhya Devi used to beat her for bringing less dowry and also tortured her physically and mentally. On 24.4.2016 at about 6.00 a.m., all the accused gave beating to the prosecutrix and a rope was also tied around her neck with intention to kill her, as a result of which, she received injury marks on her neck and other parts of the body. Upon this information, FIR was registered in the police station concerned against the accused. Thereafter, the case was investigated.

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

4. The accused were charged by the learned trial Court for theirs committing offences punishable under Sections 498-A, 307, 323 read with Section 34 of the IPC. In proof of the prosecution case, the prosecution examined 11 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 trial Court, in which the accused claimed innocence and pleaded false implication in the case. In their defence, the accused examined two witnesses.

5. On an appraisal of the evidence on record, the learned trial Court, recorded findings of conviction against the accused/appellants herein.

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

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

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

9. Smt.Shakuntla Devi, the prosecutrix is the wife of co-accused/convict Pawan Kumar. Co-accused/convicts Desh Raj and Sandhya Devi are respectively her father-in-law and mother-in-law. In the ill-fated incident which occurred on 24.4.2006 at the matrimonial home of the prosecutrix, the latter ascribes to co-accused Pawan Kumar besides to Desh Raj and Sandhya Devi an incriminatory role of theirs tying rope Ext.P-1 recovered under memo Ex.PW-1/B around her neck with a *mens rea* to eliminate her, yet the incriminatory role aforesaid as stands ascribed to accused/convicts Desh Raj and Sandhya Devi, however, for reasons imputed/ascribed herein-after, is infirm. In sequel, co-accused/convict Pawan Kumar alone is to be construed to be the person who tied a rope Ex.P-1 recovered under memo Ex.PW-1/B, around the neck of the prosecutrix in consequence whereto, she, as proved by Ex.PW-5/A, suffered ligature marks on the back and the sides of her neck with a groove of about 1-1/2 c.m., which tailed of upward and laterally on the relevant portion of her neck. PW-5 has on the reverse of Ex.PW5/C underscored therein the factum of the aforesaid injuries being simple yet he has also recorded therein of the injuries sequeled by cord/rope Ex.P-1 standing tied around the neck of the prosecutrix purportedly by accused Pawan Kumar, would assume gravity, if she was hanged for a time longer than the one as stood consumed by accused/convict Pawan Kumar. Furthermore, PW-5 in his examination-in-chief has deposed of the abrasion occurring on the back and the side of the neck of the prosecutrix being not sequelable if a person tries to strangulate herself/himself with a rope. Likewise, PW-11 Dr. S.K. Soni, who prepared opinion comprised in Ex.PW11/A, has during the course of his examination-in-chief deposed therein of bilateral subconjunctval haemorrhage present in the eyes of the prosecutrix which stand depicted by him in Ex.PW11/A being sequelable by strangulation by user on the neck of the prosecutrix of a strangulatory material/item, inclusive of a rope/cord. He stood subjected to cross-examination by the learned defence counsel. However, the learned defence counsel while holding him to cross-examination has merely suggested to him of the injuries depicted in the MLCs aforesaid being not sequelable, if a person attempts to commit suicide, suggestion whereof stood disaffirmatively responded by PW-11. However, the learned defence counsel did not while continuing to hold him to cross-

examination concert to put any further suggestion to PW-11 for belying his disaffirmative answer to his apposite suggestion put to him of injuries occurring around the neck of the prosecutrix being sequelable by hers attempting to commit suicide. Consequently, the defence is to be construed to be acquiescing to the factum of the injuries found occurring around the neck of the prosecutrix being a sequel to rope, Ex.P-1 standing tied around besides tightened around the neck of the prosecutrix/victim. With this Court concluding of the injuries begotten on the neck of the prosecutrix/victim being a sequel to a rope/cord standing tied around besides tightened around the neck of the prosecutrix, the concomitant ensuing inference therefrom is of with the prosecutrix in her recorded deposition on oath firmly ascribing to accused/convict Pawan Kumar an inculpatory role of his tying rope/cord, Ex.P-1 recovered under memo Ex.PW1/B around her neck, deposition whereof has remained un-belied, as apparently with the learned defence counsel while holding her to cross-examination omitting to put apposite suggestions to PW-1 qua the significant fact of accused/convict Pawan Kumar, who stood deposed by the prosecutrix in her examination-in-chief to be the person, who tied rope/cord around her neck, being neither available at the time contemporaneous to his purportedly tying rope, Ex.P-1 around her neck nor his being the person, who tied or tightened rope around her neck. In aftermath, a conjoint reading of the deposition of PW-11 wherein he repulsed the suggestion put to him by the learned defence counsel while his standing subjected to cross-examination by the defence counsel of the injuries detected around the neck of the prosecutrix being not sequelable by hers attempting to commit suicide vis-a-vis the unshattered testimony of PW-1 constituted in her examination-in-chief wherein she with firmness ascribes an inculpatory role to accused/convict Pawan Kumar of his tying rope, Ex.P-1 around her neck, gives a firm impetus to an inevitable conclusion of the prosecution succeeding to prove the charge against the accused/convict Pawan Kumar.

10. Be that as it may, the learned Senior Counsel appearing for the accused/appellants contends qua the ascription of an inclupatory role by PW-1 to accused/convict Pawan Kumar being a sequel of invention and premeditation, hence, not amenable for credence, given the factum of the occurrence standing taken place on 24.4.2006, whereas, it stood belatedly reported on 28.4.2006 by the informant/victim. He also contends of the aforesaid omission on the part of the informant to promptly report the matter to the police station concerned visits it with a vice of falsity, especially when as unraveled by the deposition of the prosecutrix of hers on 25.4.2006 when her parents visited her at her matrimonial home, hers disclosing the entire episode to them, imperatively enjoined them to promptly report the matter to the police station concerned. However, the aforesaid submission holds no vigour as the effect of delay, if any, stands shred of efficacy, if any, it holds, prominently when for reasons aforestated this Court has firmly concluded of rope, Ex.P-1 recovered under memo Ex.PW1/B being the item or strangulatory material, with user whereof evidently by the accused injuries detected respectively by both PW-5 and PW-11, on or around the neck of the prosecutrix, stood entailed thereon, also the aforesaid apposite formidable conclusion dispels the concert of the defence of the injuries found thereat being a sequel to the prosecutrix attempting to commit suicide. Contrarily, firm credence qua the testimony of PW-1 (the prosecutrix) wherein she ascribes an inculpatory role to accused Pawan Kumar is enjoined to be placed thereon.

11. Also even if in the F.I.R. lodged qua the occurrence besides in her testimony recorded on oath she ascribes to convicts/accused Desh Raj and Sandhya Devi aforesaid the role of theirs along with convict/accused Pawan Kumar tying a rope around her neck, nonetheless the aforesaid ascription of an inculpatory role to both by the prosecutrix is rendered frail in face of there occurring in her cross examination an admission of on the relevant day and time only her husband and she being present in the room. Consequently, when only both aforesaid were present at the relevant time in the room, the accused/convict Pawan Kumar alone is to be construed to be the person who tied a rope around her neck whereas with accused/convicts Desh Raj and Sandhya Devi being unavailable thereat, rendered them incapacitated to tie rope around her neck also disabled them to tie its knot around the neck of the prosecutrix, in sequel the ascription qua them by the prosecutrix an inculpatory role of theirs also tying a rope around her neck is rendered emasculated, it standing engendered by sheer concoction.

12. However, with this Court dispelling the efficacy of ascription by the prosecutrix of the aforesaid incriminatory role to co-accused/convicts Desh Raj and Sandhya Devi, the tenacity of the ascription by the prosecutrix of an incriminatory role to them, of theirs respectively ill-treating her, for hers bringing insufficient dowry to her matrimonial home, is to be tested. The imputation of the aforesaid inculpatory role by the prosecutrix to co-accused/convicts aforesaid is nebulous besides vague suffering from an inherent infirmity arising from lack of a precise narration by the prosecutrix qua the time whereat both co-accused/convicts aforesaid subjected her to ill-treatment for hers bringing insufficient dowry to her matrimonial home. Given the imprecision in timing by the prosecutrix qua the imputations made by her qua co-accused/convicts aforesaid besides omission on her part besides her parents to despite holding knowledge of the accused aforesaid subjecting her to ill-treatment for bringing insufficient dowry to her matrimonial home, report the matter either to the Panchayat or any other authority, cannot but constrain this Court to conclude of the arraying of the aforesaid by the prosecutrix being wholly imaginative, it not standing founded upon any credible evidence. Consequently, when the only surviving purported incriminatory role qua accused/convicts Desh Raj and Sandhya Devi is of theirs ill-treating her on account of hers bringing insufficient dowry to her matrimonial home, incriminatory role whereof stands discounted, the findings of conviction recorded qua them are liable to be reversed.

13. For the foregoing reasons, the instant appeal is partly allowed. Consequently, the judgment of the learned trial Court is modified. In sequel, accused Desh Raj and Sandhya are acquitted of the offences charged. However, the conviction and sentence imposed upon convict/appellant Pawan Kumar by the learned trial Court is affirmed and maintained. Records be sent back forthwith.

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

Dharam Dass ……Petitioner.
Versus
State of Himachal Pradesh …… Respondent.

Criminal Revision No.59 of 2007
Reserved on : 24.06.2016
Date of Decision: 1st July, 2016

Indian Penal Code, 1860- Section 497- Accused developed illicit relation with informant and committed sexual intercourse with her- a complaint was filed against the accused, which was sent to police for investigation – challan was filed for the commission of offence punishable under Section 497 – accused was tried and convicted by the trial Court- an appeal was preferred, which was dismissed- held, in revision that there are various contradictions in the testimonies of eye-witnesses - police had found that no case was made out against the accused for the commission of offences punishable under Sections 366 and 376 of Indian Penal Code – complaint was signed by husband and wife, which is not maintainable as only a complaint filed by the husband is maintainable- prosecution had failed to prove its case beyond reasonable doubt and the Court had wrongly convicted the accused- revision accepted. (Para-12 to 29)

Case referred:

Krishnan and another Versus Krishnaveni and another, (1997) 4 Supreme Court Case241

For the Petitioner	:	Mr. G.R.Palsra, Advocate.
For the Respondent	:	Ms. Pankaj Negi, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (Oral)

Present Criminal Revision Petition filed under Section 397/ 401 of the Code of Criminal Procedure, is directed against the judgment dated 13.4.2007, passed by learned Additional Judge, Mandi, H.P(Camp at Karsog) in Criminal Appeal No.27 of 2003, affirming the judgment dated 5.7.2003, passed by learned Sub Divisional Judicial Magistrate, Karsog in Police Challan No.8-II of 2003, whereby present petitioner-accused has been held guilty for having committed an offence punishable under Section 497 of IPC.

2. Briefly stated facts of the case as emerge from the record are that on 31.8.2002, complainant Bal krishan as well as Smt. Prem Dassi filed a complaint in the Court of learned Sub Divisional Judicial Magistrate, Karsog, District Mandi, HP (hereinafter referred to as "Trial Court') alleging therein that accused taking benefit of loneliness of complainant Prem Dassi had enticed and allured her by stating that her husband remains on border and can die at any time. As per complainant Bal Krishan, accused promised to marry with complainant No.2, Prem Dassi despite knowing that she is legally wife of complainant Bal Krishan. As per complaint, accused developed illicit relation with complainant Prem Dassi and this process accused committed sexual intercourse with the wife of complainant Bal Krishan. Averments contained in complaint reveals that complainant Prem Dassi is mother of three children and accused compelled her for sexual intercourse. It has been also alleged in the complaint that accused threatened complainant Prem Dassi wife of complainant Bal Krishan that in case she discloses to anybody about their relations, she would face dire consequences. As per complaint, on 29th August, 2000 when complainant Bal Krishan came on leave to his house, he was told by local people and his wife complainant Prem Dassi admitted the illicit relation with the accused. Complainant specifically prayed that accused may be punished for having committed the offence punishable under Sections 366,376,497 of Indian Penal Code (hereinafter referred to as "IPC").

3. Learned trial Court taking cognizance of the complaint vide order dated 31st August, 2002 held that the complaint discloses commission of cognizable offence and, as such, he sent the same to the SHO Police Station, Karsog under Section 156(3) Cr.P.C for investigation. Record further reveals that the police after investigating the matter came to the conclusion that no offence under Sections 366 and 376 of IPC exist against the accused and accordingly, a case under Section 497 of IPC was registered against the accused on the allegations contained in the complaint, which was admittedly signed by complainant Bal Krishan and his wife Prem Dassi.

4. As per the prosecution, when matter was investigated on the complaint of complainant, it was found in the statement of the complainant Prem Dassi that accused used to visit her house and they had developed illicit relation. It also emerges from the record of the investigation that their relations were limited to the room of complainant Prem Dassi. Police before conducting the case under section 497 of IPC, concluded that accused with the consent of complainant Prem Dassi developed illicit relation and to substantiate aforesaid conclusion, police also recorded the statements of the witnesses Ramu Ram(PW-3), Sudesh Kumar(PW-4) and Kumari Poonam, wherein they stated that accused used to visit the house of complainant Prem Dassi oftenly. Police on the basis of the investigation carried out by it, presented the challan in the competent Court of law for convicting the accused for having committed the offence punishable under Section 497 of IPC.

5. Learned trial Court after satisfying itself that a prima facie case exist against the accused, framed charge under Section 497 of IPC against him, to which he pleaded not guilty and claimed trial. It also reveals from the record that prosecution with a view to prove its case beyond reasonable doubt examined as many as six witnesses and learned trial Court also recorded the statement of the accused under Section 313 Cr.P.C

6. Learned trial Court after appreciating the material evidence available on record held the present petitioner-accused guilty of having committed the offence punishable under

section 497 of IPC and vide judgment/order dated 5.7.2003 sentenced him with fine of Rs. 3000/- for the offence punishable under section 497 of IPC, in default of payment of fine, further to undergo simple imprisonment for one month.

7. Feeling aggrieved and dissatisfied with the impugned judgment of conviction passed by learned trial Court below, present petitioner-accused filed an appeal under Section 374 of the Code of Criminal Procedure in the Court of learned Additional Sessions Judge, Mandi H.P, vide Cr. Appeal No.27 of 2003, which was dismissed by learned Additional Sessions Judge on 13.4.2007, Hence, the present criminal revision petition before this Court.

8. Mr. G.R. Palsra, learned counsel representing the petitioner vehemently argued that the judgments passed by both the Courts below convicting the accused for having committed the offence punishable under section 497 IPC are not sustainable in the eyes of law as same are not based upon the correct appreciation of the evidence available on record. He also contended that the judgments passed by the learned Courts below are against law and facts on record, which have been passed ignoring the basic principle and ingredients of section 198(2) Cr.P.C as well as Section 497 IPC and as such, great prejudice has been caused to the petitioner-accused. He forcibly contended that both the Courts below have fallen in grave error by not appreciating that the trial Court had no power whatsoever, to take cognizance of the case since challan was put in the Court by the police after investigation relating to the offence under section 497 IPC. As per Mr. Palsra, the Magistrate has only power if the complaint is presented to him and after recording the statement of the complainant, the complaint is further forwarded for investigation. He also contended that the judgment passed by both the Courts below deserves to be quashed and set-aside on the ground that the prosecution has miserably failed to prove on record the factum of marriage between complainants Bal Krishan and Prem Dassi, which is primary requirement of Section 497 IPC. He submitted that for want of sufficient evidence in support of legal marriage, no conviction could be made under section 497 IPC. During arguments, he also invited the attention of the Court towards the statements given by the prosecution witnesses as well as record made available during the trial of the case to demonstrate that there are major contradiction in the statements of prosecution witnesses and same could not be relied upon by the Courts below while convicting the accused-petitioner. He forcibly contended that both the Courts below have ignored the most important fact that the children of the complainant Prem Dassi were neither cited as prosecution witness nor examined, especially when as per prosecution story, during the time of sexual intercourse, these children woke up and saw the scene. He also contended that no independent witness, whatsoever, was associated by the prosecution and as such, deposition, if any, made by interested parties could not be looked into by the Courts below while convicting the present petitioner-accused under section 497 of IPC. Lastly, Mr. Palsra, learned counsel raised question of maintainability of complaint Ex.PW1/A filed by the complainants namely Bal Krishan and Prem Dassi. As per Mr. Palsra, learned counsel representing the petitioner that bare perusal of complaint Ex.PW1/A suggest that same has been filed by the husband and wife i.e. Bal Krishan and Prem Dassi complainant. He strenuously argued that once an attempt was made to implicate the present petitioner-accused by complainant Bal Krishan on the ground of adultery there was no occasion, whatsoever, for complainant Prem Dassi to sign the complaint, who admittedly as per the version of PW-1 i.e. husband was a consenting party to the adultery, if any. In the aforesaid background, Mr. Palsra, learned counsel prayed for quashing and setting aside of the judgment of conviction passed by the both Courts below.

9. Mr. Pankaj Negi, learned Deputy Advocate General appearing on behalf of the respondent-State supported the judgments passed by both the Courts below and submitted that no interference, whatsoever, of this Court is warranted in the present facts and circumstances of the case. He contended that the judgments passed by both the Courts below are based on proper appreciation of evidence available on record and as such, same deserves to be up held. While refuting all the submissions as well as grounds set up in the criminal revision petition, learned Deputy Advocate General, strenuously argued that there is ample evidence on record to suggest

that accused repeatedly committed sexual intercourse with the complainant Prem Dassi against her wishes and, as such, he has been rightly convicted by the learned Court below. In his attempt to persuade this Court to maintain the conviction passed by the learned trial Court below, Mr. Negi, learned Deputy Advocate General made this Court to travel through the statements of the witnesses as well as record of learned trial Court to demonstrate that how accused took undue advantage of the absence of husband of complainant Prem Dassi and allured her to have sexual intercourse with him. Lastly, Mr. Negi, learned Deputy Advocate General, reminded the Court of its limited jurisdiction under Section 397 Cr.P.C and prayed that while exercising its power under section 397 Cr.P.C, this Court has no power to re-appreciate the evidence available on record, especially when it clearly stands proved on record that both the Courts below have meticulously dealt with the each and every aspect of the matter.

10. I have heard the learned counsel representing the parties and have carefully gone through the record made available.

11. Mr. Pankaj Negi, learned Deputy Advocate General while advancing his arguments on behalf of the respondent-State specifically raised the issue of limited jurisdiction of this Court under Section 397 Cr.P.C, but in the present case where during arguments having been made by the learned counsel for the parties, petitioner-accused has been able to point out the material discrepancies/ contradictions and discrepancies in the statements made by the prosecution witnesses, this Court solely view a view to ascertain that the judgment passed by both the Courts below are based upon correct appreciation of evidence available on record and same are not perverse, undertook an exercise to critically examine the witnesses to reach just and fair decision. Apart from above, specific question with regard to the maintainability of complaint purportedly filed under Section 497 of IPC has also been taken by the petitioner-accused and this Court after perusing the complaint deem it fit in the given facts and circumstances of the case to critically analysis the evidence.

12. True, it is that this Court has very limited powers under Section 397 of Criminal Procedure Code while exercising its revisionary jurisdiction. But in the peculiar facts and circumstances of the present case, it would be apt and in the interest of justice to critically examine the evidence available on record that too solely with a view to ascertain that judgments passed by learned Courts below are not perverse and same are based on correct appreciation of evidence on record.

13. As far as scope of power of this Court while exercising revisionary jurisdiction under Section 397 is concerned, the Hon' ble Apex Court in ***Krishnan and another Versus Krishnaveni and another*, (1997) 4 Supreme Court Case241**; has held that in case Court notices that there is a failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities/incorrectness committed by inferior criminal Court in its judicial process or illegality or sentence or order. The relevant para of the judgment is reproduced as under:-

> **"8. The object of Section 483 and the purpose behind conferring the revisional power under Section 397 read with Section 401, upon the High Court is to invest continuous supervisory jurisdiction so as to prevent miscarriage of justice or to correct irregularity of the procedure or to mete out justice. In addition, the inherent power of the High Court is preserved by Section 482. The power of the High Court, therefore, is very wide. However, the High Court must exercise such power sparingly and cautiously when the Sessions Judge has simultaneously exercised revisional power under Section 397(1). However, when the High Court notices that there has been failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is but the salutary duty of the High Court to**

prevent the abuse of the process or miscarriage of justice or to correct irregularities/ incorrectness committed by inferior criminal Court in its judicial process or illegality of sentence or order."

14. Since Mr. G.R.Palsra, learned counsel during his arguments specifically invited the attention of this Court to complaint Ex.PW1/A filed by the complainant Bal Krishan and Prem Dassi to demonstrate that the complaint is not maintainable under Section 497 of IPC against the accused as the same has been signed by Prem Dassi wife of complainant Bal Krishan alongwith complainant i.e. husband. It would be appropriate for this Court to examine the issue of maintainability at first instance before adverting to the merits of the case.

15. After perusing the complaint Ex.PW1/A filed by complainant Bal Krishan as well as his wife Smt. Prem Dassi it clearly emerge that complainant filed the complaint against the accused in the Court of learned Sub Divisional Judicial Magistrate, Karsog on the pretext that the complainant Bal Krishan was serving in Indian Army in the border and his wife Smt.Prem Dassi is his legally wedded wife and out of their wedlock three children were born.Careful perusal of the complaint suggest that it has been alleged that complainant Bal Kirshan being soldier in Indian Army remains away from his house for the security of the borders of the nation and the accused taking advantage of loneliness of his wife Prem Dassi enticed and allured her by stating that her husband remains on border and can die at any time. It is also alleged in the complaint that accused despite knowing that Prem Dassi is legally wedded wife of complainant Bal Krishan developed illicit relation and committed sexual intercourse with her. If the complaint Ex.PW1/A is read in its entirety, it can be inferred that basic allegation of the complainant is that accused despite knowing that Prem Dassi is the legally wedded wife of the complainant Bal Krishan developed illicit relation and committed sexual intercourse with her. Further perusal of the complaint suggests that a prayer has been made to punish the accused for having committed the offence punishable under Sections 366,376, 497 of IPC.

16. Careful perusal of the allegations made in the complaint, nowhere suggests the commission of offence punishable under section 366 and 376 of IPC. Interestingly, aforesaid complaint Ex.PW1/A is made on behalf of husband and wife as the same has been signed by both of them. At this stage, it may be noticed that police after investigation concluded that no case, if any, exist against the accused under Sections 366,376 of IPC and as such, on the basis of the complaint Ex.PW1/A, FIR was registered against the accused under Section 497 of IPC. In the aforesaid background, only question, which requires determination of this Court is whether complaint Ex.PW1/A can be held to be maintainable against the accused under Section 497 of IPC when admittedly complaint is filed by husband and wife jointly by appending their signatures on the complaint.

17. As has been observed above, plain reading of complaint does not disclose the offence, if any, under Sections 366 and 376 of IPC against the accused but he could be charged under section 497 of IPC on the basis of the averments contained in complaint Ex.PW1/A. But once police after investigating the matter on the basis of the complaint lodged by the complainant came to the conclusion that there are no grounds to proceed against the accused under sections 366 and 376 of IPC, it can be concluded that complaint Ex.PW1/A filed by the complainant against the accused was only for committing offence under section 497 of IPC.

18. Now at this stage, very interesting question, which arise for determination of Court is that whether the complaint for having committed offence under Section 497 of IPC can be entertained by any Court of law when it is signed by the both wife and husband. At this stage, it would be apt to reproduce the provision of section 497 of IPC:-

"<u>497. Adultery</u>:- Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term

which may extend to five years, or with fine, or with both. I such case the wife shall not be punishable as an abettor".

19. Bare reading of Section 497 IPC suggest that complaint, if any, for punishing the person for having sexual intercourse with the wife of another man knowingly well that she is the wife of another man, can only be filed by the husband and definitely not by woman with whom accused person had sexual intercourse without the consent or connivance of husband of that lady.

20. In the present case, admittedly wife of complainant Bal Krishan is complainant alongwith his husband as she has also signed that complaint filed before the learned Sub-Divisional Judicial Magistrate, Karsog. It is undisputed that complainants in their complaint had initially prayed for punishing the accused under Section 497 , 366, 376 of IPC but as has been observed above, perusal of the complaint, nowhere suggest that offence under sections 366,376 of IPC is made out against the accused, rather averments contained in the complaint suggest that accused despite knowing that Prem Dassi is legally wedded wife of the complainant Bal Krishan had developed illicit relation with her and committed sexual intercourse on several occasions. It is the own case of the complainant as well as prosecution that taking advantage of loneliness, accused had enticed and allured her by giving false promise to marry her and committed sexual intercourse. It is specifically averred in the plaint that accused promised wife of the complainant to marry and then indulged in sexual intercourse meaning thereby wife of the complainant was consenting party to the sexual intercourse, if any, committed by the accused. But at this juncture, Court perused the averments contained in the complaint solely with a view to ascertain whether the complaint filed and signed by both husband and wife alleging therein adultery, which punishable under section 497 IPC, is maintainable or not. After perusing provision as contained under Section 497 IPC as well as averments contained in the complaint, this Court has no hesitation to conclude that once police had concluded that no prima-facie case exist against the accused under Sections 366 and 376 IPC, complaint, if any, filed by the complainant and his wife could only be construed to be filed under section 497 of IPC against the accused. But in the present case, where admittedly wife of the complainant signed the complaint along with husband praying therein for punishing the accused under section 497 IPC, consequently very character of the complaint has changed and same is not maintainable under Section 497 IPC.

21. After perusing the provision contained in section 497 IPC, this Court has no hesitation to conclude that by signing complaint alongwith husband, wherein specific prayer was made to punish the accused under section 497 IPC, entire proceedings conducted on the basis of the aforesaid complaint stands vitiated. Once wife of the complainant joined her husband in filing the complaint under section 497 IPC, very character of the complaint gets changed and same cannot be considered to be filed under section 497 IPC, in any manner. Section 497 of IPC only authorize husband to file complaint against the person, who commits sexual intercourse with his wife against his wishes. But in the present case wife of the complainant husband joined him in filing complaint and alleges that accused had developed illicit relation and thereafter committed sexual intercourse against her wishes by threatening that in the event of any disclosure made by her, he would kill her children. Accordingly, this Court after perusing the complaint Ex.PW1/A as well as statements recorded during the trial, is of the definite view that complaint, if any, made against the accused for having committed offence under section 497 of IPC, signed by husband and wife both is not maintainable and petitioner-accused could not be proceeded in any court of law on the basis of complaint Ex.PW1/A. Moreover, at the cost of repetition, it is again highlighted that bare perusal of complaint as well as her statement recorded during the trial clearly suggest that she was a consenting party to the alleged sexual intercourse committed by the accused. Since this Court after perusing the complaint Ex.PW1/A and bare perusal of law contained under section 497 IPC has come to the conclusion that complaint Ex.PW1/A filed against the accused under section 497 IPC is/was not maintainable, there is no occasion to examine the case on merits and the judgment passed by learned Court below could be dismissed solely for the reasons stated hereinabove. But this Court keeping in view the

allegations made in the complaint as well as offence with which the accused has been charged, deem it proper to examine the case on merits. This Court while exploring necessary answer to basic question of maintainability, as has been answered above, had an occasion to peruse the statements made by the prosecution witnesses.

22. In the present case, prosecution with a view to prove its case examined as many as six witnesses. Complainant Bal Krishan examined himself as PW-1 and deposed that he is serving in the Army. In his statement it has come that accused promised her wife to marry her and maintain her children and when his wife did not accede to his allurement and promise, he threatened to kill her as well as her children. As per the statement of PW-1, accused committed sexual intercourse with his wife on the point of knife. He also stated in his examination-in-chief that due to fear her wife did not disclose aforesaid fact to anybody and when on 15.8.2002 he inquired from his landlord Ramu Ram (PW-3) and Sudesh Kumar (PW-4), they also told him that they saw the accused in the room of his wife. In his cross-examination, PW-1 categorically admitted that he saw the accused first time in the Court. Careful perusal of the statement given by this witness suggest/indicate that wife of the complainant was a consenting party to the sexual intercourse, if any, by the accused. Though, it has been stated by PW-1 that when his wife did not accede to the allurement and promise given by the accused, accused threatened to kill her and her children and committed sexual intercourse on the point of knife. But at this stage, it remains unexplained that if wife of the complainant Bal Krishan was forced to commit sexual intercourse at the point of knife what prevented her to raise hue and cry, rather none of the prosecution witnesses i.e landlord Ramu Ram and Sudesh Kumar nowhere stated that they ever heard any hue and cry raised by the complainant. They simply stated that they saw the accused in the room of his wife.

23. PW-2, Prem Dassi, who is also complainant in the present case alongwith husband, stated that her husband is serving in Army and she is residing alongwith her children at Karsog for the last five years. It has come in her statement that one day, she was sleeping in her room at about 10:30 PM she saw accused standing outside then she called her landlord Ramu Ram. It has also come in her statement that landlord asked her to vacate his house on the pretext of maintenance and thereafter she took the house on rent from Sudesh Kumar. She stated in her statement that after six months, accused visited his house and entered in the room without any alarm or without her permission. When complainant inquired from the accused why he had entered in the house without permission, then accused replied he had come to tell her about her husband. As per statement of PW-2, thereafter accused told that her husband is serving in Indian Army. It has also come in the statement that accused asked to marry him as her husband is serving in the Army and by showing knife to her forcibly committed sexual intercourse with her. It has also come in her statement that accused forcibly committed sexual intercourse with her and threatened her to do away her life if she disclosed to the police or any other person. It has specifically come in the statement of PW-2 that accused keep on committing sexual intercourse with her against her wishes. It has also come in the statement that when her husband came on leave, then they filed complaint Ex.PW1/A against the accused.

24. In cross-examination, PW-2 admitted that she was residing alongwith her three children in one room. Now, if the deposition made by PW-2 in her examination-in-chief is examined in view of the deposition made by her in her cross-examination where she stated that she used to reside with her three children in one room story put forth by her appears to be unbelievable because as per her version, accused came to her house at 10:30 PM and by showing knife committed sexual intercourse with her. PW-2, admitted that she resided with her children in one room, story of forcible sexual intercourse put forth by her does not appears to be trustworthy. It can be presumed that at 10:30 PM in night children must be in the room when accused allegedly came and on the point of knife and committed sexual intercourse. At this juncture, it remains unexplained that where were children when accused forcibly committed sexual intercourse with her and if they were there why did not they raise any alarm. But in the present case, there is nothing in the statement of PW-2 and PW-1 to suggest that children, who

were presumably present in the room when accused entered in the room at 10:30 PM as well as PW-2, raised any alarm.

25. Another story put forth by PW-2 that the accused kept on committing sexual intercourse with her against her wishes by giving/ extending threats to kill her as well as her children does not appear to be plausible/ trustworthy. Had PW-2 narrated the incident to anybody with regard to forcible committing of sexual intercourse with her, this Court would have lent some credence to the same but in the present case story put forth by PW-2 does not appear to be worth lending any credence and same deserves o be rejected out rightly. It has been also not explained why three school going children were not cited as prosecution witness to substantiate the allegations made by PW-1 as well as PW-2 in their complaint against the accused.

26. As far as another prosecution witnesses namely Ramu Ram(PW-3) and Sudesh Kumar(PW-4) are concerned they have only stated that they had objected the visit of accused to the house of the complainant Prem Dassi and warned her to file complaint against the accused before the police. In his cross-examination, PW-3 stated that he got the room vacated from Prem Devi on the pretext that he is also having younger daughter in his house. PW-4, Sudesh Kumar also not supported the case of the prosecution and stated that he saw the accused visiting the house of complainant Prem Dassi. But in cross-examination, he admitted that Prem Dassi is residing in one room alongwith her three children. Careful perusal of the statements of PW-3 and PW-4, nowhere suggest that they had any hint whatsoever with regard to the aforesaid illicit relation, if any, developed between the accused and complainant Prem Dassi. They nowhere stated on oath that they heard any hue and cry made by the complainant, rather it has come in cross-examination of PW-3 that he asked Prem Dassi to vacate his room on the pretext that he is also having younger daughter in his house, meaning thereby he was not approved of the conduct of the complainant Prem Dassi. Factum with regard to PW-2 living in one room along with her children also stands proved with the admission made by PW-4 in his cross-examination.

27. PW-6, Nain Singh, investigating officer also stated that on completion of the investigation, no offence under Sections 366 and 376 of IPC was made out against the accused and only offence punishable under section 497 of IPC was made out against the accused. In his cross-examination, he admitted that complainant Prem Dassi had not given the statement that accused had committed sexual intercourse on the point of knife. PW-6, also admitted in his cross-examination that Prem Dassi had given the statement that accused has committed sexual intercourse with her consent and has also admitted in his cross-examination that Prem Dassi has not given any statement regarding committing of sexual intercourse with her by the accused.

28. Conjoint reading of statements given by the prosecution witnesses, nowhere suggest that the accused had ever developed relation with PW-2 against her wishes, rather there is overwhelming evidence on the record to suggest that PW-2 was a consenting party to the sexual intercourse allegedly committed by the accused. None of the prosecution witnesses other than PW-1 and PW-2 have stated anything with regard to illicit relation as well as sexual intercourse allegedly having committed by the accused. Since police after conducting the investigation concluded that no case/offence under sections 366 and 376 of IPC exist against the accused, this Court find does find it proper in the given facts and circumstances of the case to explore whether the accused could be held guilty for having committing the offence punishable under Sections 366 and 376 of IPC on the basis of the material available on record. But this Court after perusing the evidence available on record is of the view that there are lot of contradictions and inconsistencies in the statements given by PW-1 and PW-2 and deposition made by them are not worth lending any credence. PW-2 with whom accused allegedly committed sexual intercourse against the wishes of her husband has been not specific and candid in alleging something against the accused, rather she changed her statements very quickly during examination-in-chief as well as cross-examination. Careful perusal of statement made by her, nowhere suggest that the same is truthful and worth giving any weight age. Accordingly, this Court after examining the record made available to it, is of the view that accused petitioner could not be held guilty of having

committed the offence punishable under section 497 IPC on the basis of the evidence adduced on record by the prosecution, rather it appears that Courts below merely by seeing the statement of PW-2 complainant swayed in emotions and without analyzing the statements to ascertain the genuineness of the story put forth by the prosecution, came to the conclusion that accused is guilty of having committed the offence punishable under section 497 IPC. Hence, this Court has no hesitation to conclude that both the Courts below have erred in holding that the accused committed the offence under section 497 IPC. Consequently, in view of the aforesaid discussion, this Court is of the view that the judgment passed by both the Courts below deserves to be quashed and set-aside as the same are not based on correct appreciation of evidence available on record. Moreover, as has been discussed in detail, both the Courts below have erred in entertaining the complaint admittedly filed by both husband and wife against the accused for punishing him under section 497 of IPC. No complaint could be filed jointly by husband and wife for punishing accused under Section 497 of IPC

29. In totality of the facts and circumstances of the present case, I have no hesitation to conclude that the judgment passed by both Courts below are not based on the correct appreciation of the evidence available on record and hence the same is quashed and set-aside. Accused is acquitted of the charge. His bails bonds are discharged. The fine amount, if any deposited by the petitioner-accused be refunded to him.

The present criminal revision stands disposed of, so also pending application(s), if any.

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

Hari Narayan Jaat ……Appellant.
Versus
State of H.P. …….Respondent.

Cr. Appeal No. 86 of 2016.
Reserved on: June 30, 2016.
Decided on: July 01, 2016.

N.D.P.S. Act, 1985- Section 20- Accused was occupying seat No. 22 in the bus- he was carrying a black coloured bag on his lap – search of the bag was conducted during which 2.5 kg charas was recovered- accused was tried and convicted by the trial Court- held, in appeal that prosecution version was proved by the official witnesses and the conductor of the bus - all the codal formalities were completed on the spot- case property was produced before PW-7 who re-sealed the same and handed it over to MHC- it was found to be charas on analysis- minor contradictions are not sufficient to make the prosecution case doubtful- prosecution case was proved beyond reasonable doubt and the accused was rightly convicted by the trial Court- appeal dismissed. (Para-10 to 15)

Cases referred:
Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat, AIR 1983 SC 753,
Karamjit Singh vs. State (Delhi Administration), AIR 2003 SC 1311

For the appellant: Mr. Ramesh Sharma, Advocate.
For the respondent: Mr. M.A.Khan, Addl. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 24.11.2015, rendered by the learned Special Judge, Kullu, H.P., in Sessions trial No. 57/2014, whereby the appellant-accused (hereinafter referred to as the accused), who was charged with and tried for offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the ND & PS Act), has been convicted and sentenced to undergo rigorous imprisonment for a term of ten years along with fine of Rs. 1,00,000/- and in default of payment of fine, he was further ordered to undergo simple imprisonment for a period of one year.

2. The case of the prosecution, in a nut shell, is that on 22.4.2014 as per rapat No. 15(A), the police team headed by ASI Rajesh Kumar (PW-9) proceeded for nakabandi towards Bajaura at about 9:45 AM. When the team was present at Bajaura, a Punjab Roadways bus, bearing No. PB-12Q-9963 reached at Check Post. It was enroute from Manali to Chandigarh. It was being driven by Jasbir Singh and its conductor was Harjit Singh (PW-3). The bus was stopped for checking. ASI Rajesh Kumar (IO) along with HC Hitesh (PW-8) and Conductor Harjit Singh (PW-3) entered the bus from rear door. The driver was also called. They started checking the luggage of the passengers. On checking, accused was found sitting on seat No. 22 in the bus. He was carrying black colour bag on his lap. Accused got frightened on seeing the police party. On asking about the contents of the bag, accused could not give satisfactory reply. He was called out of the bus along with the bag. The IO in the presence of witnesses gave his personal search to accused and during his personal search nothing incriminating was found. Thereafter, the bag carried by the accused was searched by the IO and on search, three packets wrapped with cello tape were found in the bag. On opening the packets, black colour substance in the shape of balls was recovered which was found to be charas. It weighed 2.500 kgs. Out of the recovered charas, sample of 25 grams was separated which was packed in a cloth parcel and sealed with three seals of letter "T". The remaining bulk charas was separately packed and sealed in another cloth parcel by putting eight seals of letter "T". Bag was separately packed and sealed in third parcel. Samples of seal "T" were drawn. NCB form in triplicate was filled vide Ext. PW-5/D. Thereafter, IO prepared rukka Ext. PW-8/A and sent to the Police Station Bhuntar, on the basis of which FIR Ext. PW-6/A was registered. The case property was produced before PW-7 SI Lal Singh, who resealed the same with seal "D". He filled in the relevant columns of NCB form. The case property along with the documents was deposited with PW-5 MHC Gian Chand. He made entry in the malkhana register. On 23.4.2014, PW-5 MHC Gian Chand sent the same to FSL Junga. The report of the FSL is Ext. PW-7/B. 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 convicted the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. Ramesh Sharma, Advocate, has vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. M.A.Khan, Addl. Advocate General for the State has supported the judgment of the learned trial Court dated 24.11.2015.

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-2 HHC Thakur Singh testified that he remained posted in Police Station Bhuntar from November, 2013 to May, 2014. On 23.4.2014, MHC Gian Chand gave him one sealed parcel sealed with eight seals of "T" and four seals of "D", NCB form in triplicate, recovery memo, copy of FIR, sample seals "T" and "D" vide RC No. 93/2014 for depositing in FSL, Junga. On 24.4.2014, he deposited the same at FSL Junga under receipt.

7. PW-3 Harjit Singh, Conductor testified that on 22.4.2014, he was deputed in bus bearing No. PB-12Q-9963 with Jasbir Singh driver to cater Manali Chandigarh bus service. At about 9:45 AM, their bus was stopped by the police at Bajaura check post for checking. There were about 15-20 passengers in the bus. The passengers were directed to get their luggage checked. One person was sitting at seat No. 22. He was asked about his luggage and he told that the bag belonged to him. The person had kept the luggage on his legs. The bag was checked. The police took that person and bag to a tent at check post. He along with the driver also accompanied the police. The person disclosed his identity. The bag was found to be containing three packets which were taped from outside. On opening the tapes, black coloured substance in the shape of small balls was recovered. It was found to be charas. It weighed 2.500 kgs. The police separated 25 grams of substance from the bulk and sealed it in a cloth parcel. The remaining substance was packed in a cloth parcel and sealed. The bag was packed and sealed in third parcel. The police prepared some documents. The bus ticket of the person was obtained from him. The police took those parcels to the Police Station. Thereafter, they left for Chandigarh on the same route. He admitted his signatures on Ext. PW-3/A as well as signatures of driver Jasbir Singh. He also admitted his signatures on Ext. PW-3/B. The ticket issued to the accused is Ext. PW-3/G and the photocopy of the same is Ext. PW-3/H. In his cross-examination, he admitted that ticket Ext. PW-3/G did not bear the name of the accused. The bus started from Manali at 7:25 AM. There were shops and residential houses near the check post. The police did not send any person in his presence to search for independent witnesses. The bag was not opened inside the bus. It was lifted and touched by the police and then the accused was asked to come down along with the bag. It took around 1 ½ hours for the police to complete the proceedings.

8. PW-5 MHC Gian Chand testified that he was working as MHC in the Police Station Bhuntar. He brought the malkhana and RC register of the Police Station. On 22.4.2014, SHO Lal Chand deposited three sealed parcels with him. The first parcel was sealed with eight seals of seal “T”, four seals of “D” and stated to be containing 2.475 kgs. of charas. The second parcel was sealed with three seals of “T” and three seals of “D” stated to be containing 25 grams of charas. The third parcel was sealed with eight seals of “T” and stated to be containing a pithu bag. He also deposited copies of FIR, recovery memo, samples of seal “T” and “D”, NCB form in triplicate. He made entries at Sr. No. 129 of the malkhana register vide Ext. PW-5/Aon 23.4.2014, he sent one parcel containing 2.475 kgs of charas to FSL Junga along with sample seals “T” and “D”, copies of recovery memo, FIR, NCB form in triplicate and docket through HHC Thakur Singh for examination. As long as the case property remained in his possession, no tampering was done with the same.

9. PW-7 SI Lal Chand deposed that on 22.4.2014 ASI Rajesh Kumar produced the case property before him duly sealed containing 2.475 kgs of charas and another sealed parcel stated to be containing 25 grams of charas. He resealed the same with his own seal “D”. He deposited the case property with the MHC.

10. PW-8 HC Hitesh Kumar deposed the manner in which the accused was apprehended from the bus sitting on seat No. 22. The search, seizure and sealing proceedings were completed on the spot. In his cross-examination, he admitted that surrounding TCP Bajaura, there were residential houses and shops. The IO did not make any efforts to call for local witnesses from such houses and shops. The personal search of the accused was undertaken.

11. PW-9 ASI Rajesh Kumar also deposed the manner in which the accused was apprehended. NCB form in triplicate was filled in by him. He prepared rukka Ext. PW-8/A. It was sent to the Police Station through HC Hitesh Kumar. He prepared the spot map Ext. PW-9/A. He handed over the case property to SHO in the Police Station. In his cross-examination, he deposed that no one else was sitting by the side of the accused. The passengers were sitting in the front and back seat on which the accused was sitting. He admitted that there were houses and shops surrounding TCP Bajaura. Thousands of vehicles used to ply day and night on the

National Highway No. 21. He did not try to associate any person from the locality at the time of search nor did he try to stop any vehicle in order to associate occupants of the vehicles. He tried to associate passengers of the bus but no one was willing, as they said that they were going in connection with their important work. According to him, the bus remained at the spot till 2:00 PM. The passengers of the bus had gone by that time.

12. The prosecution has examined PW-3 Harjit Singh, PW-8 HC Hitesh Kumar and PW-9 ASI Rajesh Kumar in order to prove its case. PW-3 Harjit Singh is the conductor of the bus bearing No. PB-12Q-9963. He has categorically testified in his statement that the accused was sitting on seat No. 22 of the bus. He was asked about the luggage, which he admitted that it belonged to him. The person had kept the luggage on his legs. He has identified his signatures on memos and that of driver Jasbir Singh. PW-8 HC Hitesh Kumar and PW-9 ASI Rajesh Kumar are official witnesses. They have supported the case of the prosecution to the hilt. The prosecution has proved that the accused was issued ticket by PW-3 Conductor Harjit Singh vide Ext. PW-3/G. The I.O. has associated PW-3 Conductor Harjit Singh as independent witness. PW-3 Conductor Harjit Singh had no inimical disposition towards the accused.

13. PW-9 ASI Rajesh Kumar has deposed that he has tried to associate the passengers of the bus as witnesses but they were not willing to be associated as witnesses. Merely that in memo Ext. PW-3/B, FIR number has not been written would not in any manner prejudice the case of the accused. All the codal formalities were completed on the spot. The samples were properly sealed. The case property was produced before PW-7 SI Lal Singh. He resealed the same and deposited it with the MHC. PW-5 MHC Gian Chand has made necessary entry in the malkhana register and the case property was thereafter sent to FSL, Junga. The report of the FSL, Junga is Ext. PW-7/B. The case property remained in safe custody from its seizure till its production in the Court and it was the same case property which was recovered from the accused.

14. According to PW-3 Conductor Harjit Singh, they left Bajaura with bus at 11:15 AM and PW-9 ASI Rajesh Kumar has deposed that the bus remained at the spot till 2:00 PM. It is a minor contradiction since the accused was apprehended on 22.4.2014 and the statements of PW-3 Conductor Harjit Singh and PW-9 ASI Rajesh Kumar were recorded on 20.11.2014 and 9.10.2015, respectively. The witnesses are not supposed to remember the time with mathematical precision.

15. Their lordships of the Hon'ble Supreme Court in the case of ***Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat,*** reported in ***AIR 1983 SC 753,*** have held that over much importance cannot be given to minor discrepancies. Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses, therefore, cannot be annexed with undue importance. More so, when the all important "probabilities-factor" echoes in favour of the version narrated by the witnesses. It has been held as follows:

> " 5. It appears that the parents of P.W. 1 as well as parents of P.W. 2 wanted to hush up the matter. Some unexpected developments however forced the issue. The residents of the locality somehow came to know about the incident. And an alert Woman Social Worker, P.W. 5 Kundanben, President of the Mahila Mandal in Sector 17, Gandhinagar, took up the cause. She felt indignant at the way in which the appellant had misbehaved with two girls of the age of his own daughter, who also happened to be friends of his daughter, taking advantage of their helplessness, when no one else was present. Having ascertained from P.W. 1 and P.W. 2 as to what had transpired, she felt that the appellant should atone for his infamous conduct. She therefore called on the appellant at his house. It appears that about 500 women of the locality had also gathered near the house of the appellant. Kundanben requested the appellant to apologize publicly in the presence of the woman who had assembled there. If the appellant had acceded to . this request possibly the matter might have rested there and might not have

come to the court. The appellant, however, made it a prestige issue and refused to apologize. Thereupon the police was contacted and a complaint was lodged by P.W. 1 on 19 Sept. 1975. P.W. 1 was then sent to the Medical officer for medical examination. The medical examination disclosed that there was evidence to show that an attempt to commit rape on her had been made a few days back. The Sessions Court as well as the High Court have accepted the evidence and concluded that the appellant was guilty of sexual misbehavior with P.W. 1 and P.W. 2 in the manner alleged by the prosecution and established by the evidence of P.W. 1 and P.W. 2. Their evidence has been considered to be worthy of acceptance lt is a pure. finding of fact recorded by the Sessions Court and affirmed by the High Court. Such a concurrent finding of fact cannot be reopened in an appeal by special leave unless it is established: (1) that the finding is based on no evidence or (2) that the finding is perverse, it being such as no reasonable person could have arrived at even if the evidence was taken at its face value or (3) the finding is based and built on inadmissible evidence, which evidence, if excluded from vision, would negate the prosecution case or substantially discredit or impair it or (43 some vital piece of evidence which would tilt the balance in favour of the convict has been overlooked, disregarded, or wrongly discarded. The present is not a case of such a nature. The finding of guilt recorded by the Sessions Court as affirmed by the High Court has been challenged mainly on the basis of minor discrepancies in the evidence. We do not consider it appropriate or permissible to enter upon a reappraisal or reappreciation of the evidence in the context of the minor discrepancies painstakingly highlighted by learned counsel for the appellant. Over much importance cannot be attached to minor discrepancies. The reasons are obvious:

> (1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen. (2) ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.
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> (3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another. (4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.
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> (5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment 1.1 at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time- sense of individuals which varies from person to person.
>
> (6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

(7) A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious

mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him-Perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment.

6. Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all important "probabilities-factor" echoes in favour of the version narrated by the witnesses."

16. Their lordships of the Hon'ble Supreme Court in the case of ***Karamjit Singh vs. State (Delhi Administration),*** reported in ***AIR 2003 SC 1311,*** have held that there is no principle of law that without corroboration by independent witnesses their testimony cannot be relied upon. Presumption that person acts honestly applies as much in favour of police personnel as of other persons. It has been held as follows:

" 8. Shri Sinha, learned senior counsel for the appellant, has vehemently urged that all the witnesses of recovery examined by the prosecution are police personnel and in absence of any public witness, their testimony alone should not be held sufficient for sustaining the conviction of the appellant. In our opinion the contention raised is too broadly stated and cannot be accepted. The testimony of police personnel should be treated in the same manner as testimony of any other witness and there is no principle of law that without corroboration by independent witnesses their testimony cannot be relied upon. The presumption that a person acts honestly applies as much in favour of police personnel as of other persons and it is not a proper judicial approach to distrust and suspect them without good grounds. It will all depend upon the facts and circumstances of each case and no principle of general application can be laid down. PW11 Pratap Singh has clearly stated in the opening part of his examination-in-chief that ACP Shakti Singh asked some public witnesses to accompany them but they showed their unwillingness. PW10 Rajinder Prasad, SI has given similar statement and has deposed that despite their best efforts no one from public was willing to join the raiding party due to the fear of the terrorists. Exactly similar statement has been given by PW9 R.D. Pandey. We should not forget that the incident took place in November 1990, when terrorism was at its peak in Punjab and neighbouring areas. The ground realities cannot be lost sight of that even in normal circumstances members of public are very reluctant to accompany a police party which is going to arrest a criminal or is embarking upon search of some premises. At the time when the terrorism was at its peak, it is quite natural for members of public to have avoided getting involved in a police operation for search or arrest of a person having links with terrorists. It is noteworthy that during the course of the cross- examination of the witness the defence did not even give any suggestion as to why they were falsely deposing against the appellant. There is absolutely no material or evidence on record to show that the prosecution witnesses had any reason to falsely implicate the appellant who was none else but a colleague of theirs being a member of the same police force. Therefore, the contention raised by Shri Sinha that on account of non-examination of a public witness, the testimony of the prosecution witnesses who are police personnel, should not be relied upon has hardly any substance and cannot be accepted."

17. Thus, the prosecution has proved its case against the accused beyond reasonable doubt and there is no occasion for us to interfere with the well reasoned judgment of the learned trial Court dated 24.11.2015.

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

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Himachal Pradesh State Electricity Board & Anr. .... Petitioners
Versus
Mohan Singh & Anr. .... Respondents

CWP No. 973 of 2009
Reserved on: 29.06.2016
Date of decision: 01.07.2016

Constitution of India, 1950- Article 226- A reference was made to Labour Court-cum-Industrial Tribunal, Dharamshala as to whether services of the claimant had been legally terminated as Beldar by the Executive Engineer, HPSEB- the reference petition was partly allowed by the Labour Court- aggrieved from the award, present writ petition has been filed- held, that persons engaged after the engagement of the claimant were continued after the disengagement of the claimant, meaning that the Board had not followed the principle of 'first come last go'- it was also not established that claimant had abandoned the job- claimant was disengaged without complying with the provision of Section 25-G of Industrial Disputes Act- Writ Court cannot sit in appeal and set aside the award made by the Labour Court, which is based on evidence and facts- findings recorded by the Labour Court should not be interfered with, unless and until the findings are perverse or not borne out from the material on record- appeal dismissed.
(Para-11 to 18)

Case referred:

State of H.P. and another Vs. Shankar Lal and other connected matters, I L R 2016 (I) HP 225 (D.B.)

For the petitioners: Mr. Vivek Sharma, Advocate.
For the respondents: Mr. Rahul Mahajan, Advocate, for respondent No. 1.

The following judgment of the Court was delivered:

<u>Ajay Mohan Goel, J.(Oral):</u>

By way of the present writ petition, the petitioners have prayed for quashing of award dated 26.11.2008 passed by the Presiding Judge, Labour Court-cum-Industrial Tribunal, Dharamshala, H.P. in Reference No. 385/2002.

2. Brief facts of the case necessary for adjudication of the present case are that a Reference was received by the Labour Court-cum-Industrial Tribunal, Dharamshala, from the appropriate Government, as to whether the claimant had been illegally terminated w.e.f. 21.10.1999 as a Beldar by the Executive Engineer, HPSEB, Jogidner Nagar Division in violation of the provisions of Section 25-G and Section 25-H of the Industrial Disputes Act and whether the claimant was entitled for any relief and compensation?

3. On notice, the claimant filed his statement of claim, in which it was stated that he was engaged as a daily waged Beldar by the Board on muster rolls basis on 25.02.1999. He served as such till 20.10.1999. His services were terminated on 21.10.1999. According to the claimant, during the period of his employment, he was given artificial breaks of 305 days by the Board from 25.02.1999 to 20.10.1999. These artificial breaks were given to him without any reason and according to the workman, he was entitled to the benefit of continuity of service as per the provisions of Section 25-B of the Industrial Disputes Act. According to him, the respondent/Board had violated the provisions of Clause 14(2) of the HPSEB Establishment Standing Orders while dispensing with the services of the workman, which Standing Orders were framed under the Industrial Employment (Standing Orders) Act, 1946. No inquiry was

conducted before retrenching him and the Board had also not followed the principle of 'last come first go' as envisaged under Section 25-G of the Industrial Disputes Act. As per the claimant, other workers, namely, Man Singh son of Kalyan Singh, Prithi Chand son of Bhoop Singh, Safi Mohammad son of Hamid Ahmed, Durga Dass son of Kalu Ram etc. who were junior to him and were retained in service at the time of his retrenchment. He also alleged violation of the provisions of Section 25-H and Section 25-N of the Industrial Disputes Act.

4. In reply filed to the statement of claim, the Board admitted that the claimant was engaged as daily wage Beldar on 25.02.1999 but vehemently refuted the allegation of workman that he was given frictional breaks as alleged. According to the Board, the claimant worked only for a period of 60 days from 25.02.1999 to 20.10.1999 and used to remain absent from duty and ultimately he abandoned the job after 20.10.1999. As per the Board, in this view of the matter, the workman was neither charge-sheeted nor he was paid any compensation. It was further stated that in view of the willful absence of claimant from the work from time to time, his case was not covered by the provisions of Section 25-B of the Industrial Disputes Act and keeping in view the fact that the claimant had not worked for 90 days during the period he remained in the employment of the Board, his name was not included in the list of temporary workmen. It was further the case of the Board that as the claimant had abandoned the job on his own, there was no question of complying with the principle of 'last come first go' nor it could be said that the Board had breached the provisions of Clause 14(2) of the Standing Orders.

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

1. Whether the termination of services of the petitioner by the respondent w.e.f. 21.10.1999 is violative of the provisions of the I.D. Act, 1947 and certified Standing Orders framed by State Electricity Board? .... OPP

2. Whether the petition is not maintainable? ... OPR

3. Whether the petition is barred by time? ... OPR

4. Whether the petitioner is estopped from filing the petition due to his act and conduct? ... OPR

5. Relief.

6. On the basis of material placed on record by the parties, the issues so framed by the learned Labour Court were answered as under:-

Issue No. 1 : Yes.

Issue No. 2 : No.

Issue No. 3 : No.

Issue No. 4 : No.

Relief : As per operative part of the Award, the petition is partly allowed.

7. Learned Labour Court held that in his statement as PW-1 the claimant maintained that he was engaged as Beldar and he worked as such from 25.02.1999 to 20.10.1999. His services were dispensed with on 21.10.1999 without any notice or charge-sheet, whereas persons junior to him were retained. Learned Labour Court held that seniority issued by the Additional Superintending Engineer, Electrical Division HPSEB, Jogidner Nagar, vide letter dated 05.09.2002 Ext. PA demonstrated that Man Singh, Prithi Chand, Safi Mohammad, Durga Dass and Gian Chand, whose names figure at serial numbers 112B, 113, 114, 115 and 116 had been engaged between 01.05.1999 to 11.10.1999 i.e. after the date of engagement of the claimant. On the said basis, learned Labour Court held that the stand taken by the Board witness Mr. V.S. Thakur to the effect that the said persons were senior to the

claimant was incorrect and false. On these basis, learned Labour Court held that the Board had in fact violated the provisions of Section 25-G of the Industrial Disputes Act. It further held that the Board had also violated the provisions of Section 25-H of the Industrial Disputes Act because no material had been produced on record by the Board to substantiate its contention that the claimant had abandoned the job on his own.

8. The learned Labour Court thus held that in the present case the Board has violated the provisions of Section 25-G and Section 25-H of the Industrial Disputes Act and it partially allowed the claim petition by holding the claimant to be entitled to be reinstated in the same capacity as in which he was working at the time of retrenchment. The learned Labour Court further held that the claimant was not entitled to continuity of service nor he was held entitled to back wages.

9. Feeling aggrieved by the judgment passed by the learned Labour Court, the petitioner/Board has filed the present writ petition.

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

11. The case of the claimant to the effect that the Board had violated the provisions of Section 25-G of the Industrial Disputes Act is based on Ext. PA, which is the seniority list issued by the Additional Superintending Engineer, Electrical Division HPSEB Joginder Nagar vide letter dated 05.09.2002. As per the said seniority list, as is evident from the award passed by the learned Labour Court, Man Singh, Prithi Chand, Safi Mohammad, Durga Dass and Gian Chand, figure at serial numbers 112B, 113, 114, 115 and 116. The respective dates of their engagements are 01.05.1999, 21.06.1999, 21.07.1999, 21.09.1999 and 11.10.1999. On the other hand, the date of engagement of the claimant is 25.02.1999. Ext. PA thus categorically demonstrates that the persons who were engaged by the Board after the engagement of the claimant were continued after the disengagement of the claimant, meaning thereby that the Board has not followed the principle of 'first come last go'. The Board has not been able to place on record any material to substantiate its case that the claimant has abandoned the job on his own.

12. Keeping this fact in view that on one hand the Board has not able been to substantiate that the claimant has abandoned the job and on other hand it stands proved on record that persons engaged by the Board after the claimant have been retained, though the services of the claimant have been terminated, in my considered view, the findings returned by the learned Labour Court to the effect that the termination of the services of the claimant was in violation of the provisions of Section 25-G of the Industrial Disputes Act, are correct. Learned counsel for the petitioner could not point out as to how the said findings returned by the learned Labour Court were either perverse or were not borne out from the material produced on record.

13. Similarly, in my considered view there is no infirmity with the findings which have been returned by the learned Labour Court with regard to the violation of the provisions of Section 25-H by the Board in the present case. It stands proved on record that whereas on one hand the claim was disengaged/terminated without complying with the provisions of Section 25-G. On the other hand, the Board engaged fresh hand without first giving an opportunity to the claimant to be re-engaged.

14. Now coming to the relief which has been granted by the learned Labour Court to the claimant, it has only directed the Board to re-engage the claimant and no other relief has been granted in favour of the claimant. Keeping in view this aspect of the matter that it stands proved on record that the Board had terminated the services of the claimant while retaining the services of the persons engaged after him, clearly the provisions of Section 25-G of the Industrial Disputes were violated. Accordingly, in my considered view, there is neither any infirmity nor any infirmity with the findings returned in this regard by the learned Labour Court. The conclusions arrived at by the learned Labour Court are on the basis of material which was placed

before it by both the parties. The findings returned by the learned Labour Court to the effect that services of the claimant were terminated without complying with the provisions of Sections 25-H of the Industrial Disputes Act cannot be said to be not borne out from the material on record by the parties. Further, in my considered view, the relief which has been granted in favour of the claimant by the learned Labour Court is also a very reasonable relief as he has only been held entitled to be reinstated and no relief of continuity of service or back wages has been given to the claimant by the learned Labour Court.

15. It has been held by this Court in ***LPA No. 4 of 2016*** titled ***State of H.P. and another*** Vs. ***Shankar Lal and other connected matters***, decided on 02.01.2016, as under:-

> "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.

16. Thus, it is evident that as far as the awards passed by the learned Labour Courts are concerned, the finding of fact so recorded by the learned Labour Court should not be interfered until and unless the findings so returned by the learned Labour Court are perverse or not borne out from the material on record.

17. In the present case, it cannot be said that the findings returned by the learned Labour Court are either perverse or not borne out from the material on record, therefore, the same do not warrant any interference.

18. Accordingly, I concur with the award passed by the learned Labour Court and hold that there is no merit in the present writ petition and the same is accordingly dismissed, so also the pending miscellaneous application (s), if any.

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

Himachal Road Transport Corporation and another .....Appellants.

Versus

Smt. Sarvitari Devi and another .....Respondents

FAO (MVA) No. 268 of 2011

Date of decision: 1st July, 2016.

Motor Vehicles Act, 1988- Section 171- Tribunal had awarded interest @ 9% per annum- held, that interest is to be awarded as per prevailing rate- thus, rate of interest reduced to 7.5% per annum. (Para- 8 and 9)

Cases referred:

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

Smt. 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

For the appellants: Mr. Jagdish Thakur, Advocate.
For the respondents: Mr.Rakesh Thakur, Advocate, for respondent No.1.

The following judgment of the Court was delivered:

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

This appeal is directed against the judgment and award dated 30.3.2011, made by the Motor Accident Claims Tribunal-II Solan, H.P., in MAC Petition No. 12-NL/2 of 2008, titled *Smt. Sarvitari Devi versus H.R.T.C. and others*, for short "the Tribunal", whereby compensation to the tune of Rs.4,10,000/- alongwith interest @ 9% per annum, came to be awarded in favour of the claimant, hereinafter referred to as "the impugned award", for short.

2. Claimant has filed claim petition before the Tribunal for the grant of compensation, as per the break-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 Sanjeev Sharma was caused on account of rash and negligent driving of the offending vehicle by the respondent No.3, as alleged? OPP.*

(ii) *If issue no. 1 is proved in affirmative, whether the petitioners are entitled for compensation if so, the amount thereof? OPP*

(iii) *Whether the respondents 1 to 3 are responsible to make payment of the amount as alleged? OPP.*

(iv) *Relief.*

4. Claimant has examined three witnesses and driver Pyar Singh stepped into the witness-box as RW1. Appellants/HRTC have examined Rajinder Kumar as RW2.

5. The Tribunal, after scanning the evidence held that the driver has driven the offending vehicle rashly and negligently. The FIR was lodged against the driver and after making deductions in paras 9 to 12 held that the accident was outcome of the rash and negligent driving of the driver of the HRTC.

6. I have gone through the pleadings and the findings recorded. The Tribunal has rightly came to the conclusion that the driver has driven the offending vehicle rashly and negligently. It is apt to record herein that the findings recorded by the Tribunal against driver have not been questioned by the driver. Thus, it cannot lie in the mouth of the owner that the driver was not rash and negligent. Thus, the findings recorded by the Tribunal on issue No. 1 are upheld.

7. Issues No. 2 and 3 are interconnected hence, I deem it proper to determine both these issues together.

8. The deceased was 22 years old, was working as a teacher in Sunrise Public School, Baruna and was earning Rs.5000/- per month. The claimant has proved the said fact and also placed on record the certificate of Bachelor of Physical Education Ext. PW3/C. Thus, the Tribunal has rightly held that the income of the deceased was Rs.5000/- per month and applied the multiplier accordingly. Thus, the Tribunal has rightly awarded an amount of Rs.4,10,00/- as compensation, but has fallen in an error in granting 9% interest. Only 7.5% interest was to be granted.

9. 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.

10. Appellant-HRTC is directed to deposit the amount within eight weeks from today. On deposit, the Registry is directed to release the awarded amount in favour of the claimant, through payees' cheque account or by depositing the same in her bank account, strictly in terms of the conditions contained in the impugned award. Excess amount, if any, be released to the appellants, through payees' cheque account.

11. Viewed thus, the appeal is allowed and the impugned award is modified, as indicated hereinabove.

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

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

Hira Nand Shastri ……Petitioner.

Versus

Ram Rattan Thakur and another ……Respondents.

Cr. Revision No. 148 of 2015.
Date of decision: 1st July, 2016.

Negotiable Instruments Act, 1881- Section 138- Accused had borrowed money from the complainant and had issued a cheque for the repayment of the amount- cheque was dishonoured with an endorsement 'insufficient funds'- accused failed to make payment despite valid notice of demand- he was tried and convicted by the trial Court- an appeal was preferred, which was dismissed- held, in revision that revisional jurisdiction should normally be exercised in exceptional cases when there is a glaring defect in the proceedings or there is a manifest error of law resulting in flagrant miscarriage of justice- Revisional Court will interfere when findings recorded by the Court are perverse, based on no evidence or contrary to the evidence on record- accused had failed to rebut the statutory presumptions attached to the cheque- accused was wrongly convicted by the trial Court- revision petition dismissed. (Para-6 to 23)

Cases referred:
Amur Chand Agrawal vs. Shanti Bose and another, AIR 1973 SC 799
State of Orissa vs. Nakula Sahu, AIR 1979, SC 663,
Pathumma and another vs. Muhammad, AIR 1986, SC 1436
Bansi Lal and others vs. Laxman Singh, AIR 1986 SC 1721,
Ramu @ Ram Kumar vs. Jagannath, AIR 1991, SC 26,
State of Karnataka vs. Appu Balu, AIR 1993, SC 1126 = II (1992) CCR 458 (SC)
Kaptan Singh and others vs. State of M.P. and another, AIR 1997 SC 2485 = II (1997) CCR 109 (SC),
Chinnaswami vs. State of Andhra Pradesh, AIR 1962 SC 1788
Mahendra Pratap vs. Sarju Singh, AIR 1968, SC 707
P.N. G. Raju vs. B.P. Appadu, AIR 1975, SC 1854

Ayodhya vs. Ram Sumer Singh, AIR 1981 SC 1415
State of Kerala vs. Puttumana Illath Jathavedan Namboodiri (1999) 2 SCC 452
State of A.P. vs. Rajagopala Rao (2000) 10 SCC 338,

For the Petitioner	:	Mr. Nitin Thakur, Advocate.
For the Respondents	:	Mr. R.K.Bawa, Senior Advocate, with Mr. Jeevesh Sharma, Advocate, for respondent No.1. Ms. Meenakshi Sharma, Addl. A.G., with Mr. J.S. Guleria, Asstt. A.G., for respondent No.2.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge **(Oral).**

The petitioner has preferred this Criminal Revision against the judgment/order dated 27.2.2015 passed by learned Additional Sessions Judge (2), Shimla in Cr. Appeal No. RBT-187-S/10 of 2014/13 whereby he confirmed the order/judgment passed by learned Judicial Magistrate 1st Class, Court No.3, Shimla in Case No. 58-3 of 2012/11 dated 24.6.2013/16.7.2013 convicting and sentencing the petitioner under Section 138 of the Negotiable Instruments Act, 1881.

2. The complainant /respondent No.1 filed a complaint under Section 138 of the Negotiable Instruments Act, 1881, (for short 'Act'), on the ground that the petitioner was known to him and had borrowed from him a sum of Rs.1,90,000/-. In lieu of discharging his liability, the petitioner issued the aforesaid cheque for a sum of Rs.1,90,000/- (Ex.CW-1/A). The cheque was dishonoured by the bank with remarks "insufficient funds". The respondent thereafter issued notice to the petitioner calling upon him to make the payment within 15 days from the receipt of the notice. The legal notice was duly received by the petitioner as the same was returned back with the endorsement "unclaimed and refused". The respondent was left with no other option, but to file the aforesaid complaint.

3. The petitioner/accused was summoned and thereafter notice of accusation was put to him to which he pleaded not guilty and claimed trial. The complainant /respondent was directed to produce his evidence. After completion of evidence, entire incriminating circumstances and evidence were put to the petitioner. The defence raised by the petitioner was that the cheque was issued as security and date and amount had been filled up by the complainant himself. Though the petitioner was granted to lead evidence in defence, but he failed to do so.

4. The learned trial Court after evaluating the evidence and hearing the parties, convicted and sentenced the accused/petitioner to undergo simple imprisonment for six months and to pay compensation of Rs.2,25,000/- to the complainant, which findings was assailed but maintained by the court of learned Additional Sessions Judge (2), Shimla. It is against both these findings that the petitioner has filed this revision petition on the ground that both the learned Courts below have failed to take into account the defence raised by the petitioner which has consistently been to the effect that the complainant had borrowed money from Ramesh Thakur, who had retained blank signed cheque of the petitioner which was subsequently filled up by Ramesh Thakur in connivance with the complainant to his advantage. It was further submitted that the petitioner had never borrowed money from the complainant/respondent and the same stands duly proved on record.

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

5. Before proceeding to embark upon the relative merits of the case, it would be necessary to note the scope and power of this Court while dealing with such type of criminal revision petitions.

6. In ***Amur Chand Agrawal vs. Shanti Bose and another, AIR 1973 SC 799,*** the Hon'ble Supreme Court has held that the revisional jurisdiction should normally be exercised in exceptional cases when there is a glaring defect in the proceedings or there is a manifest error of point of law and consequently there has been a flagrant miscarriage of justice.

7. In ***State of Orissa vs. Nakula Sahu, AIR 1979, SC 663,*** the Hon'ble Supreme Court after placing reliance upon a large number of its earlier judgments including Akalu Aheer vs. Ramdeo Ram, AIR 1973, SC 2145, held that the power, being discretionary, has to be exercised judiciously and not arbitrarily or lightly. The Court held that "judicial discretion, as has often been said, means a discretion which is informed by tradition methodolised by analogy and discipline by system".

8. In ***Pathumma and another vs. Muhammad, AIR 1986, SC 1436***, the Hon'ble Apex Court observed that High Court "committed an error in making a re-assessment of the evidence" as in its revisional jurisdiction it was "not justified in substituting its own view for that of the learned Magistrate on a question of fact".

9. In ***Bansi Lal and others vs. Laxman Singh, AIR 1986 SC 1721***, the legal position regarding scope of revisional jurisdiction was summed up by the Hon'ble Supreme Court in the following terms:

> "It is only in glaring cases of injustice resulting from some violation of fundamental principles of law by the trial court, that the High Court is empowered to set aside the order of the acquittal and direct a re-trial of the acquitted accused. From the very nature of this power it should be exercised sparingly and with great care and caution. The mere circumstance that a finding of fact recorded by the trial court may in the opinion of the High Court be wrong, will not justify the setting aside of the order of acquittal and directing a re-trial of the accused. Even in an appeal, the Appellate Court would not be justified in interfering with an acquittal merely because it was inclined to differ from the findings of fact reached by the trial Court on the appreciation of the evidence. The revisional power of the High Court is much more restricted in its scope".

10. In ***Ramu @ Ram Kumar vs. Jagannath, AIR 1991, SC 26,*** Hon'ble Supreme court cautioned the revisional Courts not to lightly exercise the revisional jurisdiction at the behest of a private complainant.

11. In ***State of Karnataka vs. Appu Balu, AIR 1993, SC 1126 = II (1992) CCR 458 (SC),*** the Hon'ble Supreme Court held that in exercise of the revisional powers, it is not permissible for the Court to reappreciate the evidence.

12. In ***Ramu alias Ram Kumar and others vs. Jagannath AIR 1994 SC 26*** the Hon'ble Supreme Court held as under:

> "It is well settled that the revisional jurisdiction conferred on the High Court should not be lightly exercised particularly when it was invoked by a private complaint".

13. In ***Kaptan Singh and others vs. State of M.P. and another, AIR 1997 SC 2485 = II (1997) CCR 109 (SC),*** the Hon'ble Supreme Court considered a large number of its earlier judgments, particularly Chinnaswami vs. State of Andhra Pradesh, AIR 1962 SC 1788 ; Mahendra Pratap vs. Sarju Singh, AIR 1968, SC 707; P.N. G. Raju vs. B.P. Appadu, AIR 1975, SC 1854 and Ayodhya vs. Ram Sumer Singh, AIR 1981 SC 1415 and held that revisional power can be exercised only when "there exists a manifest illegality in the order or there is a grave miscarriage of justice".

14. In ***State of Kerala vs. Puttumana Illath Jathavedan Namboodiri (1999) 2 SCC 452,*** the Hon'ble Supreme Court held as under:

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

15. In ***State of A.P. vs. Rajagopala Rao (2000) 10 SCC 338,*** the Hon'ble Supreme Court held as under:

> "The High Court in exercise of its revisional power has upset the concurrent findings of the Courts below without in any way considering the evidence on the record and without indicating as to in what manner the courts below had erred in coming to the conclusion which they had arrived at. The judgment of the High Court contains no reasons whatsoever which would indicate as to why the revision filed by the respondent was allowed. In a sense, it is a non-speaking judgment".

16. In light of the aforesaid exposition of law, this Court will interfere with the findings recorded by the learned Courts below only if the same are either perverse, based on no evidence or have been arrived contrary to the evidence on record.

17. The complainant Ram Rattan appeared as CW-1 and testified on record that he had advanced a loan of Rs.1,90,000/- to the petitioner and he in turn in order to discharge the said unpaid outstanding liability, had issued one cheque No.105665 dated 8.11.2011 of Rs.1,90,000/- Ex.CW1-A. At that time, the petitioner had assured the complainant/respondent that the cheque would be honoured, however, when the cheque was presented, the same was received back dishonoured for the reason "insufficient funds". The cheque was received alongwith returning memo Ex.CW-1/B dated 15.11.2011, constraining the complainant/respondent to issue a statutory legal notice Ex.CW-1/C dated 21.11.2011, postal receipt whereof is Ex.CW-1/D. Despite having the notice, the petitioner failed to make the payment within the stipulated period.

18. In cross-examination, the respondent/complainant admitted that he was having good relation with the petitioner. He further stated that the amount was demanded from him in September, 2011 and a sum of Rs.1,50,000/- was paid through bank while as sum of Rs.40,000/- was paid in cash from his own. He denied that the petitioner had not received the notice and further denied that the blank cheque issued by the petitioner had been misused by him.

19. The petitioner in his statement under Section 313 Cr.P.C. denied the entire case as set up by the respondent and stated that the cheque in question had been given to the respondent as security purpose, but he had misused it by encashing the same.

20. Both the learned Courts below have disbelieved the version put forth by the petitioner. Even otherwise, the petitioner has failed to rebut the statutory presumptions attached to the cheque under Section 139 of the Negotiable Instruments Act. This is not one of those exceptional cases where there is glaring defect in or there is manifest error on the point of law and therefore, there is no further question of there being a flagrant miscarriage of justice, rather the instant case is a classical example where the petitioner a retired government servant getting more than Rs.25,000/- as pension and having considerable income from agricultural pursuits because of bad intention does not want to pay the amount. These observations are being made on

the basis of the records of the proceedings as would be evident from the following sequence of events:

(i) On 18.6.2015 this revision petition came up for consideration for the first time and this Court suspended the sentence imposed upon the petitioner subject to his depositing the entire compensation amount within a period of eight weeks, if not already deposited.

(ii) On 21.8.2015 on failure to comply with the order by depositing the amount, the petitioner moved an application being Cr.MP No. 832 of 2015 praying therein for extension of time to deposit the compensation amount and also furnishing the bail bonds. The reason given for extension was that due to ill-health and despite best efforts the petitioner could not arrange the amount and had already applied for a loan from the H.P. State Co-operative Agriculture and Rural Development Bank Ltd., Shimla which was under process. This court taking into consideration the contents of the application duly supported by the affidavit of the petitioner granted extension of four weeks and the matter was ordered to be listed on 24.9.2015.

(iii) On 24.9.2015 the order was not complied with, therefore, this Court directed the petitioner to appear in person on 01.10.2015.

(iv) On 01.10.2015 the petitioner appeared before this Court and stated that he proposed to liquidate the entire amount by obtaining loan, but such submission was not accepted and the petitioner was directed to file application to this effect.

(v) On 15.10.2015 the application filed by the petitioner for extension of time was allowed and this Court graciously granted the petitioner time to deposit the entire compensation amount and furnish the bail bonds upto 31.12.2015. However, it was made clear that no further time in any circumstances would be granted to the petitioner.

(vi) On 31.12.2015 the learned counsel for the petitioner made a statement that the petitioner had already moved the application for obtaining the loan and liquidating the amount in question. The petitioner was directed to file an affidavit to this effect.

(vii) However, when the case came up for consideration on 7.1.2016, affidavit filed by the petitioner was not available on the record, but copy thereof was handed over in the open Court and taking into consideration the averments contained therein which indicated that the petitioner had moved an application for obtaining the loan, this Court magnanimously granted time to the petitioner to deposit the amount upto 31.3.2016.

(viii) On 7.4.2016 the petitioner was again directed to appear before the Court as the respondent/complainant represented that the petitioner had not deposited/paid the compensation amount.

(ix) On 28.4.2016 the petitioner appeared and handed over a sum of Rs.20,000/- to the respondent and undertook to pay the remaining amount within a period of six weeks and the matter was adjourned to 23.6.2016.

(x) On 23.6.2016, the compensation amount save and except Rs.20,000/-had not been paid and it was made clear that in case the orders passed by this Court on previous dates are not complied with, then the consequences would follow. The petitioner thereafter had made an oral request for extension of time to deposit the amount on the ground that he expected a bumper apple crop. It was during the course of these proceedings that the petitioner himself informed the court that he was a pensioner getting more than Rs.25,000/- per month as pension. The petitioner as per his affidavit is 60 years, which obviously means that he has only recently retired and must have got a considerable pensionary benefits, that apart, he is getting a pension of Rs.25,000/- per month and claimed to be having a considerable agriculture income, but then he does not have the intention to pay the compensation awarded by the learned Courts below.

21. Even today i.e. on 1.7.2016 the petitioner has failed to comply with the orders of the Court.

22. The above narration of facts clearly indicate that the petitioner was granted more than ample time stretching over one year to comply with the orders and deposit the compensation amount, but the petitioner has not chosen to deposit the amount.

23. In view of the aforesaid discussion, not only is there no merit in this petition, even the petitioner appears to have taken this Court for a ride whereby despite his bad intention, the Court magnanimously granted as many as 12 opportunities over one year in order to accommodate the petitioner, who unfortunately was not only out to deceive the respondent but was also out to betray the indulgence shown by this Court from time to time. Consequently, there is no merit in this revision petition and the same is accordingly dismissed, so also the pending application(s) if any.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Kulvinder Singh ….Petitioner.
Versus
Executive Engineer, HPPWD. … Respondent.

CWP No. 2860 of 2009.
Decided on: 1.7.2016.

Constitution of India, 1950- Article 226- Petitioner was denied back wages by the Labour Court – aggrieved from the order, present petition has been filed- held, that Labour Court ought to have awarded back wages at least from the date of raising the industrial dispute- Award passed by Labour Court modified to the extent that petitioner shall be entitled for back wages from the date of raising industrial dispute till the date of re-employment. (Para-7 to 9)

Cases referred:
Raghubir Singh Vs. General Manager, Haryana Roadways, Hissar, (2014) 10 Supreme Court Cases 301
Jasmer Singh Vs. State of Haryana and another (2015) 4 Supreme Court Cases 458

For the petitioner. : Mr. S.D. Vasudeva, Advocate.
For respondent. : Mr. Vikram Thakur & Mr. Puneet Rajta, Deputy Advocate Generals.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. *(Oral)*

By way of present petition, the petitioner has prayed for the following reliefs:-

"(i) a writ in the nature of certiorari may kindly be issued thereby modifying the impugned dated 23.6.2009 Annexure P-3 to the extent that the respondent may very kindly be directed to regularize the petitioner on the post of Motor-Mate;

(ii) a writ in the nature of mandamus may kindly be issued thereby directing the respondent to grant seniority to the petitioner along with the back-wages at lest for three years and other consequential benefits with interest at the rate of 9% per annum in the interest of justice and fair play."

2. When the mater was taken up for arguments Mr. Vasudeva, learned counsel for the petitioner has submitted that he will be restricting his claim in the present petition only to the factum of the denial of back-wages to the petitioner by the learned Labour Court at least from the

date when the workman had put the machinery in motion for the redressal of his grievance by way of raising the industrial dispute.

3. At the time of arguments my attention was drawn by Mr. Vasudeva, learned counsel for the petitioner to the findings returned by the learned Labour Court in para 19 of the award which is under challenge by way of present petition. According to him, the learned Labour Court has erred in not granting back-wages to the petitioner on the ground of delay without appreciating that the petitioner at least was entitled for back-wages from the date when he had approached the appropriate authority for the redressal of his grievance.

4. Mr. Thakur, learned Deputy Advocate General has submitted that there is neither any perversity nor any infirmity with the award passed by the learned Labour Court and it has rightly refused to grant back-wages in favour of the petitioner in view of the fact that there was an inordinate delay on the part of the petitioner in approaching the appropriate authority for the redressal of his grievance and the said delay has not been explained by the petitioner.

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

6. In my considered view there is merit in the contention of Mr. Vasudeva, learned counsel for the petitioner to the effect that learned Labour Court ought to have had awarded back-wages in favour of the petitioner at least from the date when the petitioner had raised the industrial dispute.

7. The Hon'ble Supreme Court in **Raghubir Singh** Vs. **General Manager, Haryana Roadways, Hissar**, (2014) 10 Supreme Court Cases 301 has held in para 45 as under:-

> *"45. It is an undisputed fact that the dispute was raised by the workman after he was acquitted in the criminal case which was initiated at the instance of the respondent. Raising the industrial dispute belatedly and getting the same referred from the State Government to the Labour Court is for justifiable reason and the same is supported by law laid down by this Court in Calcutta Dock Labour Board (supra). Even assuming for the sake of the argument that there was a certain delay and latches on the part of the workman in raising the industrial dispute and getting the same referenced for adjudication, the Labour Court is statutorily duty bound to answer the points of dispute referred to it by adjudicating the same on merits of the case and it ought to have moulded the relief appropriately in favour of the workman. That has not been done at all by the Labour Court. Both the learned single Judge as well as the Division Bench of the High Court in its Civil Writ Petition and the Letters Patent Appeal have failed to consider this important aspect of the matter. Therefore, we are of the view that the order of termination passed by the respondent, the award passed by the Labour Court and the judgment & order of the High Court are liable to be set aside. When we arrive at the aforesaid conclusion, the next aspect is whether the workman is entitled for reinstatement, back wages and consequential benefits. We are of the view that the workman must be reinstated. However, due to delay in raising the industrial dispute, and getting it referred to the Labour Court from the State Government, the workman will be entitled in law for back wages and other consequential benefits from the date of raising the industrial dispute i.e. from 02.03.2005 till reinstatement with all consequential benefits."*

8. Further, the Hon'ble Supreme Court in **Jasmer Singh** Vs. **State of Haryana and another** (2015) 4 Supreme Court Cases 458 has held in para 21 and 22 as under:-

> *"21. The said relief in favour of the appellant-workman, particularly the full back wages is supported by the legal principles laid down by this Court in the case of Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya wherein the Division Bench of this Court to which one of us was a member, after*

considering three-Judge Bench decision, has held that if the order of termination is void ab initio, the workman is entitled to full back wages.

22. The relevant para of the decision is extracted hereunder:- (Deepali Gundu case, SCC p.344, para22)

> *"22. The very idea of restoring an employee to the position which he held before dismissal or removal or termination of service implies that the employee will be put in the same position in which he would have been but for the illegal action taken by the employer. The injury suffered by a person, who is dismissed or removed or is otherwise terminated from service cannot easily be measured in terms of money. With the passing of an order which has the effect of severing the employer employee relationship, the latter's source of income gets dried up. Not only the concerned employee, but his entire family suffers grave adversities. They are deprived of the source of sustenance. The children are deprived of nutritious food and all opportunities of education and advancement in life. At times, the family has to borrow from the relatives and other acquaintance to avoid starvation. These sufferings continue till the competent adjudicatory forum decides on the legality of the action taken by the employer. The reinstatement of such an employee, which is preceded by a finding of the competent judicial/quasi judicial body or Court that the action taken by the employer is ultra vires the relevant statutory provisions or the principles of natural justice, entitles the employee to claim full back wages. If the employer wants to deny back wages to the employee or contest his entitlement to get consequential benefits, then it is for him/her to specifically plead and prove that during the intervening period the employee was gainfully employed and was getting the same emoluments. Denial of back wages to an employee, who has suffered due to an illegal act of the employer would amount to indirectly punishing the concerned employee and rewarding the employer by relieving him of the obligation to pay back wages including the emoluments."*

9. Thus, the Hon'ble Supreme Court has categorically stated in the above judgments that a workman will be entitled in law for back-wages and other consequential benefits at least from the date of raising the industrial dispute.

Therefore, keeping in view the said legal position, the award passed by the learned Labour Court is modified to the extent that in addition to the relief which have been granted in favour of the petitioner by the learned Labour Court, the petitioner shall also be entitled for back-wages from the date he raised the industrial dispute till the date he was offered reinstatement by the respondent. The respondent is directed to pay to the petitioner the said back-wages within a period of three months. With the said modification in the award passed by the learned Labour Court, the present petition is disposed of. No order as to cost.

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

Manoj Kumar .....Appellant.

Versus

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

Cr. Appeal No. 4096 of 2013
Decided on :1.7.2016

Indian Penal Code, 1860- Sections 376 & 506- Prosecutrix was studying in Class-8th - accused is a teacher in the school who raped her – the matter was reported to police- accused was tried

and convicted by the Trial Court- held in appeal the prosecutrix has supported the prosecution version- Medical officer found that prosecutrix was subjected to sexual intercourse- the accused had also confessed by executing a document Ext. PW-4/A- the Prosecution version was proved beyond reasonable doubt - the accused was rightly convicted by the Trial Court - appeal dismissed. (Para 9-18)

For the Appellant: Mr. N.S Chandel, Advocate.
For the Respondent: Mr. Vivek Singh Attri, Deputy Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal stands directed against the impugned judgment of 2.5.2013 rendered by the learned Sessions Judge, Hamirpur, in Sessions trial No. 25 of 2012, whereby the learned trial Court convicted the appellant (hereinafter referred to as "accused") for his committing offences punishable under Sections 376 and 506 of the Indian Penal Code also sentenced him as under:-

> "………….*the accused is sentenced to a rigorous imprisonment of eight years with a fine of Rs.20,000/- for the offence punishable under Section 376 of IPC. In default of fine he shall undergo further a simple imprisonment of six months. He is also sentenced to rigorous imprisonment for a period of one year and a fine of Rs.2000/- for the offence punishable under Section 506 of IPC. In default of fine, S.I for 15 days. Fine if recovered, shall go to the victim/prosecutrix as compensation. Both these sentences shall run concurrently*………"

2. Brief facts of the case are that on 2.6.2012 prosecutrix alongwith her mother moved an application Ex.PW-1/B before the Police Station, Barasar alleging therein that she is resident of village Kohdra Pattian and studying in eight class in Government Middle School, kyara Bag. Teacher Manoj Kumar (accused) is a resident of village Kotlu and he teaches the students of Primary wing in her school. On 24.3.2012 at about 1.00 p.m. when she was going alone to her village accused followed her and seeing her alone he caught hold her from the arm and took her towards the cluster of bamboos and committed rape on her. It is further alleged that thereafter on 4.4.2012 at about 3.00 p.m. when she was coming to her house from the school, accused again committed rape on her. Accused Manoj Kumar used to talk to her on mobile No. 96252 89319 which belongs to her mother. He had taken this mobile number from her on 23.3.2012 by saying that her Hindi teacher had been asking for the same. Accused used to talk on this mobile number with her because there in only one mobile phone in her house and the same is with her mother. On 24.5.2012 while accused was talking with her on phone, her mother heard their conversations and enquired about it, on which the prosecutrix narrated the whole incident to her mother. She also disclosed to her mother that accused used to tease her in the school and threatened that in case she disclosed the incident to any one, she would be killed. Due to all this she stopped going to school. She requested for action against the accused. FIR Ex. PW-18/A came to be registered on the application aforesaid. Thereafter investigation of the case was handed over to ASI Madan Lal (PW-21). On the same day Pradhan Kashmir Singh (PW-4) handed over one complaint Ex.PW-3/A which was written by Ranjit Singh (PW-3) father of the prosecutrix to ASI Madan Lal alongwith the statements of the prosecutrix and accused comprised in Ex. PW-1/A and PW-4/A respectively, which were taken into possession by him vide recovery memo Ex.PW-4/B in presence of witnesses Roop Singh (PW-5) and Joginder Singh. Site plan Ex. PW-21/A was prepared by the Investigating Officer. The accused was arrested and information about his arrest given to his relatives. Vide application Ex. PW-PW-18/C, medical examination of the prosecutrix was conducted and her MLC Ex. PW-16/C was obtained. Underwear Ex.P-1 and vaginal smear of the prosecutrix were preserved and samples were sent for chemical examination. As per PW-16 there were signs of sexual intercourse, but no sign of forceful sexual intercourse.

The investigating Officer sent the accused to CHC Barsar and vide application Ex.PW-21/B his medical examination was conducted. His MLC is comprised in Ex. PW-8/A. As per the MLC the accused was found capable of performing sexual intercourse. PW-8 took the underwear Ex.P-3 of the accused and sealed the same in a cloth parcel Ex.P4 and handed over the same to the police. Thereafter on application Ex.PW-21/C the investigating Officer obtained birth certificate of the prosecutrix which is comprised in Ex.PW-14/A. Statements of the witnesses as per their version stand recorded. On 8.6.2016 the Investigating Officer recorded the supplementary statements of the prosecutrix, her mother and Roop Singh (PW-5). While recording statements of the witnesses, the Investigating Officer got conducted the videography through C Raj Kumar and CDs Ex.PW-10/A were prepared. On 13.8.2012 the investigating Officer made a request letter Ex.PW-21/E to the Secretary, Gram Panchayat, Kyara Bag and received the receipt Ex.PW-14/B vide letter Ex.PW-14/C from Kanta Kumari. Thereafter PW-21 also wrote a letter to the Superintendent to police, Hamirpur for obtaining billing address and call detail alongwith tower location of mobile No. 96252-89319 and 94189-75637 and received the same through Nodal Officer Madan Lal and JTO Sachin Bansal, which are Ex.PW-12/A (6 leaves) and Ex.PW-13/A (10 leaves) and it was found that accused had been talking to prosecutrix between the period from 23.3.2012 to 11.6.2012. The investigating Officer on an application comprised in Ex.PW-21/F obtained record (Ex. PW-15/A and 15/B-1 & 2) regarding admission of the prosecutrix and her attendance w.e.f. 24.3.2012. The case property was deposited with the MHC Ravi Kumar(PW-9) who entered the same in the Malkhana concerned, abstracts of entries in the Malkhana register comprised in Ex.PW-9/A and E.PW-9/B and sent the parcels to RFSL Gutkar for chemical examination through C Sunil Kumar vide RC No. 81/12 copy of which is Ex.PW-9.C. On receipt of RFSL report and completion of all codal formalities and on conclusion of the investigation into the offence, allegedly committed by the accused challan was prepared and filed in the Court.

3. The accused stood charged by the learned trial Court for his committing offences punishable under Sections 376 and 506 of IPC to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 21 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. In his defence, he tendered in evidence copies of attendance register Ex. DA and DB.

5. On an appraisal of evidence on record, the learned trial Court returned findings of conviction against the accused for his committing offences punishable under Sections 376 and 506 of the IPC.

6. The learned counsel appearing for the 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 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 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 investigation into the offences qua which the accused stood charged by the learned trial Court stood germinated by Ex.PW-1/B. Ex. PW-1/B is the complaint made on 2.6.2012 by the prosecutrix to the S.H.O of the Police Station concerned. It embodies a narration therein of the accused on two occasions subjecting the prosecutrix to forcible sexual intercourse. The initial forcible sexual encounter which occurred inter-se the prosecutrix and the

accused was on 24.3.2012, it stood succeeded by another forcible sexual encounter inter-se both, sexual encounter whereof occurred on 4.4.2012.

10. The prosecutrix in her deposition on oath has deposed a version in corroboration to the enunciations embodied in Ex.PW-1/B. The solitary deposition of the prosecutrix bereft of any corroboration by other prosecution witnesses alone is sufficient to constrain this Court to record findings of conviction against the accused. However, before testing the veracity of the deposition of the prosecutrix, the prime factum of hers at the relevant time holding empowerment to mete consent to the accused for his subjecting her to sexual intercourse is required to be determined. The evidence qua the portrayal of the prosecutrix at the time contemporaneous to the occurrence not thereat being a major stands unfolded by Ex.PW-14/A. In sequel, the effect of consent, if any, purveyed by the prosecutrix to the accused for the latter subjecting her to sexual intercourse is wholly inconsequential.

11. Even before proceeding to determine the veracity of the deposition of the prosecutrix, it is imperative to allude to the deposition of PW-16, who subjected the prosecutrix to medical examination. In her deposition she has underscored therein of on hers subjecting the prosecutrix to medical examination hers detecting thereon the hereinafter extracted observations:-

> "ON EXAMINATION:
>
> There was no external injuries visible on body.
>
> ON Local examination
>
> She was wearing brown colour underwear that was preserved for sample.
>
> No external injury was present. Pubic hair were shaved so that cannot be preserved for sample. Discharge outside the external orifice present and hymen was broken.
>
> Virginal smear were made and preserved.
>
> Pervaginal examination
>
> Uterus size were parous mobile and it was antiverted.
>
> Her menstrual history
>
> Her menarchae at 11 years, her last menstrual period was on 26th April, 2012. So she was advised urine pregnancy test that was negative at that time.
>
> Samples were preserved and sent for chemical examination."

12. She has also deposed therein of hers recording a final opinion on 7.8.2012 of there existing, on the relevant portions of the person of the prosecutrix, on its standing subjected to medical examination by her, visible symptoms of hers standing subjected to sexual intercourse, yet she has underlined therein of hers not detecting on the relevant portions of the person of the prosecutrix any indication or evidence of hers standing subjected to forcible sexual intercourse. Consequently, the deposition of PW-16 does with specificity spell the factum of the minor prosecutrix standing subjected to sexual intercourse. The effect, if any, of hers on hers subjecting the prosecutrix to medical examination not detecting on the relevant portions of her person any evidence of hers standing subjected to forcible sexual intercourse when impinges upon hers meteing consent to the accused, consent whereof to the accused for his allegedly perpetrating the alleged penal misdemeanors upon her person for reasons ascribed hereinabove not obviously holding any leverage to the learned counsel for the accused, of the prosecutrix consensually succumbing to the sexual misdemeanors perpetrated on her person by the accused, is hence concomitantly legally insignificant.

13. The learned counsel appearing for the accused has made an *ad nauseam* allusion to the deposition of the prosecutrix besides has inextenso adverted to the depositions rendered by her parents who stepped into the witness box as PW-2 and PW-3 whereupon hence he espouses of with their respective testimonies imbuing the genesis of the prosecution case with deep

pervasive discrepancies, renders the prosecution case to be a pure invention or a concoction whereupon no credence is imputable by this Court.

14. The learned counsel for the accused has contended of with Ex. PW-3/A uncontrovertedly standing forwarded by the father of the prosecutrix to the Pradhan of the Panchayat concerned who prior thereto stood communicated by PW-2, the mother of the prosecutrix the incidents of sexual misdemeanors perpetrated by the accused on the person of the prosecutrix, awakenings whereof of the mother of the prosecutrix qua the sexual misdemeanors perpetrated on 24.3.2012 and 4.4.2012 on the person of the prosecutrix by the accused stood engendered on the prosecutrix making the apposite communications to her, yet with PW-3/A being reticent qua the incidents of sexual misdemeanors ascribed by the prosecutrix to the accused renders the subsequently instituted complaint before the police concerned to stand clothed with unauthenticity rather its standing engendered by premeditation or concoction. The aforesaid submission addressed before this Court by the learned counsel for the accused suffers from an inherent infirmity as it is founded upon a pure misreading of the recitals embodied in Ex.PW-3/A. Even if in Ex.PW-3/A there is an omission of enunciation with specificity qua the sites whereat the sexual misdemeanors ascribed by the prosecutrix to the accused stood perpetrated on her person besides the dates when the accused perpetrated sexual misdemeanors upon the prosecutrix , nonetheless an incisive reading thereof unveils a sure manifestation of the prosecutrix weepingly on hers standing belabored by her mother on the latter overhearing her speaking on the phone making disclosures to her mother of all the sexual misdemeanors which stood perpetrated by the accused on her person. Even if there are non-enunciations therein with specificity qua the sites besides qua the dates whereon the prosecutrix stood subjected to forcible sexual misdemeanors by the accused yet the words “SUB KUCH BATLAYA’ occurring therein encompass within their ambit of hers standing subjected to forcible sexual intercourse by the accused. Even otherwise the recitals prior thereto occurring in Ex.PW-3/A with vividity manifest of the prosecutrix standing encumbered with fright on account of the accused intimidating her over telephone. Further more with revelations occurring therein of the accused brandishing a knife at her for instilling fear in her against hers revealing the incident to any body especially with all the aforesaid unfoldments occurring therein standing not concerted to be belied by the learned defence counsel while holding PW-3 to cross-examination, constrain a conclusion, of the defence conceding to the unfoldments occurring in Ex.PW-3/A. Consequently, with the defence standing inferred to concede to the aforesaid unfoldments comprised in Ex.PW-3/A an inevitable ensuing sequel therefrom is of the accused taking to mete threatenings to the prosecutrix also his taking to brandish a knife at her for instilling fear in her mind for silencing her against hers revealing the incident to anybody, as he held a guilt in his mind of his subjecting the prosecutrix to forcible sexual intercourse. Cumulatively hence the effect of non-enunciations, if any, in Ex.PW-3/A qua the perpetration of sexual misdemeanors by the accused on the person of the prosecutrix on two occasions is wholly insignificant. Even otherwise the learned defence counsel while holding PWs 1 to 3 to cross-examinations has omitted to put apposite suggestion to each qua the 2nd portion of Ex. 3/A wherein the phrase occurs “SAB KUCH BATLAYA” of its not holding any interpretation qua its echoing an unfoldment by the prosecutrix to her mother of the sexual misdemeanors perpetrated on her person by the accused or of its not holding the signification of the prosecutrix communicating to her mother qua hers standing subjected to forcible sexual intercourse by the accused. Omissions aforesaid by the learned defence counsel while holding the aforesaid PWs to cross-examinations, for hence the aforesaid interpretation standing not lent to the phrase “SAB KUCH BATLAYA” occurring in Ex. PW-1/A renders it to with aplomb being amenable to an inference of the prosecutrix at the stage of preparation of Ex. PW-3/A disclosing to her parents even the factum of the accused subjecting her to sexual intercourses. The spurrings of the aforesaid interpretation vis-à-vis the relevant manifestations occurring in Ex.PW-3/A disables the learned counsel for the accused to contend of the subsequently introduced factum in PW-1/B of the prosecutrix standing subjected to sexual intercourse by the accused being both an improvement also an embellishment besides apparently in gross contradiction vis-à-vis PW-3/A hence rendering both to be bereft of any sanctity.

Concomitantly also disables the learned counsel for the accused to contend of the deposition of the prosecutrix anvilled thereupon being un-amenable to credence standing imputed thereto by this Court.

15. Be that as it may the learned counsel for the accused has with much vigor contended of reliance as placed upon Ex. PW-4/A embodying therein the confessional statement of the accused being grossly inapt given the emanations occurring on a reading of the testimony of PW-19 qua its preparation occurring when 300-400 persons congregated outside the Panchayat Ghar whereat the accused at the relevant time stood interrogated by the Pradhan, Gram Panchayat concerned preeminently when is perse magnificatory of its standing prepared under duress and compulsion exercised upon him, hence leaves it to hold no evidentiary worth. Also he concerts to rid it of its tenacity on the score of PW-19 deposing in his cross-examination of the accused not in his presence appending his signatures thereon besides he also assays to belie its probative worth on the anchorage of his scribing it on the direction of Pradhan whereupon he contends of its standing recorded at the behest of the Pradhan hence not being a volitional statement of the accused. However the aforesaid contention also holds no vigor in the face of the accused not denying the existence of his signatures as occur thereon. Predominantly with the inference formed hereinabove qua the embodiments in Ex.PW-3/A echoing of the prosecutrix prior thereto narrating to her parents of the accused subjecting her to sexual intercourse renders the aforesaid espousal made by the learned counsel for the accused qua Ex.PW-4/A which embodies the confessional statement of the accused whereon his signature exists to hold no efficacy contrarily it is to be concluded of the embodiments occurring in Ex.PW-4/A holding concurrence with the manifestations occurring in Ex.PW-3/A prepared prior thereto, manifestations whereof for reasons aforestated unravel of the prosecutrix divulging to her parents the factum of hers standing subjected to sexual intercourse by the accused. If the aforesaid submission addressed before this Court by the learned counsel for the accused for belying the sanctity of PW-4/A is accepted, it would sequel the inapt consequence of this Court reading Ex.PW-3/A and Ex.PW-4/A dichotomously, endeavor whereof is to be obviated.

16. Be that as it may the volitional making of Ex.PW-4/A stands concerted by the learned counsel for the accused to stand jettisoned by the factum of its standing preceded by his in the Panchayat Ghar standing interrogated by the Pradhan of the Panchayat concerned whereat 300-400 persons as deposed by PW-19 had congregated. However the factum of a mammoth gathering of 300-400 thronging the Panchayat Ghar at the relevant time when he thereat stood interrogated by the Pradhan would not *ipso facto* render its making by the accused to be under any exertion of duress or compulsion upon him rather given the emanation in the deposition of PW-19 of the accused appending his signatures thereon subsequently elsewhere wherebefore no evidence stands adduced of his thereat standing subjected to duress or compulsion rather contrarily when recitals in Ex.PW-4/A would hold vigor only on theirs standing signatured by the accused, signatures whereof he subsequently appended thereon elsewhere than at the Panchayat Ghar without any proven exercise of duress or compulsion upon him renders the making of Ex.PW-4/A dehors its recitals standing dictated to PW-19 by the Pradhan to be volitional hence credence is enjoined to be imputed thereto.

17. Further more the contention of the learned counsel for the accused anvilled upon the attendance register portraying qua the presence of the prosecutrix standing recorded in the apposite school from 9 a.m. to 3 p.m. on both the dates whereat she stood subjected to forcible sexual intercourse by the accused belying the factum of hers on 24.3.2012 standing subjected in the school premises to forcible sexual intercourse by the accused also suffers diminution in legal worth engenderable from the afore-referred inference standing invincibly recorded by this Court qua PW-4/A holding sanctity. Further the submission of the learned counsel for the accused of non-ascription in Ex.PW-1/B with specificity qua the venue and time of hers standing subjected to forcible sexual intercourse which purportedly occurred on 4.4.2012 hence rendering the propagation therein to be hence ridden with falsity also for all the reasons afore-stated suffers the fate of its standing axed by this Court.

18. A wholesome analysis of the evidence on record portrays that the appreciation of evidence as done by the learned trial Court does not suffer from any perversity and absurdity nor it can be said that the learned trial Court in recording findings of conviction has committed any legal misdemeanor, in as much, as, its mis-appreciating the evidence on record or its omitting to appreciate relevant and admissible evidence. In aftermath this Court does not deem it fit and appropriate that the findings of conviction recorded by the learned trial Court merit interference.

19. In view of the above discussion, I find no merit in this appeal, which is accordingly dismissed and the judgment of the learned trial Court is maintained and affirmed. Record of the learned trial Court be sent back forthwith.

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

Manorma Verma ....Petitioner.

Versus

State of HP & Ors. ....Respondents

CWP No. 2640 of 2009
Date of Decision: 01.7.2016.

Constitution of India, 1950- Article 226- The petitioner was selected and appointed as T.G.T. by Parents Teacher Association- guidelines were framed by the government for dealing with the complaints regarding the appointments of the teachers- a complaint was filed against the petitioner that his appointment was not in accordance with Rules- his appointment was cancelled by S.D.M., Theog- the petitioner preferred an appeal which was dismissed- held, that the committee looking into complaint had not prepared the comparative statement to show that merit was ignored – petitioner was appointed as T.G.T. by P.T.A. in terms of PTA Rules, 2006- orders set-aside and directions issued to the respondent to permit the petitioner to work as PTA.

(Para 9-11)

For the petitioner: Mr. Dilip K. Sharma, Advocate.

For the respondents: Mr. Rupinder Singh Thakur, Additional Advocate General for respondents No.1 to 3.
Mr. Munish Dhatwalia, Advocate, for respondent No.4

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

By way of present writ petition filed under Section 226 of the Constitution of India, the petitioner has invoked extraordinary jurisdiction of this Court and has prayed for following reliefs:-

> ***"a)*** *That a writ of Certiorari may be issued for quashing and setting-aside the impugned orders 30.6.2009 Annexure P-8 and Annexure P-6 notification dated 6.11.2008, whereby the learned Deputy Commissioner has dismissed the appeal filed by the present petition and upheld the finding of the learned SDM Theog, HP.*
>
> ***b)*** *That writ of mandamus may be issued directing the respondent to allow the petitioner to perform her duties as TGT (arts) in Government High School Chanair, Tehsil Theog, District Shimla, H.P.*
>
> ***c)*** *That the notification dated 27.5.2008 be quashed and set-aside.*

d) *That the entire record pertaining to the case may be called for the kind perusal of this Hon'ble Court.***"**

2. Briefly stated facts as emerge from the record are that the petitioner was selected and appointed as Trained Graduate Teacher (In short 'TGT') Arts in the Government High School Chanair, Tehsil Theog, District Shimla, Himachal Pradesh by Parents Teachers Association (in short 'PTA'). PTA appointed the petitioner as TGT in terms of PTA Rules, 2006. Perusal of communication dated 20.9.2006 written by Headmaster Government High School Chanair, Theog addressed to learned Deputy Director of Education, Shimla, HP, suggests that the petitioner was appointed against the post of TGT (Arts) on merit basis by the PTA. Careful perusal of the letter also suggest that the petitioner was selected by the PTA in terms of PTA new Rules, formulated by State of Himachal Pradesh and appointment of the petitioner was made purely on temporary basis. Pursuant to aforesaid communication dated 20.9.2006, the petitioner applied within 15 days of the issuance of the aforesaid letter and joined at the aforementioned school as TGT.

3. Subsequently, Government of Himachal Pradesh, Higher Education Department issued a notification on 27.5.2008, providing that committees constituted in terms of notification dated 19.4.2008 would hear the affected parties/complainants after going through the records and guidelines to take appropriate decision. Vide communication dated 27.5.2008 (Annexure P-6), State of Himachal Pradesh framed following guidelines:-

"1. The complaints by the affected parties have to be made to the Chairman of the Committee concerned on an Affidavit by 20th June, 2008.

2. The Committees will inquire into the submissions made in the complaints such as adequate publicity not made, interview not held, all the eligible applicants not invited for interview or/and merit ignored or any other issue brought to the notice of the Committees.

3. The complaints against ignoring of merit shall be evaluated based on the evaluation criteria given in the enclosed Annexure-A.

4. Deputy Commissioner of the District will decide whether he will chair the Committee himself or nominate ADC or ADM for a College or for a group of Colleges. For the Senior Secondary/High Schools, he will nominate ADC, ADM or SDM for a school or for a group of schools.

5. The committee will forward its recommendations to the PTA and head of concerned educational institutions by 22nd September, 2008.

6. Further Grant-in-aid to the PTA and acceptance of the teachers will be as per recommendations of the Committee.

7. An appeal against the recommendations of the Committees can be made to Divisional Commissioner for Colleges and for other Educational Institutions to the Deputy Commissioner within 30 days from the date of recommendations.

8. The Chairman of the Committee concerned will set up a mechanism to receive complaints in this regard.

9. Principal of the College, the Principal of the Senior Secondary School and Headmaster of the High School will recheck the educational qualifications of all the teachers offered by the PTA and verify whether their educational qualifications are as per the requirement of R&P Rules of the post against which they are appointed. In case the qualifications do not meet the requirement no Grant-in-Aid is admissible to the PTA as already provided in Rule-7 of the Grant-in-Aid to PTA Rules-2006.

10. Cases where specific order has been made by the Hon'ble Court will be dealt keeping in view those Orders.

11. If allegation of adequate publicity not made, interview not held, all the eligible applicants not invited for interview or/and merit ignored is proved then the existing teacher provided by the PTA will not be accepted. The PTA provided teacher will

also not be accepted if the Committee for other reasons comes to the conclusion that selection procedure was wrong and recommends non acceptance of the teacher."

4. Pleadings on record suggest that respondent No.5 filed complaint before the Committee constituted in terms of notification dated 27.5.2008 against the present petitioner alleging therein that PTA had not made appointment of the petitioner strictly in accordance with rules in vogue, however, it would be noticed at this stage that no complaint, whatsoever, is available on the record. Neither the same has been placed on record by the respondents with their reply nor it is available in the record called by this Court for examination. Pursuant to aforesaid complaint received from respondent No.5, SDM Theog, passed order dated 6.11.2008, wherein he passed following order:-

"Application of Sh. Shashi Bhushan, S/o Sh. Deep Ram, S/o Kajau Tehshil Theog, against the appointment of TGT Arts in GHS Channiar.

Order

In compliance of the Govt. Notification No. EDN-A-Kha[7]3/2006 dated Shimla-2 dated 27th May, 2008 has constituted a Committee to inquire into the cases of irregularities/anomalies regarding appointment of teachers by the Parents Teacher Association in the Pradesh. As per the direction, the Committee has to go through the original record and guidelines conveyed by the govt.

The Committee has to inquire into the various points as follows:-

1. Adequate publicity

2. Interview not held

3. All eligible applicants not invited or interview

4. Merit ignored

5. Any other issues brought to the notice of the Committee.

6. In case of merit ignored, the Annexure[a] has to be followed

7. PTA President

The complaint has given an affidavit regarding his grievance and requested to inquire into the matter as under:- ***Merit ignored***

The desired record summoned and simultaneously, the complainant concerned in person. The Principal and Subject Specialist called upon the said date 16-8-2008 & 29-8-2008.

As per the above facts, the committee comes to the conclusion that as per the record made available from the concerned school, it reveals that the appointment made by the PTA Committee does not fall in the norms fixed by the Govt. of H.P. and the appointment made by the PTA committee is cancelled and committee recommended the name of Geeta Sharma, D/o Sh. Ram Dutt Sharma."

5. Before proceeding further, it would be apt to notice at this stage that though perusal of the aforesaid order passed by the learned SDM suggests that matter was placed before some committee constituted in terms of notification dated 27.5.2008 but surprisingly, there is no document either on the record of the Court case file or in the records produced by the respondents in terms of orders passed by this Court. This Court only could lay its hand to the order dated 6.11.2008, whereby learned SDM, cancelled the appointment of the petitioner made by the PTA committee and recommended the name of Ms. Geeta Sharma for the post. Aforesaid order though suggests that merit was ignored at the time of appointment of the petitioner made by PTA of the concerned school but as has been observed above, there is nothing on record from where, it can be inferred that how and in what manner, merit was actually ignored by the PTA at the time of making appointment of the petitioner against the post of TGT in the concerned school, rather, bare reading of the communication dated 6.11.2008 suggests that the complainant had

given some affidavit, wherein he had made certain allegations but definitely, there is nothing on record to suggest that committee constituted in terms of notification dated 27.5.2008 actually deliberated upon the issue at hand and passed some speaking orders associating the present petitioner.

6. Feeling aggrieved and dissatisfied with the order passed by the learned SDM, Theog, the petitioner filed appeal before the learned Deputy Commissioner Shimla, he while dismissing the appeal of the petitioner vide order dated 30.6.2009 passed following orders (Annexure P8 last para):-

> *"I have gone through the record as well as the recommendation of the SDM Theog. I have also seen the result sheet as well as the comparative merit drawn by the enquiry committee on the basis of the criteria fixed by the Govt. The result sheet prepared by the PTA clearly shows that the marks have not been given by them as per criteria fixed by the Govt. The perusal of merit drawn by the enquiry committee on the basis of new criteria shows hat Km. Manorma scored 55.27 marks against 58.48 scored by the Geeta Sharma. In view of above the recommendation passed by the SDM Theog is upheld and the appeal is dismissed. File be consigned to G.R.R. after due completion."*

7. The petitioner being aggrieved with the order passed by the learned SDM and Deputy Commissioner Shimla, apprehending that his service would be terminated in terms of the recommendations made by the aforesaid authorities, approached this Court by way of present writ petition. The Hon'ble Division Bench of this Court vide order dated 10.8.2009, while admitting the petition and issuing notice to the respondents ordered that *"the petitioner will be allowed to work as PTA Teacher (TGT Arts), in case, no other person has been appointed against her place."*

8. Mr. Dilip K. Sharma, Advocate, representing the petitioner vehemently argued that the impugned orders are not sustainable as the same are not based upon the correct appreciation of the documentary evidence available on record. He contended that the petitioner was rightly appointed by PTA, on 20.9.2006 purely on merit basis and strictly in terms of the grant-in-aid rules, 2006, which were in vogue at that time as far as appointment of teachers by the PTA is concerned. He forcefully contended that the respondents had no occasion, whatsoever, to entertain the complaint of respondent No. 6, especially, when she had participated in the selection process and appeared in the interview. Once she appeared in the interview, she had no right, whatsoever, to challenge the appointment of the petitioner, which was purely made on the merit basis. He also urged that learned SDM while passing order dated never associated the petitioner in any manner. No notice, whatsoever, was ever issued to the petitioner intimating therein with regard to filing of complaint, if any, by respondent No.5. He prayed that since order dated 6.11.2008 passed by the learned SDM, was passed at his back without affording him any opportunity of being heard, same deserves to be quashed and set-aside.

9. On the other hand, Mr. Rupinder Singh Thakur, learned Additional Advocate General, duly assisted by Mr. Rajat Chauhan, Law Officer, for the respondent-State supported the impugned orders recommending therein cancellation of the appointment of petitioner. He forcefully contended that since PTA had appointed the present petitioner in violation of the rules framed by the respondent, his appointment has been rightly cancelled by the authorities and as such, no interference, whatsoever, of this Court is warranted in the present facts and circumstances of the case. However, during the arguments having been made by him, he was unable to demonstrate from the record that how committee constituted in terms of notification dated 27.5.2008 actually dealt with the complaint, if any, lodged by respondent No.5. Though learned AG produced record pertaining to the inquiry conducted by the respondent on the basis of the complaint but he was unable to point out any document suggestive of the fact that at that time of so called inquiry, other members were also associated and on the basis of some rules as has been observed in the order dated 6.11.2008, committee had drawn some comparative merit.

Rather, learned Additional Advocate General to substantiate his arguments only relied upon the merit list drawn by the PTA on 18.9.2006, where petitioner was appointed as TGT (Arts) in the school concerned. Though, in order dated 6.11.2008, there is mention with regard to complainant having been filed an affidavit specifically alleging therein that "merit Ignored" but in the absence of any complaint, this Court is unable to accept the aforesaid contention of respondent No. 6 as well as other respondents. Otherwise also perusal of the communication dated 6.11.2008 nowhere suggests that aforesaid allegation of merit having been ignored at the time of recruitment of the petitioner, has been dealt with by the committee headed by learned SDM because there is nothing on record to suggest that some comparative statement was drawn by the so called committee after receipt of complaint from respondent No.5. There is no document available on record to suggest that meeting, if any, of committee ever held after the receipt of complaint from respondent No.5. This court could only lay its hand to letter dated 6.11.2009, wherein it finds mention that "*as per the record made available from the concerned school, it reveals that the appointment made by the PTA Committee does not fall in the norms fixed by the Govt. of H.P. and the appointment made by the PTA committee is cancelled and committee recommended the name of Geeta Sharma, D/o Sh. Ram Dutt Sharma."* Hence, this Court, in the absence of record, if any, with regard to inquiry allegedly conducted by the committee constituted in terms of notification dated 27.5.2008, whereby, the appointment made by PTA committee has been ordered to be cancelled, really finds it difficult to accept the contention put forth on behalf of respondents. Further perusal of order dated 30.6.2009 passed by learned Deputy Commissioner in the appeal preferred by the petitioner suggests that inquiry committee had drawn some merit list on the basis of new criteria, wherein present petitioner Kumari Manorma secured 55.2 marks against 58.48 secured by Geeta Sharma. But this is not understood that how learned Deputy Commissioner came to the aforesaid conclusion in the absence of any record. At least, this Court was unable to lay its hand to merit list, if any, drawn by the Inquiry committee on the basis of new criteria. It appears that learned Deputy Commissioner without looking into the records only accepted the order of the ld. SDM and dismissed the appeal preferred by the petitioner. Moreover, careful perusal of the reply filed by respondents No. 4 i.e. PTA suggests that appointment of present petitioner was made strictly in terms of PTA Rules, 2006, which was in vogue at the time of making appointment on contract basis by PTA. It would be apt to reproduce Para No. 3 of the reply filed by respondent No.4 i.e. PTA:-

> *"3. That the contents of para-3 of the writ petition are also admitted in toto. It is worthwhile to mention here that the PTA under the Chairmanship of replying respondent found the petitioner most suitable and meritorious as compared to other candidates appeared in the interview for the selection of TGT (Arts) teacher in Govt. High School, Chanair, Tehsil Theog, District, Shimla. The petitioner as per Annexure P-4 is suffering 55% disability (Locomotor) and her place of residence is only about one Km away from the school and that too in the same Panchayat (GP Pargaya). As far as the non selected candidate Shri Shashi Bhushan, respondent No.5 is concerned is a permanent resident of village Kajau which is at a distance of more than 15 km away from the Govt. High School Chanair. It is pertinent to mention here that Shri Shashi Bhushan, respondent No.5 got his degree from an institution not recognized by Govt. of Himachal Pradesh and as such his candidature was rejected by the PTA Committee. The candidature of respondent No. 6, Ms. Geeta was also not found to be suitable as per PTA Rules, 2006, as she belongs to Village Bagharan, V&PO Chhota Shimla, Tehsil and District Shimla and the said place of residence of Respondent No. 6 is about 17 Km. from the school. The PTA was justified in rejecting the candidature of said Geeta Sharma. The learned SDM Theog while passing the impugned order (Annexure P-7) has not taken into consideration the said disqualification of Respondents No. 5 and 6, therefore, the order Annexfure-P7 is not sustainable in law and the same is liable to be quashed."*

Careful perusal of the aforesaid reply filed by respondent No. 4 leaves no doubt in the mind of this Court that the petitioner was appointed as a TGT Arts by PTA strictly in terms of PTA Rules, 2006, which was the guiding factor for the PTA for making appointment of teachers on contract basis at that relevant time. Rather, close scrutiny of reply filed by respondent No. 4 suggests that petitioner being most eligible candidate available at that time, was rightly appointed by PTA. Court sees no reason to dis-believe the version put forth by respondent No.4 in their reply, which is duly supported by an affidavit, in the absence of some documentary evidence suggestive of something contrary. Moreover, there is no allegation of malafide or bias against the PTA in the writ petition. Respondent No.5 while making complaint, if any, only alleged that merit has been ignored but no mala-fide, whatsoever, has been alleged against the PTA, rather, reply filed by respondents No. 2 and 3 is silent qua the appointment made by PTA. Respondents have only stated that during scrutiny of documents and after hearing the complainant as well as Principal of institution, it was found that appointment made by the PTA is not in accordance with the norms of Govt. as per Annexures P6 dated 27.5.2008. But at this stage, fact remains that once the appointment of the petitioner was made in the year, 2006 that too strictly, in terms of PTA Rules, 2006, there is no question of compliance if any of the rules framed by the respondent with regard to the selection/appointment by PTA in terms of rules framed in year 2008.

10. Admittedly, in the present case, the petitioner was appointed by PTA in the year 2006 in accordance with PTA Rules 2006, which was in vogue and as such assertion of the respondent-State that appointment of PTA was not made in accordance with the Rule framed in year, 2008 has no force and same deserve to be rejected outrightly.

11. Consequently, in view of the detailed discussion made hereinabove, the petition is allowed and impugned orders are quashed and set-aside and respondents are directed to allow the petitioner to continue against the post of TGT in the Govt. High School Chanair, Tehsil Thoeg, District Shimla, HP. The petition stands disposed of, so also pending applications, if any.

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

National Insurance Co. Ltd. .....Appellant

Versus

Vinod Kumar and another .... Respondents

FAO No.:211 of 2011.

Decided on : 01.07.2016

Motor Vehicles Act, 1988- Section 149- It was contended that deceased was travelling in the vehicle as a gratuitous passenger- his risk was not covered- claimants had specifically pleaded that the deceased had hired the vehicle for loading seasonal vegetables- no evidence was led to the contrary- person hiring the vehicle cannot be called a gratuitous passenger- appeal dismissed. (Para-12 to 15)

Cases referred:

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

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

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

NHPC versus Smt. Sharda Devi & others, I L R 2014 (V) HP 744

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

For the appellant: Mr.Deepak Bhasin, Advocate.

For the respondents: Mr.Shanti Swaroop, Advocate, for respondent No.1.

Mr.Hemant Sharma, Proxy Counsel, for respondent No.2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

This appeal is directed against the award, dated 28th February, 2011, passed by the Motor Accident Claims Tribunal, Una, District Una, H.P. (for short, "the Tribunal") in Claim Petition No.26 of 2008, titled Vinod Kumar vs. Subhash Chand and another, whereby compensation to the tune of Rs.4,71,400/-, alongwith interest at the rate of 8% per annum from the date of filing of the claim petition till the amount is deposited, 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 and the insured have not questioned the impugned award on any ground, thus, the same has attained finality so far as it relates to them.

3. Feeling aggrieved, the insurer has challenged the impugned award by the medium of instant appeal on the grounds taken in the memo of appeal.

4. Learned counsel for the appellant/insurer argued that the offending vehicle was a goods carriage vehicle and was not meant for carrying the passenger. Since the appellant was traveling in the said vehicle, he was a gratuitous passenger and, therefore, his risk was not covered.

5. The argument, thought attractive, is devoid of any force for reasons to be enumerated hereinbelow.

6. Claimant Vinod Kumar filed the claim petition under Section 166 of the Motor Vehicles Act, 1966 (for shot, the Act) before the Tribunal for grant of compensation on account of the injuries sustained by him in the accident, which occurred on 8th July, 2008, at about 7.30 AM near Six Meel NH 21, Mandi, H.P. On the fateful day, the claimant-injured was traveling in Mahindra Jeep bearing No.HP-36-8964, which was being driven by Sanjeev Kumar. When the said Jeep reached near Six Meel, the driver lost control over the vehicle, as a result of which the vehicle rolled down around 200 feet from the road, resulting into the death of the driver Sanjiv Kumar, while the claimant sustained spinal injury and the lower part of the body of the claimant-injured virtually became dead.

7. Respondents resisted the claim petition by filing replies.

8. In order to prove his case, the claimant-injured examined as many as five witnesses, while the owner of the offending Jeep stepped into the witness box as RW-1.

9. The Tribunal, after referring to the evidence led by the parties, has held that the accident was the outcome of rash and negligent driving of the driver of the offending Jeep, which findings are borne out from the records and need no interference. Accordingly, the same are upheld.

10. Before issue No.2 is taken up, I deem it proper to deal with issues No.3 and 4.

11. As far as issue No.3 is concerned, it was for the insurer to lead evidence and prove that the driver of the offending Jeep was not having a valid and effective driving licence at the time of accident, has not led any evidence. On the other hand, the driving licence of the driver has been proved on record as Ext.P2, which does disclose that the driver of the offending vehicle was having a valid and effective driving licence at the time of accident. Therefore, the findings returned by the Tribunal on issue No.3 merits to be upheld and are accordingly upheld.

12. Issue No.4 is "Whether the petitioner was a gratuitous passenger.........". The claimant has specifically pleaded in the claim petition that, on the fateful day, he had hired the offending Jeep and was going from Jalandhar to Bandrol, District Kullu for loading the seasonal vegetables and has also proved the said factum by leading evidence. There is no evidence to the

contrary led by the insurer to prove that the claimant-injured had not hired the offending Jeep for the said purpose.

13. This Court in a case titled as **National Insurance Co. Ltd. versus Kamla and others,** reported in **2011 ACJ 1550,** has also discussed the same issue while referring to the judgment of the Apex Court in **National Insurance Co. Ltd. versus Cholleti Bharatamma,** reported in **2008 ACJ 268 (SC)** and held that the person, who had hired the vehicle for transporting goods, met with the accident, cannot be said to be an unauthorized/gratuitous passenger.

14. It is apt to reproduce paras 8 to 11 of the judgment rendered in **Kamla's case (supra)** herein:

> *"8. Coming to the second plea taken by the learned counsel for the appellant that the deceased was a gratuitous passenger, a perusal of the reply filed by respondent No. 2, insurance company shows that they had only pleaded that the deceased was admittedly not employee of the insured and was traveling in the truck as a gratuitous passenger. Thus, it was submitted that the Insurance Company was not liable. Reliance was also placed upon the decision in* ***National Insurance Co. Ltd. v. Cholleti Bharatamma, 2008 ACJ 268 (SC)****wherein the plea was taken that the owner himself travel in the cabin of the vehicle and not with the goods so as to be covered under Section 147. However, in case the driver permits a passenger to travel in the tool box, he cannot escape from the liability that he was negligent in driving the vehicle and moreover, in a petition under Section 163-A of the Motor Vehicles Act, rash or negligent driving is not to be proved and, therefore, this decision does not help the appellant.*
>
> *9. Learned counsel for the appellant had also relied upon the decision in* ***National Insurance Co. Ltd. v. Maghi Ram****, 2010 ACJ 2096 (HP), wherein a learned Judge of this Court has considered the question and had observed that the Insurance Company is liable in respect of death or bodily injury to any person including the owner of goods or his authorized representative carried in the vehicle. It was observed that it is apparent that the goods must normally be carried in the vehicle at the time of accident.*
>
> *10. The allegations made by the petitioners in the petition as well as in the evidence were that the deceased had gone after hiring the truck with his vegetable and was coming in the same vehicle when the accident took place. The learned counsel for the claimants/respondents No. 1 to 4 had relied upon the decision of Hon'ble Punjab & Haryana High Court in* ***National Insurance Co. Ltd. v. Urmila****,* ***2008 ACJ 1381 (P&H)****, wherein it was observed that a passenger was returning after selling his goods when the vehicle turned turtle due to rash and negligent driving. Insurance Company seeks to avoid its liability on the ground that the deceased was no longer owner of the goods as he had sold them off. It was observed that the deceased had hired the vehicle for transporting his animals for selling and was returning in the same vehicle. It was held that the deceased was not an unauthorized/gratuitous passenger in the vehicle till he reached the place from where he had hired the vehicle.*
>
> *11. The above decision clearly applies to the present facts, which are similar to the facts of the case and accordingly, I am inclined to hold that the deceased was not an unauthorized/ gratuitous passenger. No conditions of the insurance policy have been proved that the risk of the owner of goods was not covered in the insurance policy and as such, there is no substance in the plea raised by the learned counsel for the appellant, which is rejected accordingly."*

15. Following the same principle, this Court in a bunch of two appeals, **FAO No. 9 of 2007**, titled as **National Insurance Company Limited versus Smt. Teji Devi & others,** being the lead case, decided on 22nd August, 2014; **FAO No. 22 of 2007,** titled as **Naresh Verma versus The New India Assurance Company Ltd. & others,** decided on 26th September, 2014, **FAO No. 77 of 2010,** titled as **NHPC versus Smt. Sharda Devi & others,** decided on 17th

October, 2014, **FAO No.638 of 2008, titled National Insurance Company vs. Smt.Sundri Devi and another, decided on 3rd July, 2015,** and **FAO No.448 of 2011, Sarita Devi and others vs. Ashok Kumar Nagar and others, decided on 17th June, 2016,** held that in case the vehicle hired for loading of goods meets with an accident, prior to reaching the destination, the hirer of the goods traveling in the said vehicle cannot be termed as gratuitous passenger. .

16. Having said so, the findings returned by the Tribunal on issue No.4 are upheld.

17. Coming to issue No.2, the claimant-injured has not questioned the impugned award on the ground of adequacy of compensation. Accordingly, the findings returned by the Tribunal on this issue are also upheld.

18. As a consequence of the above discussion, it is held that there is no merit in the appeal filed by the appellant and the same is dismissed. The Registry is directed to release the amount of compensation in favour of the claimant-injured forthwith, strictly in terms of the impugned award.

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

Smt. Nirmala Devi .....Appellant
Versus
Daya Ram & others .....Respondents

FAO No. 48 of 2007
Decided on : 1.7.2016

Motor Vehicles Act, 1988- Section 166- Claim petition was dismissed on the ground that deceased was negligent while driving scooter- Investigating Officer also stated that accident is outcome of rash and negligent driving of the deceased- in these circumstances, petition was rightly dismissed- appeal dismissed. (Para-3 to 8)

For the Appellant : Mr. Tara Singh Chauhan, Advocate.
For the respondents: Nemo for respondents No. 1 & 3.
Mr. Rajiv Jiwan, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

Learned Counsel for respondent No. 4-insurer stated at the Bar that his client has shown inability to pay 50,000/- under the head 'no fault liability' as per the mandate of Section 140 of the Motor Vehicles Act, 1988 and prayed that the appeal be heard and decided on merits.

2. Heard.

3. This appeal is directed against the award dated 27th December, 2006, passed by the Motor Accident Claims Tribunal, Una, District Una, H.P. (hereinafter referred to as 'the Tribunal'), in M.A.C. Petition No. 12 of 2004, titled as Smt. Nirmala Devi versus Daya Ram & others, whereby the claim petition came to be dismissed (hereinafter referred to as 'the impugned award').

4. The Tribunal had dismissed the claim petition on the ground that deceased Jagtar Singh was negligent while driving scooter bearing registration No. HP-20-B-1585.

5. The Tribunal has made discussions relating to Issue No. 1 in paras 9 to 15 of the impugned award, which are legally correct.

6. A.S.I., Sukh Lal (RW-2) has conducted the investigation. He has stated that the accident is outcome of rash and negligent driving of deceased Jagtar Singh.

7. Having said so, it can safely be held that the Tribunal has rightly made discussion in para-14 of the impugned award. It is apt to reproduce the said para of the impugned award herein:

> "*ASI Sukhlal (RW 2), then investigator, Police Station, Una, claims to have investigated the case related to the FIR aforementioned. On investigation, what he observed was that the scooterist Jagtar Singh had after overtaking a stationary bus, which was on its way towards Amb struck the scooter against the truck after swerving to the wrong side of the road. Claiming to have recorded Som Nath's statement under section 154 Cr. P.C. Ext.RW2/A, Sukhlal further maintained that according to his investigations and the statements of the witnesses, there was no fault on the part of the truck driver. According to him, he had prepared a site plan Ext.RW2/C in accordance with the spot position. During cross-examination, he maintained that there was blood at point 'A'. In the site plan Ext.RW2/C, this point is shown to be the place of accident, which is 3 ft. from the eastern extremity of the metalled portion of the road and 21 ft. from the western edge thereof. Thus, it is manifest from the location of the point of accident that the truck, which was on its way towards Una, was moving on the left side of the road, and the scooter emerged in front of it after swerving to its right side. This position lends assurance only to the respondent 1 and 2's claim that it was in fact the scooterist who while trying to overtake a private bus suddenly appeared in front of the truck and struck the scooter against it. The accident is therefore attributable to rashness and negligence of the scooterist and the petitioner's allegation that the respondent 2 was driving the truck in a rash and negligent manner is nothing but a myth.*"

8. Viewed thus, the impugned award is upheld and the appeal is dismissed.

9. 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

Oriental Insurance Co. Ltd. ... Appellant

Versus

Rita Devi and others ... Respondents

FAO No.: 207 of 2011.
Decided on : 01.07.2016

Motor Vehicles Act, 1988- Section 149- It was contended that driver did not have a valid licence- held, that burden lies upon the insurer to prove that vehicle was being driven without licence and no evidence was led- appeal dismissed. (Para-10)

For the appellant: Mr.Deepak Bhasin, Advocate.
For the respondents: Mr.Rajiv Rai, Advocate, for respondents No.1 to 4.
Mr.Tara Singh Chauhan, Advocate, for respondent No.5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

This appeal is directed against the award, dated 19th February, 2011, passed by the Motor Accident Claims Tribunal, Bilaspur, District Bilaspur, H.P. (for short, "the Tribunal") in Claim Petition No.57 of 2008, titled Rita Devi and others vs. Kishori Lal and another, whereby compensation to the tune of Rs.4,30,000/-, alongwith interest at the rate of 7.5% per annum from the date of filing of the claim petition till the amount is deposited, came to be awarded in favour of the claimants and the insurer was saddled with the liability, (for short the "impugned award").

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

3. Feeling aggrieved, the insurer has challenged the impugned award by the medium of instant appeal on the ground that the Tribunal has wrongly fastened it with the liability.

Brief facts:

4. The claimants filed the Claim Petition before the Tribunal averring that on 24th August, 2008, at about 5.00 p.m., Sanjeev Kumar was coming on his Motor Cycle No.HP-24A-6111 from Bhager side towards Beri and truck bearing No.HP-51-1612 being driven by driver-cum-owner namely Kishori Lal rashly and negligently came from opposite side and hit the motor cycle of the deceased, resulting into multiple injuries to the deceased and ultimately, he succumbed to the same. Thus, the claimants, being the dependants, filed the claim petition claiming 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 and filed replies.

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

"1.Whether the accident and consequent death of deceased Shri Sanjiv Kumar caused on 24.8.2008 at about 5.00 P.M. at village Kandraur, District Bilaspur, H.P. was due to rash and negligent driving of Truck No.HP-51-1612 being driven by respondent No.1, as alleged, if so, its effect? ….OPP

2. If issue No.1 supra is proved in affirmative, whether the petitioners are entitled to compensation, if so, to what extent and from whom? OPP

3. Whether the petition is not maintainable, as alleged? OPRs.

4. Whether the present claim petition is bad for non-joinder and mis-joinder of necessary parties as alleged? OPRs.

5. Whether the offending vehicle was being driven by its driver without valid and effective driving licence, as alleged? OPR-3

6. Whether the offending vehicle was being driven without valid documents i.e. registration certificate, fitness certificate and valid route permit, as alleged? OPR-3

7. Whether the accident took place due to contributory negligence on the part of driver of the truck and the deceased while driving his motor cycle No.HP-24A-6111, as alleged, if so, its effect? OPR-3.

8. Relief"

7. In order to prove their respective claims, the parties led their evidence. Heard the learned counsel of the parties and have gone through the record.

8. The claimants have proved that on the fateful day the offending truck was being driven by its driver rashly and negligently, who had hit the motor cycle on which the deceased Sanjiv Kumar was traveling and had caused the accident, in which the deceased Sanjiv Kumar sustained injuries and succumbed to the same. The Tribunal has rightly made discussion in paragraph 10 to 13 of the impugned award and has rightly held that the accident had occurred only due to the rash and negligence driving of the driver of the offending truck. Accordingly, issues No.1 and 7 came to be rightly decided by the Tribunal in favour of the claimants, which findings are liable to be upheld and the same are upheld.

9. As far as issues No.3 and 4 are concerned, the Tribunal has recorded categorically that the insurer has not led any evidence to prove these issues. Accordingly, these issues rightly came to be decided against the insurer.

10. To prove issues No.5 and 6, the onus was on the insurer, has not led any evidence. 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 at the time of accident, in which it has failed. The insurer has also failed to prove that the offending vehicle was being driven without valid documents. Factum of insurance is not in dispute. Accordingly, it is held that the Tribunal has rightly decided issues No.5 and 6 against the insurer.

11. The claimant has not questioned the impugned award on the ground of adequacy of compensation. Therefore, the findings returned by the Tribunal on issue No.2 are upheld.

12. Having said so, there is no merit in the appeal filed by the appellant and the same is dismissed. The Registry is directed to release the amount of compensation in favour of the claimant-injured forthwith, strictly in terms of the impugned award.

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

Oriental Insurance Company Limited …Appellant.
Versus
Shishna Devi and others …Respondents.

FAO No. 191 of 2011
Decided on: 01.07.2016

Motor Vehicles Act, 1988- Section 149- It was contended that insured had committed breach of the terms and conditions of the policy- held, that driver possessed a valid and effective driving licence to drive the vehicle, which was LMV- carrying capacity of the vehicle is 9+1 - no evidence was led to prove that deceased was a gratuitous passenger, - in these circumstances, insurer was rightly held liable. (Para-10 to 12)

Motor Vehicles Act, 1988- Section 171- Tribunal had awarded interest @ 9% per annum- held, that interest is to be awarded on the prevailing rate- thus, rate of interest reduced to 7.5% per annum from the date of filing of the claim petition till realization of the amount. (Para-13 to 15)

Cases referred:

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
Smt. 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, ILR 2015 (III) H.P. 1149

For the appellant: Mr. G.C. Gupta, Senior Advocate, with Ms. Meera Devi, Advocate.

For the respondents: Mr. Vikrant Chandel, Advocate, for respondents No. 1 to 3.
Mr. G.R. Palsra, Advocate, for respondents No. 4 and 5.

The following judgment of the Court was delivered:

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

Subject matter of this appeal is judgment and award, dated 25th February, 2011, made by the Motor Accident Claims Tribunal (I), Mandi (for short "the Tribunal") in Claim Petition No. 50/2000, titled as Smt. Shishna Devi and others versus The Oriental Insurance Co. Ltd. And others, whereby compensation to the tune of ₹ 7,60,000/- with interest @ 9% per annum from the date of 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, owner-insured and driver of the offending vehicle have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

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

4. The claimants invoked the jurisdiction of the Tribunal for grant of compensation, as per the break-ups given in the claim petition, on the ground that they became the victims of the vehicular accident, which was caused by the driver, namely Shri Prem Singh, while driving Tempo Trax (Jeep/Gypsy), bearing registration No. HP-32A-0797, rashly and negligently on 21st February, 2009, at about 8.15 P.M., at place Jahal, in which deceased-Lekh Raj sustained injuries and succumbed to the injuries.

5. The respondents in the claim petition resisted the same on the grounds taken in the respective memo of objections.

6. On the pleadings of the parties, following issues came to be framed by the Tribunal on 10th August, 2009:

> *"1. Whether on 21.2.2009 at about 8.15 p.m. at village Jahal, respondent No. 3 was driving Tampo Trax jeep No. HP-32 A-0797 rashly and negligently and as such, caused death of Sh. Lekh Raj? OPP*
>
> *2. If issue No. 1 is proved, to what amount of compensation the petitioners are entitled and from whom? OPP*
>
> *3. Whether the driver of the Tampo Trax jeep No. HP-32A-0797 was not holding a valid and effective driving licence to drive the Tampo Trax jeep at the time of accident? OPR*
>
> *4. Whether the deceased was travelling in the Tampo Trax jeep as a gratuitous passenger? OPR*
>
> *5. Relief."*

7. The claimants have led evidence. The owner-insured and the driver of the offending vehicle themselves stepped into the witness box. The insurer has not led any evidence. Thus, the evidence led by the claimants has remained unrebutted so far it relates to the insurer.

Issue No. 1:

8. The Tribunal, after scanning the evidence, oral as well as documentary, held that the claimants have proved that driver-Prem Singh, while driving Tempo Trax (Jeep/Gypsy), bearing registration No. HP-32A-0797, rashly and negligently on 21st February, 2009, at place Jahal, caused the accident, in which deceased-Lekh Raj sustained injuries and succumbed to the injuries. There is no dispute about the said findings. Accordingly, the findings returned by the Tribunal on issue No. 1 are upheld.

9. Before dealing with issue No. 2, I deem it proper to determine issues No. 3 and 4.

Issue No. 3:

10. It was for the insurer to plead and prove that the driver of the offending vehicle was not having a valid and effective driving licence to drive the same, has not led any evidence, thus, has failed to discharge the onus. However, I have gone through the record. The driving licence is on the record as Ext. RW-2/A, the perusal of which does disclose that the driver of the offending vehicle was having a valid and effective driving licence to drive the same, which is a 'LMV'. Accordingly, the findings returned by the Tribunal on issue No. 3 are upheld.

Issue No. 4:

11. Learned counsel for the appellant-insurer vehemently argued that the deceased was a gratuitous passenger, is devoid of any force for the reason that the insurer has not led any evidence before the Tribunal to prove the said issue, thus, it cannot lie in the mouth of the appellant-insurer that the deceased was a gratuitous passenger.

12. Even otherwise, the passenger carrying capacity of the offending vehicle as '9+1', as is evident from the insurance policy, Ext. RW-1/B. The Form of Certificate of Registration is also on the record as Ext. RW-1/A, the perusal of which does disclose that the seating capacity of the offending vehicle was '10'. Viewed thus, the findings returned by the Tribunal on issue No. 4 are also upheld.

Issue No. 2:

13. The amount awarded appears to be adequate, cannot be said to be excessive or inadequate. But, the Tribunal has fallen in an error in awarding interest at the rate of 9% per annum, which was to be awarded as per the prevailing rates.

14. It is beaten law of the land that the rate of interest should be awarded as per the prevailing rates, in view of the judgments rendered by the Apex Court in cases titled as **United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others,** reported in **(2002) 6 SCC 281; Santosh Devi versus National Insurance Company Ltd. and others,** reported in **2012 AIR SCW 2892**; **Amrit Bhanu Shali and others versus National Insurance Company Limited and others,** reported in **(2012) 11 SCC 738; Smt. Savita versus Binder Singh & others**, reported in **2014 AIR SCW 2053; Kalpanaraj & others versus Tamil Nadu State Transport Corpn.,** reported in **2014 AIR SCW 2982; Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others,** reported in **(2015) 4 SCC 433;** and **Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another,** reported in **(2015) 4 SCC 434,** and discussed by this Court in a batch of FAOs, **FAO No. 256 of 2010, titled as Oriental Insurance Company versus Smt. Indiro and others,** being the lead case, decided on 19.06.2015.

15. Having said so, I deem it proper to reduce the rate of interest from 9% per annum to 7.5% per annum from the date of filing of the claim petition till its realization.

16. Having glance of the above discussions, the impugned award is modified and the appeal is disposed of, as indicated hereinabove.

17. 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.

18. Excess amount, if any, be released in favour of the appellant-insurer through payee's account cheque.

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

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

Poonam Sharma & others .....Appellants

Versus

Shri Vijay Singh & another .....Respondents

FAO No. 78 of 2011
Decided on : 1.7.2016

Motor Vehicles Act, 1988- Section 166- Monthly income of the deceased was taken as Rs. 3,000/-, which is on lower side- even a labourer would not be earning less than Rs. 6,000/- hence income of the deceased is to be taken as Rs. 6,000/-- there are four claimants and 1/4th amount is to be deducted towards personal expenses - claimants have lost source of dependency to the extent of Rs. 4,500/-- age of the deceased was 31 years- multiplier of '15' is applicable- thus, claimants are entitled to Rs. 4500/- x 12 x 15= Rs. 8,10,000/- under the head 'loss of dependency'- they are also entitled to Rs. 10,000/- each under the heads 'loss of love and affection' , 'loss of consortium', 'loss of estate' and 'funeral expenses'- thus, claimants are entitled to Rs. 8,10,000/- + Rs. 40,000/- = Rs. 8,50,000/- with interest @ 7.5% per annum from the date of filing of the claim petition till realization- award modified. (Para-9 to 15)

Cases referred:

Sarla Verma (Smt.) and others vs Delhi Transport Corporation and another, AIR 2009 SC 3104
Reshma Kumari & others versus Madan Mohan and another, 2013 AIR (SCW)
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. Bhuvnesh Sharma, Advocate, for respondent No. 1.
Mr. B.M. Chauhan, Advocate, for respondent No. 2.

The following judgment of the Court was delivered

Mansoor Ahmad Mir, Chief Justice (oral)

Challenge in this appeal is to the award dated 24th December, 2010, passed by the Motor Accident Claims Tribunal, Bilaspur, District Bilaspur, H.P. (hereinafter referred to as 'the Tribunal'), in M.A.C. Petition No. 14 of 2008, titled as Poonam Sharma & others versus Shri Vijay Singh & another, whereby compensation to the tune of Rs. 4,57,000/- with interest @ 7.5% per annum from the date of filing of the claim petition till its realization, came to be awarded in favour of the claimants-appellants and the insurer-respondent No. 2 herein, was saddled with liability, (hereinafter referred to as 'the impugned award').

2. The owner-cum-driver and the insurer 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. The only question to be determined in this appeal is-whether the compensation amount is inadequate? The answer is in the affirmative for the following reasons.

5. The said question revolves around Issue No. 2. It is apt to reproduce Issue No. 2 herein:

> "*If issue No. 1 supra is proved in affirmative, to what amount of compensation, the petitioners are entitled to and from whom? …OPP*"

6. The claimants have specifically pleaded in the claim petition that the deceased was earning Rs. 10,000/- per month. They have also placed on record photostat copy of the salary certificate of the deceased (Mark-B), which appeared to be issued by one Devender Singh, owner of Excise License Rangas Unit, District Hamirpur, H.P. As per the aforesaid salary certificate, the monthly salary of the deceased was Rs. 7,500/-.

7. Admittedly, the age of the deceased was 31 years at the time of accident.

8. The Tribunal has made discussion in para-13 of the impugned award, which is not legally and factually correct for the following reasons.

9. The Tribunal has taken the monthly income of the deceased as Rs. 3,000/-, appears to be on the lesser side. Even, a labourer would not have been earning less than Rs. 6,000/- per month at the time of the accident. Therefore, it can safely be held that that the monthly income of the deceased was not less than Rs. 6,000/-.

10. The claimants are four in number. The Tribunal has rightly deducted $1/4^{th}$ towards the personal expenses of the deceased. After deducted one-fourth towards the personal expenses of the deceased, it can be held that the claimants have lost source of dependency to the tune of Rs. 4,500/-.

11. The Tribunal has fallen in an error in applying the multiplier of '16'. The multiplier of '15' 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.**

12. Accordingly, the claimants are held entitled to the tune of Rs. 4500/- x 12 x 15= 8,10,000/- under the head 'loss of dependency'.

13. 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.

14. The Tribunal has rightly awarded interest at the rate of 7.5% per annum from the date of filing of the claim petition, is accordingly maintained.

15. Having said so, it is held that the claimants are entitled to compensation to the tune of Rs. 8,10,000/- + Rs. 40,000/- total amounting to Rs. 8,50,000/- with interest @ 7.5% per annum from the date of filing of the claim petition till realization.

16. The amount of compensation is enhanced and the impugned award is modified, as indicated above.

17. 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.

18. The appeal is, accordingly, disposed of.

19. 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 SANDEEP SHARMA, J.

Rajinder Kumar & another ..... Appellants.

Versus

Hira Lal ..... Respondent.

RSA No. 2 of 2007.
Judgment Reserved on :21.6.2016
Date of Decision: 1st July, 2016

Specific Relief Act, 1963- Section 38- Suit for fixation of boundaries by way of demarcation of the land and permanent prohibitory injunction for restraining the defendant from interfering in possession of the land was filed pleading that plaintiff is owner in possession of the suit land and defendant is interfering with the suit land without any right to do so- defendant opposed the suit by pleading that suit land had already been demarcated by Local Commissioner- no interference was being caused by the defendant- suit was decreed by the trial court- an appeal was preferred, which was allowed and the suit was dismissed- held, in appeal that plaintiff had not stated in his statement that defendant was interfering with the suit land and he intended to raise construction upon the same- Tehsildar who conducted the demarcation was not examined by any of the parties and his report was also not accepted- Local Commissioner admitted in his statement that plaintiff wanted the demarcation to be conducted on the basis of old record and not on the basis of new record- report shows that there is discrepancy in Aks Shajra for the year, 1891-92 and Aks Shajra for the year 1961-62 regarding khasra No.194 - Local Commissioner was appointed to demarcate the land- plaintiff claimed himself to be owner of the aforesaid bamboo grove on the basis of the report- plaintiff had filed a suit for demarcation and permanent prohibitory injunction but he had failed to prove that there was boundary dispute- therefore, trial Court had wrongly decreed the suit- decree was rightly reversed by the Appellate Court- appeal dismissed.

(Para-15 to 32)

Cases referred:

State of H.P. vs. Laxmi Nand and others [1992 (2) SLC 307
Hari Dass and others vs. State of H.P. [1996 (2) SLC370
State of H.P. vs. Piara Singh and others 1996(2) Sim. L.C. 370

For the Appellants: Mr. Ashwani K. Sharma, Sr. Advocate with Mr.Nishant Kumar, Advocate.
For the Respondent: Mr. Bhuvnesh Sharma, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral)

The instant Regular Second Appeal is directed against the judgment and decree dated 16.9.2006, passed by learned District Judge, Hamirpur, H.P in Civil Appeal No.111 of 2005, titled Sh.Rattan Chand versus Sh. Hira Lal, whereby the judgment passed by learned Civil

Judge(Jr. Division), Nadaun, District Hamirpur, HP in Civil Suit No.99 of 1999 has been set-aside.

2. Briefly stated facts necessary for adjudication of the case are that the appellants (hereinafter referred to as "plaintiff") filed a suit for fixation of boundaries by way of demarcation of the land comprised in khata No. 14min, khatauni No.94min, khasra No. 1096, measuring 0-03-82 hectares situated in Tika Dangri, Tapaa Bhumpal, Tehsil Nadaun, District Hamirpur, HP (hereinafter referred to as " Suit land") and for permanent prohibitory injunction as well as for possession of the suit land by way of demolition of the superstructure, if any, raised by the respondent (hereinafter referred to as "Defendant") during the pendency of the suit. Plaintiff in the plaint averred that he is the absolute owner in possession of the suit land as per Misal Haquiat for the year, 1996-97. It is averred that defendant is utter stranger to the suit land and he has no concern, whatsoever, with the suit land and land of the defendant is contiguous to his land. The plaintiffs averred that since the land of the parties is contiguous to each other and there always remains boundary dispute and same cannot be resolved until or unless revenue expert as Local Commissioner is appointed to demarcate the land of the parties and to fix boundaries thereon. The plaintiff submitted that the defendant is head-strong person and is hell-bent in digging the suit land by uprooting the boundaries forcibly with a view to raise construction over the suit land. The plaintiff specifically averred in the plaint that the cause of action accrued to him in the last week of September, 1999 when defendant threatened him that he will dispossess him from the suit land and raise construction over the suit land. In the aforesaid background, plaintiff by way of suit prayed that the defendant be restrained from causing any interference in the suit land. Plaintiff, in alternative also prayed that decree for possession may also be granted in his favour in case defendant is found to be in possession of the suit land or any part thereof.

3. Defendant by way of written statement refuted the claim of the plaintiff in toto. Defendant in his written statement took specific objection that the suit is not maintainable since the suit land and adjoining land i.e. khasra No.278/1 has already been demarcated by the Local Commissioner appointed by the learned trial Court in Civil Suit No.32 of 1995, titled as Hira Lal versus Rattan Chand, which is pending in the Court and boundaries have already been fixed. On merits, defendant submitted that adjoining khasra No.278/1 is owned and possessed by him and he is not doing anything over the suit land. Defendant specifically denied that there is any boundary dispute between the parties because as per him dispute of boundaries, if any, has already been settled by the learned trial in another case of Hira Lal versus Rattan Chand. It is specifically averred in the written statement that Local Commissioner has already fixed the boundary between khasra No.278/1 and the suit land. Defendant specifically denied the allegation of uprooting the boundary, as alleged by plaintiff and denied any kind of encroachment made by him in the suit land. Defendant averred that the plaintiff has no cause of action, whatsoever, to maintain the suit in question as nothing has been done by him over the suit land.

4. In replication, the plaintiff has denied the contents of the preliminary objections taken in reply being wrong and on merits reiterated his case as set out in the plaint.

5. Learned trial Court after appreciating the pleadings available on record framed the following issues on 14.1.2000:-

1. **Whether the plaintiff is entitled to the relief of fixation of boundaries by way of demarcation as alleged? OPP.**
2. **Whether the plaintiff is entitled to the relief of permanent prohibitory injunction, as prayed for? OPP.**
3. **Whether the plaintiff is entitled to the relief of possession by way of demolition, as prayed for? OPP.**
4. **Whether the suit is not maintainable in the present form? OPD.**

5. **Whether the plaintiff is stopped from filing the suit by his own act and conduct as alleged? OPD.**
6. **Whether the plaintiff has no cause of action as alleged? OPD.**
7. **Relief:-**

6. Learned trial Court on the basis of the evidence available on record decided issues No.1 and 2 in affirmative and rest of all were decided in negative. Learned trial Court vide impugned judgment and decree dated 30.11.2004 decreed the suit of the plaintiff for fixation of boundaries and for permanent prohibitory injunction with cost. However, issue with regard to possession of the suit land was decided against the plaintiff and hence no relief qua the same was granted to the plaintiff.

7. Feeling aggrieved and dissatisfied with the impugned judgment passed by learned trial Court, defendant filed an appeal bearing No.111 of 2005 in the court of learned District Judge, Hamirpur under Section 96 CPC read with Section 21 of the H.P. Courts Act, 1976. Learned District Judge, Hamirpur vide judgment dated 16.9.2006 accepted the appeal and quashed and set-aside the impugned judgment and decree passed by learned trial Court, as a result of which, suit of the plaintiff was ordered to be dismissed. Hence, the present appeal before this Court.

8. This Court vide order dated 19.5.2008 was pleased to admit the instant appeal on the following substantial questions of law:-

1. **Whether the impugned judgment passed by the learned first appellate Judge is the result of total misreading and also misappropriation of pleadings, material and evidence adduced on record by the parties and thus, the resultant findings and conclusions drawn by the learned 1st appellate Judge are wrong and perverse?**
2. **Whether the plaintiff was entitled for decree of permanent prohibitory injunction etc. against the defendant (respondent) when after demarcation it was established and proved on record that the defendant was asserting his right of possession over the bamboo grove in the suit land which was owned and possessed by the plaintiff?**
3. **Whether the report dated 11.3.2001 of the Local Commissioner (Tehsildar) appointed by the learned trial Judge during the pendency of the suit for demarcation of the suit land was wrongly discarded by the learned First appellate Court?**

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

10. Mr. Ashwani Kumar Sharma, learned Senior Advocate for the plaintiff vehemently argued that the impugned judgment and decree passed by learned District Judge, Hamirpur reversing the judgment and decree of learned trial Court, decreeing the suit, is against law and facts of the case and contrary to evidence on record and, as such, same deserves to be quashed and set-aside. He contended that bare perusal of the evidence available on record is enough to demonstrate that the learned first appellate Court while passing the impugned judgment has failed to appreciate the pleas set up by the parties in its right perspective. He further contended that the evidence adduced in support of the pleas taken in the plaint have not been considered in proper and legal perspective. Mr. Sharma, forcibly contended that learned first appellate Court has miserably failed to appreciate the actual controversy involved in the matter and passed the judgment and decree in appeal is very slip shod manner without adverting to the documentary evidence available on record. It is contended that the plaintiff had filed Civil Suit for decree of Permanent Prohibitory Injunction with respect to the suit land restraining the defendant on the ground that lands of the parties are contiguous to each other. In 1922-23, when the land was partitioned in the absence of plaintiff, Karukans(measurement of the land) was incorrectly changed in the revenue record while recording mutation No.36,dated 24.2.1992, which fact never

came to the knowledge of the plaintiff and, as such, wrong entries with respect to measurement continued to be carried forward and it was only recent settlement of land, aforesaid factum of wrong entries came to the knowledge of the plaintiff, who thereafter applied before the Settlement Officer, Kangra Division at Dharamshala for correction of such wrong revenue entries. Mr. Sharma, learned counsel forcibly submitted that proceedings as regards the correction were still pending before the said Authority during the pendency of the appeal. But now necessary corrections have been carried out by the revenue authorities on the application of the plaintiff.

11. Learned counsel for the plaintiff forcibly contended that it was duly proved by the plaintiff that he was owner in possession of the suit land and even the Local Commissioner (Tehsildar) appointed by the learned trial Court during the pendency of the suit, who had demarcated the suit land on the basis of old Aks Musabi reported in its report that there exist a bamboo grove on the suit land. He contended that findings and conclusions recorded by learned District Judge being totally contrary to the record available on record have been made basis to pass impugned judgment and decree in appeal and, as such, same deserves to be quashed and set-aside. Mr. Sharma, strenuously argued that since entries pertaining to the measurements of the suit land in the existing revenue record were incorrect and same were under challenge before the competent Revenue Officer, whereby the proceedings for their correction are pending consideration, there was no justification for the first appellate court to discard the report of the Local Commissioner, who admittedly demarcated the land on the basis entries contained in the Latest Aks Musabi prepared during the last settlement. Lastly, Mr. Sharma, learned counsel contended that the plaintiff was not under any legal obligation to seek correction of the entries in the revenue record in the suit filed by him, since the matter with regard to the correction of wrong entries was already under challenge, in the separate proceedings filed by him before the revenue Court. In the aforesaid background, it was prayed on behalf of the plaintiff that the impugned judgment and decree in appeal passed by learned District Judge deserves to be quashed and set-aside.

12. Mr. Bhuvnesh Sharma, learned counsel representing the respondent supported the judgment passed by learned first appellate Court. He contended on behalf of the defendant that no interference, whatsoever, of this Court is warranted in the present facts and circumstances of the case, because bare perusal of the impugned judgment and decree passed by learned first appellate Court suggest that the same is based upon correct appreciation of the evidence available on record. Mr. Sharma, learned counsel further contended that its stands proved beyond doubt that the demarcation report given by Tehsildar on the application filed by the plaintiff was on the basis of Musabi for the year, 1910-11, which stands admittedly revised. It is also contended that learned trial court has rightly concluded that the demarcation of boundary is to be carried out from the field map (Shajra) prepared in the last settlement. In the present case, demarcation was not carried out in accordance with the instructions issued in this regard.

13. During arguments, he invited the attention of this Court to the averments contained in the plaint to demonstrate that there is no mention, whatsoever with regard to the dispute of existence of bamboo grove on the suit land, rather careful perusal of the plaint suggests that by way of suit, decree for fixation of boundaries by way of demarcation of the suit land has been prayed for. He also invited the attention of the Court to the statement Ex.PW1/A recorded by Local Commissioner of the plaintiff at the time of demarcation conducted on 11.3.2001 to demonstrate that plaintiff Rattan Chand refused to get the land demarcated on the basis of new record, rather he insisted that demarcation be conducted on the basis of 'Shajra Musabi' for the year, 1891-92 and 1910-11. Mr. Sharma, learned counsel submitted that there is no illegality and infirmity in the impugned judgment passed by learned first appellate Court and, as such, same deserves to be upheld.

14. Though, present appeal has been admitted on three substantial questions of law reproduced hereinabove but this Court deems it proper to take up substantial question No.2, for consideration at first instance as it directly relates to the relief claimed by the plaintiff against the defendant. This Court is of the view that while ascertaining/determining the substantial question

No.2, this Court is required to examine the evidence be it ocular or documentary available on record and as such while critically analyzing the evidence available on record, substantial question of law No.1 would be automatically answered alongwith substantial question No.2.

15. Careful perusal of the plaint filed by the plaintiff suggests that he claimed decree for permanent prohibitory injunction restraining the defendant from raising any construction, changing nature or from interfering in any manner, whatsoever either by taking forcible possession of the suit land. Plaintiff in alternative also prayed for decree of possession being absolute owner in possession of the suit land. Interestingly, this Court while perusing the plaint available on record failed to get any averments made by plaintiff with regard to the existence of bamboo grove, if any, on the suit land, rather specific case set up by the plaintiff was that the defendant being stranger is hell-bent in digging the suit land and uprooting the boundaries forcibly with a view to raise construction. Though, it finds mention in the plaint that defendant is the owner in possession of adjoining land comprising khasra No.278/1 but there is no mention/averment, if any, in the plaint with regard to bamboo grove on the suit land. This court solely with a view to answer substantial questions framed by this Court also had an occasion to peruse the statement made by plaintiff Rattan Chand. Plaintiff (PW-1) in his examination in-chief stated that he is owner of the disputed land comprising khasra No.1096, measuring 0-03-82 hectares. He stated that disputed land is contiguous of the land of the defendant Hira Lal. It has come in his statement that land is barren and there exists one bamboo grove and he is the owner of the same. He stated in his examination-in –chief that there exists one bamboo grove and he is the owner of the same. He stated in his examination-in-chief that defendant quarrels with him with regard to bamboo grove and claimed him to be the owner of the same. He has stated that in this regard he had filed a suit in the Court, wherein Local Commissioner was appointed by the Court and as per the report of the Local Commissioner Bamboo grove falls in his land.

16. Careful perusal of the deposition made by plaintiff before the learned trial Court, nowhere suggest that the plaintiff stated something in support of his averments contained in the plaint. To the contrary, plaintiff while examining himself as PW-1 has set up new case, which admittedly was not set up in the plaint as has been observed above, after perusing the plaint. There is no mention, whatsoever, with regard to bamboo grove on the suit land in the plaint filed by the plaintiff.

17. Though, plaintiff by way of filing suit in question set up a case that defendant is head strong person who is hell-bent in digging out and uprooting the boundaries with a view to raise construction on the suit land, but interestingly, there is nothing in his statement made in examination-in-chief before the Court with regard to any kind of interference in the suit land by defendant. In his entire statement, plaintiff has nowhere stated that defendant is interfering in the suit land and intending to raise construction over the same. Similarly, there is no whisper with regard to uprooting of the boundaries by the defendant, as alleged in the plaint. Rather, careful perusal of the deposition made by him suggests that he changed very nature of dispute of the suit land, wherein he claimed the ownership and possession of the bamboo grove. Plaintiff claimed himself to be owner of the aforesaid bamboo grove on the basis of the report dated 11.3.2001 submitted by the Local Commissioner, who was admittedly appointed by the learned lower court.

18. Interestingly, the Tehsildar, who conducted the demarcation in terms of the order passed by learned trial Court was neither examined nor cross-examined by any of the parties to the suit. Moreover, his report was not exhibited in evidence. However, further careful perusal of the cross-examination of the plaintiff suggest that he admitted his statement Ex.PW1/A i.e. statement made by the plaintiff at the time of demarcation conducted on 11.3.21004 by the Tehsildar pursuant to the order passed by the learned trial Court. This Court had an occasion to peruse the Ex.PW1/A, perusal whereof suggest that the plaintiff was not keen to take demarcation as per new record and he insisted that demarcation be conducted on the basis of the old record i.e. 'Aks Shajra' for the year, 1891-92 and 1910-11. Perusal of Ex.PW1/A further reveals that plaintiff stated at the time of demarcation that he has preferred an application before

the Settlement Officer, Kangra Division at Dharamshala on the basis of old record for correction of 'Aks Musabi' and revenue record.

19. Statement of defendant Hira Lal was recorded at the time of demarcation conducted on 11.3.2001 also reveals that he was present alongwith Local Commissioner. He also stated that plaintiff Rattan Chand does not want demarcation to be conducted on the basis of recent record. He also stated that he had obtained demarcation report from the Tehsildar on 25.10.1998, in terms of the order passed by learned court below, copy whereof was made available to the authorities concern at the relevant time.

20. Though, demarcation report as has been observed above has not been exhibited but the same is available on record at page 64 of the records of the trial court. This Court with a view to ascertain correctness of the statement Ex.PW1/A made by plaintiff, perused demarcation report dated 11.3.2001 which suggests that plaintiff insisted for demarcation on the basis of 'Aks Shajra' pertaining to the year, 1891-92 and 1910-11 and he opposed the demarcation of the land at the relevant time on the basis of the recent record. Further perusal of the demarcation report suggest that there is contradiction between Aks Shajra for the year 1891-92 qua khasra No.194 and 'Aks Shajra' for the year, 1961-62. The Local Commissioner in his report stated that if the land is demarcated in accordance with the shajra for the year, 1910-11, bamboo grove falls in khasra No.1096 owned by the plaintiff. Local Commissioner in his report categorically stated that plaintiff Rattan Chand does not want to get the land demarcated on the basis of recent record since he has already filed an application for correction of revenue entries before the Settlement Collector, Kangra.

21. It is ample clear from the perusal of Ex.PW1/A as well as demarcation report dated 11.3.2001 that the plaintiff insisted for settlement on the basis of old record i.e. Aks Musabi for the year 1891-92 and 1910-11. It has also come in the demarcation report that the plaintiff at the time of demarcation produced copy of Aks musabi for the year 1891-92 and 1910-11 alongwith field book and copy of mutation No. 36, dated 24.2.pertaining to 'Aks Shajra' for the year, 1961-62. Plaintiff insisted for demarcation on the basis of Musabi prepared for the year, 1891-92 and 1910-11 because as per him wrong map was prepared and on the strength of mutation No.36, dated 24.2.1922 consolidation was carried out in the year, 1961-62. Since consolidation carried out 1961-1962 was based on wrong map prepared during the last settlement 1961-62 for which he already moved an application for correction of revenue entries before the Settlement officer Kangra, no demarcation could be given on the basis of recent settlement.

22. At this stage, it is pertinent to notice that learned trial Court vide order dated 7.8.2000 appointed Local Commissioner with a direction to demarcate the suit land comprised in khasra No.1096,measuring 0-03-82 hectares as per 'Missal Hakiat' for the year, 1996-97 and fix its boundaries. Record further reveals that specific reference was issued to the Local Commissioner to report the nature of the encroachment and the construction laid by the defendant, if any. But interestingly, as has been noticed above by this Court while perusing Ex.PW1/A and the demarcation report given by the Local Commissioner, the Local Commissioner instead of carrying out the demarcation of the suit land comprised in khasra No.1096, as per missal Hakiat for the year, 1996-97 referred to the old record for the year1891-92 and 1910-11 as insisted by the plaintiff. Careful perusal of demarcation report dated 11.3.2001 clearly demonstrates that Local Commissioner did not conduct demarcation strictly in terms of the reference and order dated 7.8.2000 passed by the learned trial court, rather Local Commissioner acting on the basis of the statement of plaintiff Ex.PW1/A recorded at the time of demarcation gave demarcation report, if any, on the basis of Aks Shajra pertaining to the year, 1891-92 and 1910-11 Local Commissioner instead of giving specific report as was called by the court referred to Aks Shajra Musabi pertaining to the year1891-92 and 1910-11 and concluded that as per Aks Shajra 1910-11 bamboo grove exist on khasra No.1096 owned by the plaintiff. Further perusal aforesaid report dated 11.3.2001 also suggest that the demarcation, if any, was not conducted in terms of the instructions contained in paragraph 10(2)(I) of Chapter 10 of the H.P. Land Records

Manual, where it has been specifically provided that the boundaries in dispute should be relayed from the village map prepared at the last settlement, meaning thereby that the demarcation, if any, was required to be carried out by the Local Commissioner on the basis of Aks Musabi prepared during the last settlement, whereas report of Local Commissioner dated 11.3.2011, nowhere suggest that he carried demarcation on the basis of copy of Musabi prepared during last settlement. If statement Ex.PW1/A is carefully read, it clearly emerges that the plaintiff attempted to set up a new case with regard to the correction of revenue entries, which was admittedly never the case of the plaintiff in his plaint. It appears that plaintiff with a view to avoid demarcation in terms of recent settlement purportedly raked up the issue with regard to preparation of wrong map on the strength of mutation No.36, dated 24.2.1992. Plaintiff by producing copy of Aks Musabi 1891-92 and 1910-11 and copy of mutation No.36, dated 24.2.1922 of aka shajra No.1961-62 before Local Commissioner has made an attempt to set up a case for correction of revenue entries, which has been never pleaded by him in the plaint.

23. This Court after carefully examining the averments contained in the plaint as well as statement of the plaintiff recorded before the trial court below, is of the view that he has miserably failed to prove his case set up in the plaint. Though, in the plaint, he averred that there is boundary dispute between the parties, but perusal of statement made by him while appearing as PW-1 to prove his case nowhere reveals that there is boundary dispute between the parties, rather statement given by plaintiff is fully devoted to prove that some bamboo grove exist on the suit land, which belongs to him. Since no specific evidence, whatsoever has been led on record to prove the averments contained in the plaint, where specific allegation of interference, raising construction, changing nature of land and taking forcible possession of the suit land has been alleged against the defendant, no relief as claimed by the plaintiff can be granted to him.

24. Since there was no specific mentioning with regard to the dispute, if any, qua the bamboo grove on the suit land raised by the plaintiff in the plaint, there was no occasion for the Court below to look into that aspect. To the contrary, learned court below was only under obligation to examine the issue whether there is any boundary dispute, if any, between the parties or not or whether defendant have interfered in the suit land by raising construction or not. Admittedly, in the present case, trial court with a view to ascertain the boundary dispute had appointed the Local Commissioner to give its report after measuring boundaries on the basis of recent settlement record. But as has been discussed, Local Commissioner appointed by the court below gave its report on the basis of record pertaining to year, 1891-92 and 1910-11 and instead of giving specific answer to the claim referred to him gave his report on the basis of documents made available by plaintiff at the time demarcation. If at this juncture, report of Local Commissioner is considered to the extent where he has reported that if land is measured in terms of Aks Shajra for the year 1891-92 and 1910-11, bamboo grove falls in khasra No.1096 owned by the plaintiff, then also report of Local Commissioner cannot be taken into consideration solely for the reason that the demarcation was not carried out in terms of instructions contained in paragraph 10(2) of Chapter 10 of H.P.Land Records Manual and, as such, same could not be looked into.

25. In ***State of H.P.*** *vs.* ***Laxmi Nand and others*** [1992 (2) SLC 307], ***Hari Dass and others*** *vs.* ***State of H.P.*** [1996 (2) SLC370], this Court has considered in detail how the demarcation is to be conducted. In ***State of H.P.*** *vs.* ***Laxmi Nand and others*** (supra), in para 17 of the judgment, it has been held as follows:-

> **"It is the admitted case of the parties that in so far as the three revenue estates are concerned, the maps prepared during the last settlement were not on square system. Accordingly, the demarcating officer was required to relay the boundaries of the fields sought to be demarcated from the Shajra (village map), prepared at the last settlement. He was required to locate three Permanent points on three different sides of the area sought to be demarcated. The three points so selected and to be taken as basis must be those, which are admitted to have remained undisputed from the last**

settlement. The officer is thereafter required to chain threes three points on the spot and then compare the result with the distance given as per scale on the Shajra. It is only when distance, so compared, agree that the Revenue Officer can proceed with the further work of measurement. A pencil line is supposed to be drawn joining these three permanent points and thereafter perpendiculars are supposed to be drawn from these lines to each of the point, which are required to be located on the spot, in order to enable him to find out the exact distance from these points to the point sought to be demarcated, and then tally the result with the help of the scale of the Shajra, which can be drawn only with the help of a crossed staff. The result to be fially(sic-finally) checked by measuring on the spot, the distance and then tallying the result with the help of scale on the Shajra. Since this report of demarcation is liable to scrutiny, by way of evidence, it is required that the report of the concerned officer on the face of it must explain the details and the manner as to how he made his measurements, which report must accompany a copy of the relevant portion of the Field Book of current settlement of the village showing Karukans (dimensions) of the fields of which he took measurements as also a map showing therein the three permanent points, the fields measured and the boundary in dispute. As per the instructions, this is one of the necessary requirements to enable the court to follow the method adopted and also in order to find out the veracity of the proceedings. The other requirement, while submitting the report is to record the statements of interested parties before taking the three permanent points to the effect that all of them agreed and accepted the three points as permanent points on three different sides of the property. In case any objection is raised as to the manner in carrying out the demarcation, the said objection is required to be reduced into writing, so as to avoid the possibility of raising any question specifically and also to enable the court to decide such objections. In case, objection is raised on the spot, the demarcating officer is also required to submit his opinion on such objections. In case, while carrying out the demarcation, any discrepancy is noticed in the area of the fields abutting on the boundary in dispute, as recorded in the last settlement and the one arrived at as a result of the actual measurement on the spot, the report is required to incorporate the same with explanation as to the cause of increase or decrease, if any, discovered on the spot. All these requirements, in our opinion, have been incorporated in the instructions with the ultimate object of ascertaining that while carrying out the demarcation correct method was adopted and no mistake committed."

26. In ***State of H.P.** vs. **Piara Singh and others*** **1996(2) Sim. L.C. 370.** The relevant para No.18 of the judgment is reproduced as under:-

"18. The demarcation is to be carried out by the revenue authorities in accordance with the provisions of the Act as well as in accordance with the instructions aforesaid and the revenue authorities are duty bound under the provisions of section 107 of the Act to carry out the same. It has been so held by this court in case *Radha Soami Satsang Beas through Sh. Madan Gopal Singh V. State of H.P and another, ILR 1984 HP 317.* In the face of this position, it is manifestly clear that the function to demarcate the limits of any holding/field is a statutory function being quashi-judicial in nature. It is absolutely necessary for the concerned revenue officer to perform such functions strictly in accordance with the instructions and guidelines issued by the Financial Commissioner under the provisions of section 106 of the Act and he has no business much less authority to

deviate therefrom as it is likely to result in affecting the valuable rights of the parties concerned. The demarcation report must spell out so as to enable the authority/court concerned when it is brought before it, the method adopted by the revenue officer while carrying out the demarcation.

With the aforesaid background, it is necessary to examine the submission of the learned counsel for the appellants (Shri Jagdish Vats and Shri Ajay Mohan Goel) to examine the evidence of PW-22, PW-23, PW-29 and PW-56. It is worthwhile to clarify here that there are three reports according to the prosecution. First is the one that is stated to have been given by the accused, Hari Dass on the application of Mohan Lal and Misru Mal when applications of different landowners were forwarded by Divisional Forest Officer, Chopal to Range Officer, Tharoch, who in turn, had forwarded those to Block Officer for the purpose of getting the land demarcated so as to enable the marking and felling of trees. On the basis of this report the trees had been marked by accused Bir Singh and Satya Dev Sharma as per marking lists. The second demarcation report is that of PW-22, Labu Ram, Kanungo who had given the details of the area from which illicit felling had been done. He states that he had prepared the demarcation reports after carrying out demarcation which had been sent by him to the SDO(Civil) Chopal along with connected revenue papers. This witness has further stated that he had not been drawn any spot map. He had simply signed the same and the spot maps were drawn by the Patwari and not by this witness. It is interesting to note that the demarcation report prepared and submitted by this witness had not been brought on record by the prosecution for the reasons best known to it. The papers with the help of which he had carried out the demarcation are Exts. PC/72 to PC/109 and Ext. PC/110 is the copy of field book which he saw in the court and boundaries were re-laid by making reference to the village map. In his cross-examination, he admitted that in the documents exhibited in the statement, he had not drawn perpendiculars on the spot maps. In this contest, it may be appropriate to mention here that since the report of this witness of demarcation is liable to scrutiny by way of evidence, it was expected of him to explain the details and the matter as to how the measurements were carried out by him alongwith a copy of the field book of current settlement of village showing the dimensions of the fields of which he took measurements as also a plan showing three permanent points, details of the fields measured and boundaries in dispute. At the same time, this witness as well as other witnesses, namely PWs 23, 29 and 56 were also required to record the statements of the persons interested that they had agreed for the fixation of three permanent points on different three sides of the property. In the event of any objection being raised, the same should have been noted. In case of any discrepancy on account of increase or decrees of the area, the same was also required to be mentioned in the demarcation report. This should have been done to ensure proper and correct demarcation and to warrant that no mistake creeps in the demarcation."

27. Moreover, plaintiff nowhere instituted a suit for declaration to the effect that he is owner in possession of the land under bamboo grove, rather his specific case was/is for correction of boundaries by way of demarcation of the suit land and for permanent prohibitory injunction and for possession after demolition of superstructure, if any, raised by the defendant during the pendency of the suit. Interestingly, there is nothing in the statement of PW-1 to prove the averments contained in the plaint, to the contrary some new story with regard to existence of bamboo grove on the suit land has been set up in the statement recorded before the Court. Since

suit filed by the plaintiff was specifically for fixation of boundaries by way of demarcation of the suit land, courts below were required to ascertain whether defendant encroached upon the land of the plaintiff in any manner or there is any forcible construction, if any, on the part of the land owned and possessed by the plaintiff. But in the present case interestingly courts below leaving aside the actual controversy at hand, proceeded to decide new case set up by the plaintiff in his statement with regard to existence of bamboo grove on the suit land.

28. Though, learned trial Court at first instance with a view to ascertain the correctness of the allegation with regard to the dispute of boundaries, appointed Local Commissioner, who instead of submitting his report in terms of specific reference made to him acted on the basis of statement given by the plaintiff at the time of demarcation and instead of giving demarcation on the basis of latest settlement record, proceeded to give his findings on the correctness of the revenue entries recorded by the authorities in past, but learned court below after finding mention of bamboo grove in the report submitted by the Local Commissioner as well as statement of plaintiff recorded during the trial proceeded to decide the issue of existence of bamboo grove on the suit land, which is/was admittedly never subject matter of the suit, if any. Since, no specific evidence whatsoever, was led on record by the plaintiff to prove its specific case of dispute of boundaries, there was no occasion whatsoever, for the learned trial court below to decree the suit of the plaintiff for fixation of boundaries and for permanent prohibitory injunction with cost. This Court is unable to understand on what basis the learned trial court passed decree for fixation of boundaries and for permanent prohibitory injunction, once the plaintiff failed to prove that there was some boundary dispute and defendant tried to interfere in the suit land. Hence, judgment and decree for permanent prohibitory injunction passed by learned trial Court is not justified at all in the given facts and circumstances of the case.

29. In view of the detailed discussion made hereinabove, this Court has no hesitation to conclude that the plaintiff in no manner was entitled for decree of permanent prohibitory injunction against the defendant in the absence of specific evidence on record that interference, if any, was being made by defendant over the suit land. As has been discussed in detailed above, that the issue with regard to right and possession over the bamboo grove was not subject matter of dispute and, as such, any finding on the same by the learned Court below being uncalled for, is not required to be looked into by this Court. Since there was a specific reference to the Local Commissioner to conduct demarcation in terms of the recent records to determine the boundary dispute, if any, any findings qua the existence of bamboo grove over the suit land by the Local Commissioner had no relevance as far as controversy involved in the present suit is concerned. As has been observed above, that since demarcation was not conducted in accordance with law, any finding returned on demarcation report could not be looked into. Hence, this Court on the basis of critical analysis of the evidence made available on record has no hesitation to conclude that the plaintiff was not entitled for decree of permanent prohibitory injunction against the defendant and demarcation conducted by the Local Commissioner in contradiction of the Rules contained in paragraph 10(2) Chapter 10 of the H.P. Land Records Manual could not be looked into and, as such, substantial question of law No.2 is answered accordingly.

30. Since this Court examined entire evidence available on record while exploring/finding to answer of substantial question No.2,it sees no reason to conclude that the impugned judgment passed by learned first appellate court is result of total misreading and mis-appreciation of pleadings, rather this Court after examining the evidence available on record is of the view that the judgment passed by learned first appellate Court is based upon the correct appreciation of evidence adduced by the parties. Substantial question No.1 is answered accordingly.

31. As far as substantial question No.3 is concerned, once this Court has come to the conclusion that the demarcation report dated 11.3.2001 conducted by the Tehsildar in terms of the order passed by the learned trial Court was not in accordance with the rules, same has been rightly discarded by the learned first appellate Court. Hence, substantial question No.3 is answered accordingly.

32. Consequently, in view of the detailed discussion made hereinabove, this Court sees no reason whatsoever to interfere with the well reasoned judgment passed by the learned first appellate Court and same is accordingly upheld.

The appeal is dismissed along with pending application(s), if any.

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

Ram Krishan …Appellant.

Versus

M/s Associates Bulk Transport Company and others …Respondents.

FAO No. 201 of 2011
Decided on: 01.07.2016

Motor Vehicles Act, 1988- Section 166- Claimant/driver had sustained 55% disability qua his left upper limb – earning capacity of the claimant was Rs. 6,000/- per month- Tribunal had erred in holding that disability had affected the income to the extent of 55%- Medical Officer stated that claimant had sustained 100% disability regarding the profession of driver- thus, loss of income is to be taken as Rs. 6,000/- per month- multiplier of 10 is applicable- claimant is entitled to Rs. 6,000/- x 12 x 10 = Rs. 7,20,000/- under the head 'loss of earning capacity'. (Para-5 to 7)

For the appellant: Mr. T.S. Chauhan, Advocate.
For the respondents: Mr. Dinesh Thakur, Advocate, for respondents No. 1 and 2.
Mr. B.M. Chauhan, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

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

Challenge in this appeal is to judgment and award, dated 11th January, 2010, made by the Motor Accident Claims Tribunal, Bilaspur, District Bilaspur, H.P. (for short "the Tribunal") in M.A.C. No. 19 of 2008, titled as Ram Krishan versus M/s Associates Bulk Transport Company and others, whereby compensation to the tune of ₹ 5,25,558/- with interest @ 7.5% per annum from the date of filing of the petition till its realization came to be awarded in favour of the claimant-injured and against the insurer (for short "the impugned award").

2. The owner-insured, 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 appellant-claimant-injured has questioned the impugned award on the ground of adequacy of compensation.

4. Thus, the only question to be determined in this appeal is – whether the amount awarded in inadequate? The answer is in the affirmative for the following reasons:

5. The Tribunal in para 13 of the impugned award has recorded the statement of the doctor, namely Dr. J.L. Sharma, who was an Orthopaedic, whereby he has stated that the appellant-claimant-injured, who was a driver by profession, has suffered permanent loss of function, is not in a position to drive and even cannot plough his fields. The said witness has also proved the disability certificate, which is exhibited as Ext. PW-2/A, which does disclose that the appellant-claimant-injured has sustained 55% disability qua his left upper limb. It is apt to reproduce relevant portion of para 13 of the impugned award herein:

"13. …….Besides, the petitioner also examined Doctor J.L. Sharma, Orthopaedic as PW-2 to prove his disability certificate. This witness PW-2 Doctor J.L. Sharma stated that he is working as Registrar in the Orthopaedic department in the I.G.M.C. Shimla. That he was the member of the medical board and the petitioner was examined by the Medical Board and the disability certificate Ext. PW2/A was issued to the petitioner by Medical Board which is signed by him as member being orthopaedic. He added that the petitioner has sustained permanent disability to the extent of 55% qua his left upper limb and is not in a position to drive the vehicle adding that petitioner is also not able to plough fields due to the aforesaid permanent disability. Neither, the petitioner PW-3 Ram Krishan nor this witness Doctor J.L. Sharma are cross-examined on these material facts regarding the permanent disability sustained by the petitioner after this accident and qua the medical expenses incurred by him on his treatment….."

6. The Tribunal has rightly held that the earning capacity of the appellant-claimant-injured was 6,000/- per month at the time of the accident, but has fallen in an error in holding that the disability has suffered his income capacity only to the extent of 55%, which is not legally and factually correct. As per the statement of Dr. J.L. Sharma, as recorded by the Tribunal itself in para 13 of the impugned award, the appellant-claimant-injured has suffered 100% disability as a driver by profession. Meaning thereby, he has lost total earning capacity.

7. Thus, it is held that the appellant-claimant-injured has suffered loss of income to the tune of ₹ 6,000/- per month. The multiplier of '10', applied by the Tribunal, is maintained. Accordingly, the appellant-claimant-injured is held entitled to compensation to the tune of ₹ 6,000/- x 12 x 10 = ₹ 7,20,000/- under the head 'loss of earning capacity'.

8. The amount awarded under the other heads, i.e. 'medical expenses', 'transportation charges', 'attendant expenses', 'pain and suffering & amenities of life' to the tune of ₹ 24,058/-, ₹ 3,500/-, ₹ 2,000/-, ₹ 1,00,000/-, respectively, is upheld.

9. Viewed thus, it is held that the appellant-claimant-injured is entitled to total compensation to the tune of ₹ 7,20,000/- + ₹ 24,058/- + ₹ 3,500/- + ₹ 2,000/- + ₹ 1,00,000/- = ₹ 8,49,558/- with interest as awarded by the Tribunal. The enhanced amount of compensation shall carry interest from the date of the impugned award till its realization.

10. Having said so, the impugned award is modified, as indicated hereinabove and the appeal is allowed.

11. The insurer is directed to deposit the enhanced awarded amount before the Registry within six weeks. On deposition, the entire awarded amount be released in favour of the appellant-claimant-injured strictly as per the terms and conditions contained in the impugned award through payee's account cheque or by depositing the same in his bank account.

12. Excess amount, if any, be released in favour of the appellant-insurer through payee's account cheque.

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

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

Sanjay Singh ………..Petitioner.
Versus
State of Himachal Pradesh …………Respondent.

Cr. Revision No. 86 of 2009
Reserved on 17.6.2016
Date of Decision: 1.7.2016.

Indian Penal Code, 1860- Section 279, 337 and 304-A**-** Accused hit the vehicle against the pedestrians walking on the road- the vehicle fell 40 feet down the road and occupants sustained injuries- the accused was tried and convicted by the Trial Court – an appeal was preferred which was dismissed- held in revision, the statement of eyewitnesses duly proved that accused was driving the vehicle rashly and negligently – the mechanical expert found the vehicle in a neutral gear- the vehicle was being driven down the hill and it could be presumed that the driver had put the vehicle in neutral gear to save the fuel which shows the rashness and negligence of the accused – the road was 25 feet wide and there was 30 feet long retaining wall- there was 6 inch wall on the side of the road - the vehicle after hitting the wall had fallen in the gorge- this clearly corroborates the version of the eyewitnesses that vehicle was being driven with high speed- the accused was rightly convicted by the Trial Court- Revision dismissed, however, sentenced modified. (Para 16-42)

Cases referred:

Krishnan and another Versus Krishnaveni and another, (1997) 4 Supreme Court Case 241
Gurcharan Singh versus State of Himachal Pradesh 1990 (2) ACJ 598
Thana Ram versus State of Haryana 1996 (2) CRI.L.J. 2020,
Abdul Subhan V. State, 2007 CRI. L. J. 1089
Yudhbir Singh versus State of Himachal Pradesh 1998(1)S.L.J. 58
Dalbir Singh versus State of Haryana 2000 (5) SCC 82
State of Punjab versus Saurabh Bakshi 2015 (5) SCC 182

For the petitioner: Mr. Sunil Mohan Goel, Advocate.
For the respondent: Mr. Rupinder Singh Thakur, Additional Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Present criminal revision petition filed under Section 397 of the Code of Criminal Procedure is directed against the judgment rendered by learned Sessions Judge, Kullu, H.P., in Criminal Appeal No. 5 of 2008 dated 25.4.2009 in "Sanjay Singh v. State of Himachal Pradesh", affirming the judgment of conviction and sentence dated 12.3.2008, passed by Judicial Magistrate, Ist Class, Manali, District Kullu, HP, in Criminal Case No. 66-1/2001/21-ii of 2002/395-I of 2007, whereby the petitioner-accused is sentenced to undergo rigorous imprisonment for a period of three months and to pay fine of Rs. 1000/- and in default of payment of fine to undergo rigorous imprisonment for a period of one month under **Section 279** of the Indian Penal Code, to undergo rigorous imprisonment for a period of three months and to pay fine of Rs. 500/- and in default of payment of fine to undergo rigorous imprisonment for one month under **Section 337** of the Indian Penal Code and also to undergo rigorous imprisonment for one year and to pay fine of Rs. 5,000/- and in default of payment of fine to undergo rigorous imprisonment for a period of three months under **Section 304-A** of the Indian Penal Code. All the sentences shall run concurrently.

2. Briefly stated facts necessary for adjudication of the case are that on 2.4.2001, complainant namely Ahaliya Devi along with her daughter Seema and her children was travelling in auto rikshaw bearing No. HP-01-0629 from Bashisht to Manali temple. When they reached at Chadyari turn at about 4.40 pm, the accused-driver lost his control over the vehicle due to fast speed and struck the vehicle against Lata Devi, who was walking on the road along with two other ladies and thereafter, the vehicle along with driver and all the occupants fell about 40 fts down from the road, as a result whereof, occupants sustained injuries. The injured persons were transported to the Lady Willington Hospital, Manali for treatment. Police received a telephonic message from the aforesaid Hospital at about 5.10 pm and on the basis of same, rapat No.20 Ex.PW10/A was entered in the Police Station. Subsequently, ASI Parma Nand and Constable

Pawan Kumar went to the Hospital for verification. ASI parma Nand recorded the statement of the complaiant Ahaliya Devi Ex.PW5/A and sent it to the Police Station for registration of the case. On the basis of FIR Ext.PW5/A was registered against the driver i.e. Ext.PA. Police visited the spot of occurrence and prepared the site plan Ext.PW10/C and photographs of the spot (Ext.P1 to Ex.P4) and of the vehicle were taken and negatives of which are Ex.P5 to Ex.P8. Police impounded the vehicle involved in the accident along with its documents vide memo Ext.PW4/A. Ex.PW8/A is the mechanical report of mechanical examination of the vehicle involved in the accident. Application Ex.PW10/B was moved before the Medical Officer, Mission Hospital, Manali for the medical examination of the injured, who prepared the MLCs of accused and other injured persons vide Ext.PW7/A to Ext.PW7/F. It is also revealed from the record that petitioner-accused was driving at that relevant time without driving licence.

3. After completion of the investigation, police filed challan in the competent court of law and charged the accused for committing offences punishable under Section 279,337, 338, 304-A IPC and Section 181 of the Motor Vehicles Act. The learned trial Court after satisfying that *prima facie* case exists against the petitioner- accused, charged him for commission of offences, to which he pleaded not guilty and claimed trial.

4. During the course of trial, proseuciton with a view to prove its case examined as many as ten witnesses. The learned trial court also recorded the statement of accused under Section 313 Cr.PC, wherein accused denied the case of the prosecution. Learned trial Court after appreciating the evidence on record vide judgment dated 12.3.2008 convicted and sentenced the accused for committing the offences as per detail given above.

5. Feeling aggrieved with the judgment of conviction passed by learned trial Court, accused filed appeal under Section 374 (3) (a) Cr.PC before the learned Sessions Judge, Kullu, HP, which was dismissed and judgment of learned trial court was upheld. Hence, the present criminal revision petition by the petitioner-accused.

6. Mr. Sunil Mohan Goel, Advocate, representing the petitioner-accused, vehemently argued that the impugned judgment of the courts below are contrary to law and fact and as such, same deserve to be quashed and set-aside as they are not based upon the correct appreciation of evidence available on record, rather, evidence on record has not been appreciated in its right perspective and judgments are based upon the conjectures and surmises. He prayed that in view of the grounds taken by him in the petition, impugned judgment deserves to be quashed and set-aside and accused deserves to be acquitted of the charges framed against him.

7. On the other hand, Mr. Rupinder Singh Thakur, learned Additional Advocate General, representing respondent-State supported the judgments passed by the courts below and strenuously argued that no interference, whatsoever, of this Court is warranted in the present facts and circumstances of the case. Judgments of the courts below are based upon the correct appreciation of evidence available on record; he contended that there is overwhelming evidence to suggest that at the time of accident, offending vehicle was being driven rashly and negligently and, as such, no lenient view can be taken by this court, especially, when one of the occupant Yogesh lost his life. During his arguments, he made this Court to peruse the statements given by the prosecution witnesses i.e. occupants of offending vehicle, wherein all of them unequivocally stated that accident occurred due to rash and negligent driving of the driver-accused. Mr. Thakur also submitted before this Court that this Court has very limited powers under Section 397 Cr.PC to re-appreciate the evidence on record, especially, when both the courts below have returned concurrent finding that too after appreciating the evidence available on record very meticulously and prayed that this petition may be dismissed.

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

9. True, it is that this Court has very limited powers under Section 397 Cr.PC while exercising its revisionary jurisdiction but in the instant case, where petitioner-accused has been

convicted and sentenced, it would be apt and in the interest of justice to critically examine the statements of the prosecution witnesses solely with a view to ascertain that the judgments passed by learned courts below are not perverse and same are based on correct appreciation of the evidence on record.

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

> *8. The object of Section 483 and the purpose behind conferring the revisional power under Section 397 read with Section 401, upon the High Court is to invest continuous supervisory jurisdiction so as to prevent miscarriage of justice or to correct irregularity of the procedure or to mete out justice. In addition, the inherent power of the High Court is preserved by Section 482. The power of the High Court, therefore, is very wide. However, the High Court must exercise such power sparingly and cautiously when the Sessions Judge has simultaneously exercised revisional power under Section 397(1). However, when the High Court notices that there has been failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is but the salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities/ incorrectness committed by inferior criminal court in its judicial process or illegality of sentence or order."*

11. Perusal of the material available on record leaves no doubt that vehicle in question met with an accident on 2.4.2001, while it was being plied between Bashisht to Manali Temple. It also remains undisputed that at that relevant time, vehicle was being driven by the petitioner-accused. Now question, which remains to be ascertained by this Court is that whether at that relevant time vehicle was being driven rashly and negligently by the driver/accused or not? Apart from this, this Court on the basis of material evidence available on record, needs to find out that whether accident actually caused/occurred due to rash and negligent driving of the driver or not.

12. In the present case, prosecution with a view to prove its case beyond reasonable doubt examined as many as fifteen prosecution witnesses namely PW1 Smt. Lata, PW2 Smt. Tulsi, PW3 Prem Lal, PW-4 Chaman Lal, PW-5 Smt. Ahilya Devi, PW-6 Mehar Chand, PW-7 Oommen George, PW-8 Budhi Singh, PW-9 Seema Devi and PW-10 ASI Parma Nand.

13. Learned Court below also recorded statement of accused under Section 313 Cr.PC, wherein, he admitted that three wheeler involved in the accident was being driven by him but he stated that he is innocent and witnesses have falsely deposed against him because accident occurred due to skidding of the vehicle in question, however, record suggests that he did not lead any evidence in his defence.

14. The complainant, who appeared in witness box as PW-5 stated that on 2.4.2001, she along with her daughter namely Manisha, Seema and her five months old son was travelling in offending vehicle from Bashisht to Manali and at about 4:40 pm when they reached Chadhyari, it struck against a lady, as a result of which, the vehicle fell down 40 feet down from the road causing injuries to the occupants. She stated that she sustained injuries on her head, hand and stomach. It has also come in her statement that son of Seema sustained injuries on his head and had become unconscious. She categorically stated in her examination-in-chief that vehicle at that time was being driven by the accused in high speed, and accident occurred due to his fault. He also stated that she had reported the matter to police vide statement Ext.PW5/A, which was

recorded by the police in the Hospital in Manali. Careful perusal of cross-examination conducted by the defence of PW5 suggests that PW-5 stuck to her stand, which she actually took in her examination-in-chief . She denied all the suggestions of the defence and categorically reiterated that vehicle was being driven by the accused in an excessive speed rashly and negligently. Defence has not been able to extract anything contrary to what the complainant stated in examination-in-chief while cross-examining her. Moreover, no suggestion worth the name was put to PW1 which could be suggestive of the fact that she had motive to depose falsely against the complainant. Rather, no suggestion with regard to prior animosity/enmity of this witness with the accused was put to her. Similarly, another occupant of offending vehicle, Smt. Sema Devi (PW9) stated that on 2.4.2001 when she was travelling in the vehicle from Bashisht to manali with her mother Ahilya Devi (PW5), sister Manisha and her son Yogesh, vehicle struck with a lady and thereafter fell down from the road causing injuries to all the occupants. It has also come in her statement that offending vehicle was being driven by the accused in fast speed rashly/negligently and when they reached Chadhyari turn, driver lost his control after hitting lady and as a result of which, vehicle fell down in 40 feet deep gorge. She also supported the story of the prosecution with regard to taking of all the injured persons to Mission Hospital Manali for treatment. She also stated that her son namely Yogesh sustained head injuries and was referred to PGI Chandigarh for treatment where he breathed his last on 14th May, 2001. She categorically stated in examination-in-chief that since vehicle was driven in high speed, accused is responsible for commission of offence. In her cross-examination, she reiterated that accident took place due to negligence of accused, who failed to negotiate the curve and, as such, vehicle after hitting lady fell down from the road. This Court while perusing the statements of PWs had an occasion to peruse the cross-examination conducted by the defence of the witnesses. Minute analyses of the cross-examination conducted of these witnesses clearly suggests that defence has not been able to extract anything contrary to which this PW stated in examination-in-chief. Similarly, as in the case of PW5, no suggestion with regard to any motive to falsely depose against the accused and any prior animosity or enmity with the accused was put to this prosecution witness in her cross-examination.

15. After critically analyzing the statements made by PW5 and PW9, who were the occupants of the vehicle at that relevant time, it clearly emerges that vehicle was being driven by the accused in high speed and that too negligently. Both of the aforesaid prosecution witnesses, who can be termed as eye witnesses to the accident have unequivocally deposed that three wheeler at the time of accident was being driven by the accused rashly in high speed and accident actually occurred due to his fault. Both the witnesses have stated that when vehicle reached Chadhyari turn, it struck against one lady and thereafter fell down from the road causing injuries to the occupants. Both the prosecution witnesses have stated that the accused while negotiating the curve at Chadhyari, lost the control over the vehicle and after hitting the lady, fell 40 ft. down in the gorge. Both the material witnesses, traveling in the vehicle in question at the time of the accident, have been very very consistent, specific and candid in narrating the event actually happened just before the accident, as referred above. Defence has not been able to shatter the testimonies of these witnesses, who have been very very consistent and truthful while deposing before the learned trial Court. Though, accused while making statement under Section 313 Cr.PC stated that he is innocent and witnesses have falsely deposed against him to implicate in a false case but interestingly, no suggestion qua the motive to depose against the accused or any prior enmity with the accused was put to him and as such, the version put forth by the accused in statement made under Section 313 Cr.PC cannot be relied upon, rather, same deserve to be rejected outrightly by this Court.

16. In the present case, PW1 Lata and PW2 Tulsi mother in law of PW1 were moving on foot at that time and as per the depositions made by PW5 and 9, vehicle firstly struck against PW1 and thereafter fell 40 ft. down in a gorge.

17. PW1 deposed before the learned trial court that she along with her mother in law PW2 Tulsi and another women Prem Lata was coming back from Bashisht to Manali and when

they reached at Chadhyari curve, vehicle/three wheeler came from the side of the Bashisht and hit her from her back and the vehicle went down from the road. She stated that she does not know the speed of the vehicle as she was hit from her back. However, in her cross-examination, she stated that accused driver was not at fault and the vehicle had skidded of the road.

18. PW2 Tulsi also reiterated the version put forth by PW1. She stated that she along with PW1 Lata and another woman, after taking bath at Bashisht, were coming back to Manali by walking, and when they reached Chadhyari curve, a three wheeler came and struck against her daughter in law PW1, as a result of which, her daughter in law fell down and vehicle in question also fell down from the road. Though aforesaid, PW1 and PW2 have not supported the case of the proseuciton that vehicle was being driven by the accused rashly and negligently and in high speed at the time of accident but careful perusal of these PWs corroborates the statement given by PWs 5 and 9 with regard to the timing and place of the accident because these two witnesses have supported the version put forth by PW5 and another occupant of the offending vehicle (PW9) where they stated that at Chadhyari turn the vehicle lost the control and after hitting one lady, fell down in the 40 ft. deep gorge.

19. Since it has specifically come in the statement of PW1 that she was hit by vehicle from her back, she could not be expected to state anything qua the speed of the vehicle. As per the statements of PW1 and PW2, when they were coming back from Bashisht after taking bath, at Chadhyari, vehicle came from the side of Bashisht and hit against PW1. PW10 specifically stated that three wheeler came from Bashisht side and struck her, meaning thereby, PW1 was not in a position to see the offending vehicle at the time of accident and, as such, non-stating /mentioning of speed by her of the vehicle in question at the time of accident is immaterial and accused cannot be allowed to take any advantage of the same. Admittedly, PWs1 and 2 in cross-examination stated that driver was not at fault at the time of accident since vehicle had skidded of the road but aforesaid admission made by PW1 cannot be given much weightage for two reasons: firstly PW5 and 9 have categorically stated that at the time of accident vehicle was being driven rashly and negligently in high speed by the accused and being occupants/eye witnesses, version put forth by them cannot be brushed easily in view of the statement given by PWs1 and 2, secondly, PW1 himself admitted that vehicle struck against her from her back and she had not seen/feigned ignorance with regard to the speed of three wheeler. Since PW1 was hit by the offending vehicle from her back, she along with PW2 was definitely coming in the downwards direction at the time of accident and as per the statements of PW1, where she herself stated that she was struck from her back by the vehicle, no statement with regard to speed of the vehicle, if any, made by PWs1 and 2, can be taken into consideration solely for the reason that they had no occasion to see vehicle coming from back. As far as skidding of vehicle from the road is concerned, admission made by PW1 cannot be relied upon because admittedly, as emerges from the statements made by all the prosecution witnesses, PW1, PW2 had no idea of any vehicle coming from her back side. Had PW1 seen the vehicle coming from her back, she would have definitely tried to save herself by taking side. Moreover, none of the other prosecution witnesses have stated that the road on the given date was wet and vehicle skidded of the road. Rather, careful perusal of the cross-examination conducted on PWs 5 and 9 suggests that suggestion put to these prosecution witnesses with regard to skidding as well as road being wet has been specifically denied by them.

20. Statement of PW4 is formal in nature and they are not required to be dealt with by this Court for determining the controversy at hand. Otherwise also PW3 as per record, took the injured to the Hospital after accident whereas PW4 and PW6 namely Chaman Lal and Mehar Chand are the witnesses to the seizure memo Ext.PW4/A vide which vehicle was taken into possession by the police.

21. PW7. Dr. Oommen George, Medical Officer, Mision Hospital, Manlai medically examined injured persons PW1 Lata Devi, Complainant Ahilya Devi, Seema Devi, Manisha, Yogesh (deceased) and accused driver Sanjay Rana and issued MLC Ext.PW7/A to Ext.PW7/F. It came in her statement that injury caused to master Yogesh were grievous injuries. She also

stated that injury No. 3 sustained by injured Seema Devi could also be grievous. She also stated that except master Yogesh, who was referred to PGI, Chandigarh, all other occupants sustained simple injuries. He has stated that on 2.4.2001, he examined the injured and the injuries sustained by Yogesh (deceased) were grievous whereas other injured sustained simple injuries.

22. At this stage, it may be pointed out that deceased Yogesh at the time of accident was only five months' old and sustained head injury. Since he had sustained head injury, he was referred to PGI, Chandigarh for treatment and unfortunately died on 14.5.2001. Accordingly, medical evidence collected on record clearly depicts that PW1 namely Lata sustained simple injuries after falling on the road.

23. PW8 Budhi Singh, examined the vehicle involved in the accident and stated that after accident, he investigated the vehicle mechanically.

24. PW1, PW5 and PW9 suffered simple injuries on account of accident whereas another occupant master Yogesh succumbed to the injury. If the statement given by PW7 is read in conjunction with the statement given by other prosecution witnesses, especially, PW 5 and 9, it can be safely inferred that vehicle in question was being driven by the accused at the time of the accident rashly and negligently, as a result of which, one person died.

25. PW8 mechanically examined the vehicle. He in his statement stated that on 3.4.2001, he examined the vehicle and issued mechanical report Ext.PW8/A. He stated that vehicle in question was found in order at the time of examination but in his cross-examination, he categorically admitted that at the time of mechanical examination, he found the vehicle in neutral gear. He also admitted that road was wet when he examined the vehicle and accident was result of skidding of vehicle from the road. From the careful perusal of the statement made by PW8, who mechanically examined the vehicle, very important/crucial fact emerge, which certainly indicates towards the rash and negligent conduct of the accused. Aforesaid witnesses in cross-examination categorically stated that at the time of mechanical examination, vehicle was found in neutral gear. Careful perusal of spot map as well as statements rendered by all prosecution witnesses suggest that at the time of accident vehicle was going down the hill. Now after taking into consideration the admission made by the mechanical examiner PW8 in cross-examination, one thing clearly emerges that at the time of accident vehicle was being driven down the hill. At this stage, it can be presumed that accused driver solely with a view to save fuel put the vehicle in neutral gear as the vehicle was moving downwards and later on, it picked up speed in neutral gear and accused driver lost his control.

26. The aforesaid admission on the part of PW8, of vehicle being in neutral gear, certainly points towards the rash and negligent conduct of the accused. Learned counsel for the accused petitioner however stated that aforesaid statement of vehicle being in neutral gear at the time of mechanical examination could not be given much weightage because there is nothing apart from the statement of PW8 on record to suggest that vehicle at that relevant time was being driven in neutral gear by the accused driver. But in view of the fact, as has emerged from the records of the case, this Court after seeing the spot map and mechanical report Ext.PW8/A has reasons to presume that accused put the vehicle in neutral gear to save the fuel while driving down the hill and lost control. Another statement made by PW8 in cross examination that road was wet and accident occurred due to sudden skidding of the vehicle from the road needs to be rejected outrighly because as per his version, he mechanically tested the vehicle on 3rd April, 2001 whereas accident occurred on 2.4.2001. Since admittedly, PW8 was not present at the time of accident, which occurred on 2nd April, 2001, any statement made by him with regard to road being wet and skidding of vehicle on 2.4.2001 cannot be relied upon. Rather mechanical report i.e. Ext. PW8/A itself speaks volumes with regard to the negligent conduct of the accused that he admittedly was driving down the hill that too in neutral gear. Another factor which points towards the negligent driving being done by accused can be gauzed from the fact that as per the depositions made by all the PWs, accused first hit against the lady and thereafter, lost control of the vehicle and fell down the vehicle in gorge.

27. PW10 ASI Parma Nand stated that he had visited the Mission Hospital and recorded the statements of the complainant under Section 151 Cr.PC Ext.PW5/A and on the basis of which he lodged FIR. He also admitted of having obtained MLC Ext.PW7/A to Ext.PW7/F. It has also come in his statement that injured Yogesh was referred to PGI where he died later. He also proved spot plan Ext.PW10/C.

28. Careful perusal of site plan suggests that the width of road where accident actually occurred was 25 feet wide and and there was 30 feet long retaining wall at that place. It also emerges from perusal of Ext.PW10/C that there was 6 inch wall on the side of the road and the vehicle after breaking that wall fell down in 40 ft. gorge. As emerges from the perusal of the spot map, road was sufficiently wide and but for high speed, there could not be any other reason for vehicle to go off the road. After perusing the site plan and mechanical report, this Court has no reason to dis-believe the version put forth by PW5 and PW9 being the occupants of the vehicle that vehicle in question was being driven by the accused petitioner rashly and negligently at the time of the accident. Factum with regard to speed as well as rash and negligent driving by the accused at the relevant time can be ascertained from the fact that at the relevant place, road was 25 ft. wide and there was six inch wall on the side of the road. It is pertinent to notice at this stage that as per the statement of accused as well as PWs1 and 2, vehicle got skidded of the road and as a result of which it struck against the PW1 but record as well as statements made available on record suggests that vehicle after striking against PW1, lost control and went off the road. Had the vehicle was being driven in normal speed, definitely, it would have stopped after hitting PW1. But in the present case, vehicle went off the road that too after crossing six inch wall on the side of the road.

29. This court also carefully perused the statement given by Investigating Officer PW10, careful perusal of which clearly suggests that he has been very very consistent, specific and candid in giving the narration of the events occurred before and after the accident. There is nothing in cross-examination of PW-10 from where, it could be inferred that he had any reason/motive to falsely implicate the accused. Rather careful perusal of photographs No. 1 to 4 and mechanical report Ext.PW8/A clearly indicates that vehicle got badly damaged in the incident.

30. Conjoint reading of all the prosecution witnesses statements made by all the prosecution witnesses as well as documentary evidence led on record has compelled this Court to draw the conclusion that vehicle at the time of accident was being driven by the accused rashly and negligently that too in high speed and as such, accused has miserably failed to prove the accident occurred due to skidding of the vehicle. Rather, perusal of site plan, photographs and, especially, mechanical report that is Ext.PW8/A clearly points towards the negligent conduct of the accused. Hence, this court sees no reason whatsoever to differ with the decisions rendered by both the courts below that vehicle was being driven on high speed and accident occurred due to rash and negligent driving of the accused.

31. During the arguments having been made by the counsel for the petitioner, it was contended that none of the prosecution witnesses have categorically stated that vehicle was being driven on high speed at that relevant time, and, as such, both the courts below have fallen in an error while concluding that vehicle was being driven rashly and negligently in high speed. He also invited attention of this Court to the statements given by PW1 and PW2 and PW8 to demonstrate that accident actually occurred when the road was wet and vehicle skidded of the road and there was no fault, if any, of the accused. He also tried to point out that none of the prosecution witnesses has specifically stated that vehicle in question was being driven at the relevant time on high speed.

32. At this stage learned counsel also placed reliance upon judgment of this Court reported in ***Gurcharan Singh*** *versus* ***State of Himachal Pradesh 1990 (2) ACJ 598,*** the relevant paragraphs of which are reproduced here-in-below:-

14. Adverting to the facts of this case, it is in evidence that the truck in question was loaded with fertilizer weighing 90 quintals. Obviously, it cannot be said that the speed of the vehicle was very fast. Secondly, it is a State Highway and not a National Highway. Therefore, the speed on this account as well cannot be considered to be high.

15. Coming to the statements of witnesses on this aspect, it has been stated that the truck was moving in high speed but it has not been said as to what that speed actually was. To say that a vehicle was moving in a high speed is neither a proper and legal evidence on high speed nor in any way indicates thereby the rashness on the part of the driver. The prosecution should have been exact on this aspect as speed of the vehicle is an essential point to be seen and proved in a case under Section 304-A of the Indian Penal Code. Further, there are no skid marks which eliminate the evidence of high speed of the vehicle. In addition to this, it has been stated by the witnesses that the vehicle stopped at a distance of 50 feet from the place of accident. This appears to be exaggerated. However, it is not a long distance looking to the two points; viz, the first impact of the accident and the last tyres of the vehicle and the total length of the body of the truck in question. If seen from these angles, the distance stated by the witnesses cannot be considered to be very long and thus an indication of high speed. The version of the petitioner that he blew the horn near about the place of curve which frightened the child, cannot be considered to be without substance. This can otherwise be reasonably inferred that the petitioner would have blown the horn on seeing the child on the road as it is in evidence that the child had come on the pucca portion of the road while there is no evidence as to whether the witnesses, more particularly, Ghanshyam, PW7, Chander Kanta, PW8, mother, and a few other witnesses were there at that particular time. Rather the depositions of these witnesses indicate that they were coming from some village lane which was joining the main road in question. Children of this age, usually crafty by temperament, move faster than the parents and are in advance of them while walking. This appears to have happened in the present case. Minute examination of the circumstances of this case and the evidence brought on the record, discloses that the deceased had reached the pucca portion of the road much before the arrival of his parents and the witnesses. That is why in their deposition they have said that the child had been run over by the truck. On the other hand, the petitioner has stated that horn by him and started crossing the road which could not be seen by him and the result was the accident and the death of the child. In case some pedestrians suddenly cross a road, the driver of the vehicle cannot save the pedestrian, however slow he may be driving the vehicle. In such a situation he cannot be held negligent; rather it appears that the parents of the child were negligent in not taking proper care of the child and allowed him to come alone to the road while they were somewhere behind and they could have rushed to pull back the child before the approaching vehicle came in contact with him as it is in their depositions that the truck driver was at a distance coming at a high speed and in case the child wanted to cross the road, it could do so within the time it reached at the place of the accident. How the accident has actually taken place, has not been clearly and comprehensively stated by any of the witnesses. They appear to have been prejudiced by the act of the driver. Their versions are, therefore, coloured by the ultimate act of the petitioner and the fact that the child had been finished.

33. True it is that the Hon'ble High Court while passing aforesaid judgment has observed that *"prosecution should have been exact on this aspect as speed of the vehicle is an essential point to be seen and proved under Section 304-A of the Indian Penal Code"*. Definitely, there cannot be any quarrel with regard to the aforesaid observations made by the Court but now question arises as to what can be the method/mode for measuring the exact speed of the

offending vehicle at the time of accident. Undisputedly, in the present case, offending vehicle after collusion stopped and automatically speedometer springs back to “Zero” and as such, no help at all can be taken from speedometer to ascertain the exact speed of the vehicle. To my mind, the eye witnesses of the accident can be the best persons to depose whether offending vehicle was in high speed or not. Apart from above, aspect of high speed can be gauzed from the side/direction of the offending vehicle being driven on the wrong side and certainly an inference of its being driven rashly and negligently on high speed can be drawn by perusing spot map, photographs and mechanical reports which may point towards the force/impact, as supporting evidence. But obviously, in the absence of some specific mode to gauze the speed, only eye witnesses to the accident can be the best persons to depose the high speed/actual speed of the vehicle.

34. Mr. Goel, learned counsel also invited attention of this Court to the judgment rendered by the Hon’ble Punjab and Haryana High Court reported in ***Thana Ram*** *versus* ***State of Haryana 1996 (2) CRI.L.J. 2020,*** the relevant paragraphs of which are reproduced here-in-below**:-**

> 8. *From a bare perusal of the testimony of Avdesh Yadav (PW.2), it is evident that it is quite vague and indefinite as regards the investigation carried out by Sub Inspector Ram Chander on the spot of occurrence. According to him, he is an eye witness. He has nowhere stated if any site plan of the spot of the occurrence was prepared, whether any measurements of the spot of occurrence were taken, whether any other document was prepared on the spot in his presence, and whether any persons of the nearby place who might have been present at that time were questioned or examined by the Investigating Officer. According to this witness, the truck in question was coming from the front side and he was at a distance of about 20 yards behind the deceased. In these circumstances testimony of Avdesh Yadav (PW.2) could not be said to be safe to hold that the petitioner was driving the vehicle in question in a rash and negligent manner. It appears that both the Courts were impressed with the fact that an accident had taken place in which Kishore along with cycle were crushed under the right rear wheel of the truck and as such, came to the conclusion that the petitioner was driving his vehicle in a rash and negligent manner. To base conviction of an accused for the offences under Sections 279/304-A of the Indian Penal Code, the prosecution is bound to prove that the accused was driving the vehicle in a rash and negligent manner and there should be nexus between such driving and death of the deceased. Therefore, there should have been some material to corroborate the testimony of Avdesh Yadav (PW.2) to prove the rash and negligent driving on the part of the petitioner.*

35. Reliance is also placed on Judgment rendered by the Delhi High Court in ***Abdul Subhan V. State, 2007 CRI. L. J. 1089***, the relevant para of which is being reproduced herein below:-

> *“10. I now take up examination of the question of convicting a person merely on the allegation that he was driving a vehicle at a high-speed. In State of Karnataka v. Satish (supra) the Supreme Court was faced with a similar situation. The Court observed as under: --*
>
> > *3. Both the trial court and the appellate court held the respondent guilty for offences under Section 337, 338 and 304A IPC after recording a finding that the respondent was driving the truck at a "high-speed". No specific finding has been recorded either by the trial court or by the first appellate court to the effect that the respondent was driving the truck either negligently or rashly. After holding that the respondent was driving the truck at a "high-*

speed", both the courts pressed into aid the doctrine of res ipsa loquitor to hold the respondent guilty.

4. Merely because the truck was being driven at a "high-speed" does not bespeak of either "negligence" or "rashness" by itself. None of the witnesses examined by the prosecution could give any indication, even approximately, as to what they meant by "high-speed". "High-speed" is a relative term. It was for the prosecution to bring on record material to establish as to what is meant by "high-speed" in the facts and circumstances of the case. In a criminal trial, the burden of proving everything essential to the establishment of the charge against an accused always rests on the prosecution and there is a presumption of innocence in favor of the accused until the contrary is proved. Criminality is not to be presumed, subject of course to some statutory exceptions. There is no such statutory exception pleaded in the present case. In the absence of any material on the record, no presumption of "rashness" or "negligence" could be drawn by invoking the maxim "res ipsa loquitor". There is evidence to show that immediately before the truck turned turtle, there was a big jerk. It is not explained as to whether the jerk was because of the uneven road or mechanical failure. The motor vehicle inspector who inspected the vehicle had submitted his report. That report is not forthcoming from the record and the inspector was not examined for reasons best known to the prosecution. This is a serious infirmity and lacuna in the prosecution case.

5. There being no evidence on the record to establish "negligence" or "rashness" in driving the truck on the part of the respondent, it cannot be said that the view taken by the High Court in acquitting the respondent is a perverse view. To us it appears that the view of the High Court, in the facts and circumstances of this case, is a reasonably possible view. We, therefore, do not find any reason to interfere with the order of acquittal. The appeal fails and is dismissed. The respondent is on bail. His bail bonds shall stand discharged. The aforesaid observations of the Supreme Court make it more than clear that a mere allegation of high-speed would not tantamount to rashness or negligence. In the present case also, I find that apart from the allegation that the truck was being driven at a very high-speed there is nothing to indicate that the petitioner acted in a manner which could be regarded as rash or negligent. In any event there is no description or approximation of what was the speed at which the truck was being driven. The expression "high-speed" could range from 30 km per hour to over 100 km per hour. It is not even known as to what the speed limit on Mathura Road was and whether the petitioner was exceeding that speed limit. Therefore, in the absence of material facts it cannot be said, merely because there is an allegation that the petitioner was driving the truck at a high-speed, that the petitioner is guilty of a rash or negligent act. Clearly the petitioner cannot be convicted on the sole testimony of PW 3 which itself suffers from various ambiguities.

36. There cannot be any quarrel as far as the observation having been made by the Hon'ble Courts in cases referred above, however, this Court after seeing the overwhelming evidence on record is unable to accept the aforesaid contention put forth by the counsel for the

accused. PWs No. 5 and 9, who were the occupants and the eye witnesses to the accident have categorically stated that vehicle at that relevant time was being driven rashly and negligently in high speed by the accused. As far as the statements given by the PW1, 2 and 8 are concerned, same cannot be given much weightage solely for the reason that none of them saw vehicle coming at that time. PW1 specifically stated that she was hit from her back and, as such, she could not state anything with regard to speed and as far as PW8 is concerned, his statement of road being wet and skidding of road cannot be relied upon solely for the reason that he, for the first time, saw vehicle on 3.4.2016, when he came there for mechanical examination of the vehicle, whereas accident took place on 2.4.2016

37. In the present case, where it stands proved beyond any doubt that vehicle was being driven rashly and negligently by the accused at the time of accident, as a result of which, one person namely Yogesh lost his life, no fault, if any, can be found with the judgments passed by both the Court below.

38. Faced with this situation, learned counsel for the petitioner-accused also prayed that accused may be given the benefit of probation under Section 4(b) of the Probation of Offenders Act, 1958 keeping in view his age and his being first offender. He also stated that mitigating circumstance in this case is that more than 15 years have passed after happening of that incident and 6 years have been passed after passing the judgment dated 12.3.2008, whereby the accused was convicted and he has already suffered agony during the pendency of the appeal in the court of learned Sessions Judge, Kullu as well as in High Court of Himachal Pradesh. In support of the aforesaid arguments, Mr. Goel, also invited the attention of this Court to the judgment passed by this Hon'ble Court in ***Yudhbir Singh*** *versus* ***State of Himachal Pradesh 1998(1)S.L.J. 58***, wherein it has been held as under:

> *9. The only mitigating circumstance that appears to be there is that the time gap of about six years between the date of occurrence as well as the date of decision of this revision petitioner. During this entire period sword of present case looming over the head of the petitioner was always there. That being so, this court is of the view that instead of sending the petitioner to jail as ordered by the courts below, he is given the benefit of Section 4 of the Probation of Offenders Act. Accordingly, it is ordered that he shall furnish personal bond in the sum of Rs. 5,000/- to the satisfaction of the trial Court within a period of four weeks from today to keep peace and to be of good behavior for a period of one year from the date of execution of the bond before the court below as well as not to commit any such offence. In addition to being given benefit of Section 4 of the Probation of Offenders Act, petitioner is further directed to pay a sum of Rs. 3,000/- each to PWs Baldev Singh and Dilbagh Singh injured as compensation. Shri R.K. Gautam submitted that this amount of compensation be deposited with the trial Court on or before 31.8.1997, who will thereafter pay the same to said persons.*

39. On the other hand, Mr. Rupinder Singh Thakur, learned Additional Advocate General, invited attention of this Court to the judgment passed in the Hon'ble Apex Court in ***Dalbir Singh*** *versus* ***State of Haryana 2000 (5) SCC 82*** wherein the Hon'ble Apex Court has held as under :-

> *13. Bearing in mind the galloping trend in road accidents in India and the devastating consequences visiting the victims and their families, criminal courts cannot treat the nature of the offence under Section 304-A IPC as attracting the benevolent provisions of Section 4 of the PO Act. While considering the quantum of sentence to be imposed for the offence of causing death by rash or negligent driving of automobiles, one of the prime considerations should be deterrence. A professional driver pedals the accelerator of the automobile almost throughout his working hours. He must constantly inform himself that he cannot afford to have a single moment of laxity or inattentiveness when his leg is on the pedal of a vehicle in locomotion. He cannot and should not take a chance thinking that a rash driving*

need not necessarily cause any accident; or even if any accident occurs it need not necessarily result in the death of any human being; or even if such death ensues he might not be convicted of the offence; and lastly, that even if he is convicted he would be dealt with leniently by the court. He must always keep in his mind the fear psyche that if he is convicted of the offence for causing death of a human being due to his callous driving of the vehicle he cannot escape from a jail sentence. This is the role which the courts can play, particularly at the level of trial courts, for lessening the high rate of motor accidents due to callous driving of automobiles.

14. Thus, bestowing our serious consideration on the arguments addressed by the learned counsel for the appellant we express our inability to lean towards the benevolent provision in Section 4 of the PO Act. The appeal is accordingly dismissed.

40. This Court also cannot lose sight of the stern observations made by the Hon'ble Apex Court in ***State of Punjab*** *versus* ***Saurabh Bakshi 2015 (5) SCC 182.*** While dealing with the accident case, the Hon'ble Apex Court has taken serious view of reduction of sentences by the courts below. Their lordships in the aforesaid judgment in paras No. 1, 14, 24 and 25 have held as under;

"1. Long back, an eminent thinker and author, Sophocles, had to say:

"Law can never be enforced unless fear supports them."

Though the aforesaid statement was made centuries back, it has its pertinence, in a way, with the enormous vigour, in today's society. It is the duty of every right thinking citizen to show veneration to law so that an orderly, civilized and peaceful society emerges. It has to be borne in mind that law is averse to any kind of chaos. It is totally intolerant of anarchy. If any one defies law, he has to face the wrath of law, depending on the concept of proportionality that the law recognizes. It can never be forgotten that the purpose of criminal law legislated by the competent legislatures, subject to judicial scrutiny within constitutionally established parameters, is to protect the collective interest and save every individual that forms a constituent of the collective from unwarranted hazards. It is sometimes said in an egocentric and uncivilised manner that law cannot bind the individual actions which are perceived as flaws by the large body of people, but, the truth is and has to be that when the law withstands the test of the constitutional scrutiny in a democracy, the individual notions are to be ignored. At times certain crimes assume more accent and gravity depending on the nature and impact of the crime on the society. No court should ignore the same being swayed by passion of mercy. It is the obligation of the court to constantly remind itself that the right of the victim, and be it said, on certain occasions the person aggrieved as well as the society at large can be victims, never be marginalised. In this context one may recapitulate the saying of Justice Benjamin N. Cardizo "Justice, though due to the accused, is due to the accuser too". And, therefore, the requisite norm has to be the established principles laid down in precedents. It is neither to be guided by a sense of sentimentality nor to be governed by prejudices.

14. In this context, we may refer with profit to the decision in Balwinder Singh (supra) wherein the High Court had allowed the revision and reduced the quantum of sentence awarded by the Judicial Magistrate, First Class, for the offences punishable under Section 304A, 337, 279 of IPC by reducing the sentence of imprisonment already undergone that is 15 days. The court referred to the decision in Dalbir Singh v. State of Haryana and reproduced two paragraphs

which we feel extremely necessary for reproduction:- (Balwinder Singh case, SCC pp. 186-87, para12)

"12…1. When automobiles have become death traps any leniency shown to drivers who are found guilty of rash driving would be at the risk of further escalation of road accidents. All those who are manning the steering of automobiles, particularly professional drivers, must be kept under constant reminders of their duty to adopt utmost care and also of the consequences befalling them in cases of dereliction. One of the most effective ways of keeping such drivers under mental vigil is to maintain a deterrent element in the sentencing sphere. Any latitude shown to them in that sphere would tempt them to make driving frivolous and a frolic.

13. Bearing in mind the galloping trend in road accidents in India and the devastating consequences visiting the victims and their families, criminal courts cannot treat the nature of the offence under Section 304-A IPC as attracting the benevolent provisions of Section 4 of the Probation of Offenders Act. While considering the quantum of sentence to be imposed for the offence of causing death by rash or negligent driving of automobiles, one of the prime considerations should be deterrence. A professional driver pedals the accelerator of the automobile almost throughout his working hours. He must constantly inform himself that he cannot afford to have a single moment of laxity or inattentiveness when his leg is on the pedal of a vehicle in locomotion. He cannot and should not take a chance thinking that a rash driving need not necessarily cause any accident; or even if any accident occurs it need not necessarily result in the death of any human being; or even if such death ensues he might not be convicted of the offence; and lastly, that even if he is convicted he would be dealt with leniently by the court. He must always keep in his mind the fear psyche that if he is convicted of the offence for causing death of a human being due to his callous driving of the vehicle he cannot escape from a jail sentence. This is the role which the courts can play, particularly at the level of trial courts, for lessening the high rate of motor accidents due to callous driving of automobiles." (Dalbir Singh case, SCC pp. 84—85 & 87, paras 1 &13)"

24. Needless to say, the principle of sentencing recognizes the corrective measures but there are occasions when the deterrence is an imperative necessity depending upon the facts of the case. In our opinion, it is a fit case where we are constrained to say that the High Court has been swayed away by the passion of mercy in applying the principle that payment of compensation is a factor for reduction of sentence to 24 days. It is absolutely in the realm of misplaced sympathy. It is, in a way mockery of justice. Because justice is "the crowning glory", "the sovereign mistress" and "queen of virtue" as Cicero had said. Such a crime blights not only the lives of the victims but of many others around them. It ultimately shatters the faith of the public in judicial system. In our view, the sentence of one year as imposed by the trial Magistrate which has been affirmed by the appellate court should be reduced to six months

25. Before parting with the case we are compelled to observe that India has a disreputable record of road accidents. There is a nonchalant attitude among the drivers. They feel that they are the "Emperors of all they survey". Drunkenness contributes to careless driving where the other people become their prey. The poor feel that their lives are not safe, the pedestrians think of uncertainty and the civilized persons drive in constant fear but still apprehensive about the obnoxious attitude of the people who project themselves as "larger than life". In such obtaining circumstances, we are bound to observe that the law-makers should scrutinize, relook and revisit the sentencing policy in Section 304-A IPC, so with immense anguish."

41. After giving my thoughtful consideration to the law cited by Mr. Goel, Advocate representing the accused in the present case, I am of the view that same cannot be made applicable in the present case for granting the benefit of Section 4 of probation of Offenders Act, 1958. The Hon'ble Apex Court in the judgment cited above has deprecated the practice of courts in settling the matter by awarding compensation or releasing the accused by giving the benefit of Probation of Offenders Act, 1958. In the facts and circumstances of the present case, where there is overwhelming evidence to suggest that vehicle was driven by the accused in most rash and negligent manner, no leniency can be shown to the accused.

42. Consequently, in view of the detailed discussion made hereinabove, this Court has no reason to interfere with the well reasoned judgments of courts below, which are apparently based upon the correct appreciation of the evidence on record. However, this Court after careful perusal of the material evidence available on record as well as facts and circumstances is of the view that sentences imposed by the court below under Section 304-A of the Indian Penal Code is harsh and excessive and same needs to be modified accordingly. Accordingly, sentence imposed by the learned court below under Section 304-A of the Indian Penal Code is reduced to three months instead of one year. The petitioner-accused is directed to surrender himself before the learned trial Court forthwith to serve the sentence as awarded by learned Judicial Magistrate, Ist Class, Manali, vide separate order dated 13.3.2008 and further modified by this Court vide this judgment. Needless to say that order dated 21.8.2009, passed by this Court, whereby sentence imposed by the Court below was suspended, shall stand vacated automatically. Pending applications, if any, stand disposed of.

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

Sanjeev Kumar .....Appellant

Versus

Manmohan Singh and another .....Respondents

FAO No.:229 of 2011.
Decided on : 01.07.2016

Motor Vehicles Act, 1988- Section 149- Driver had a valid and effective driving licence to drive LMV (TPT) - offending vehicle was a jeep, and its un-laden weight was 1610 kg., thus, vehicle falls within definition of LMV- Tribunal had wrongly saddled the insured with liability- appeal allowed and the insurer directed to satisfy the award. (Para-5 to 11)

Case referred:

Kulwant Singh and others vs. Oriental Insurance Company Limited, (2015) 2 Supreme Court Cases 186

For the appellant: Mr.Jagdish Thakur, Advocate.
For the respondents: Mr.Praneet Gupta, Advocate, for respondent No.1.
Mr.G.D. 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 the award, dated 30th September, 2010, passed by the Motor Accident Claims Tribunal, Fast Track Court, Una, District Una, H.P. (for short, "the

Tribunal") in Claim Petition No.5 of 2006, titled Manmohan Singh vs. Sanjiv Kumar and another, whereby compensation to the tune of Rs.1,47,000/-, alongwith interest at the rate of 7% per annum from the date of filing of the claim petition till the payment is made, came to be awarded in favour of the claimant and the insurer was saddled with the liability, with right of recovery, (for short the "impugned award").

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

3. Feeling aggrieved, the insured/owner has challenged the impugned award by the medium of instant appeal on the ground that the Tribunal has fallen into an error in granting right of recovery to the insurer.

4. Thus, the only question to be determined in this appeal is – Whether the insurer has rightly granted right of recovery in favour of the insurer. The answer is in the negative for the following reasons.

5. Admittedly, the appellant i.e. original respondent No.1, namely, Sanjiv Kumar was driving the offending vehicle (Mahindra Pick Up) bearing No.HP-36-3685 and was having a valid and effective driving licence to drive LMV (TPT) vehicles. Copy of the driving licence has been placed on record as Mark X, which would show that the driver was competent to drive a light motor vehicle transport and the said license was valid at the time of accident. The offending vehicle involved in the accident was Jeep, registration certificate of which has been placed on record as Mark Y, wherein it is mentioned that the unladen weight of the offending vehicle was 1610 kg. Thus, the offending vehicle, in terms of Section 2(21) of the Motor Vehicle Act, which is reproduced hereinbelow, comes under the definition of "light motor vehicle".

> *"2. ....*
>
> *(21) "light motor vehicle" means a transport vehicle or omnibus the gross vehicle weight of either or which or a motor car or tractor or road-roller the unladen weight of any of which, does not exceed 7,500 kilograms."*

6. The above provision clearly shows that the vehicle, with unladen weight not exceeding 7,500 kilograms, would fall within the definition of "light motor vehicle".

7. As has been discussed supra, the driver of the offending vehicle was having driving license to drive vehicles falling within the definition of "light motor vehicle", thus, can be said to have a valid and effective driving licence, as has been held by this Court in catena of judgments, i.e. FAO No.125 of 2006, titled Oriental Insurance Company vs. Shashibala and others, FAO No.312 of 2012, titled Sukhvinder Singh and another vs. The New India Assurance Ltd. and others, etc.

8. This Court in series of cases i.e. FAO No.320 of 2008, titled Dalip Kumar and another vs. New India Assurance Company Ltd. & another, decided on 6th June, 2014, FAO No.306 of 2012, titled Prem Singh and others vs. Dev Raj and others, decided on 18th July, 2014 and FAO No.54 of 2012, titled Mahesh Kumar and another vs. Smt.Priaro Devi and Others, decided on 25th July, 2014, has discussed the issue and held that the driver having driving licence to drive Light Motor Vehicle is not required to have endorsement of "PSV" i.e. public service vehicle.

9. The Apex Court in latest decision, in **Kulwant Singh and others vs. Oriental Insurance Company Limited, (2015) 2 Supreme Court Cases 186,** has held that the driver who is having valid and effective driving licence to drive a Light Motor Vehicle is not required to have endorsement to drive a light commercial vehicle. It is apt to reproduce paragraphs No.10 and 11 hereunder:

> *"10. In S. Iyyapan (supra), the question was whether the driver who had a licence to drive 'light motor vehicle' could drive 'light motor vehicle' used as a commercial vehicle, without*

obtaining endorsement to drive a commercial vehicle. It was held that in such a case, the Insurance Company could not disown its liability. It was observed :

> *"18. In the instant case, admittedly the driver was holding a valid driving licence to drive light motor vehicle. There is no dispute that the motor vehicle in question, by which accident took place, was Mahindra Maxi Cab. Merely because the driver did not get any endorsement in the driving licence to drive Mahindra Maxi Cab, which is a light motor vehicle, the High Court has committed grave error of law in holding that the insurer is not liable to pay compensation because the driver was not holding the licence to drive the commercial vehicle. The impugned judgment (Civil Misc. Appeal No.1016 of 2002, order dated 31.10.2008 (Mad) is, therefore, liable to be set aside."*

No contrary view has been brought to our notice.

11. Accordingly, we are of the view that there was no breach of any condition of insurance policy, in the present case, entitling the Insurance Company to recovery rights."

10. In view of the above discussion, it is apparent that the Tribunal has wrongly decided issue No.3 against the owner/insured and in favour of the insurer. Accordingly, the findings returned on issue No.3 are set aside and it is held that the driver of the offending vehicle was having a valid and effective driving licence at the time of accident.

11. The findings returned by the Tribunal on issue No.4 are also required to be set aside for the reason that the onus to prove the said issue was on the insurer, which it has not discharged. It is apt to record that the factum of insurance was admitted. It was for the insurer to plead and prove that the vehicle, at the relevant time, was being driven in violation of the terms and condtions of the insurance policy and thus the insurer was in breach, has failed to do so. Accordingly, the findings returned by the Tribunal on this issue are also set aside and this issue is also decided against the insurer and in favour of the owner/insured.

12. Having said so, the appeal is allowed, the impugned award is modified and the insurer is saddled with the liability.

13. At this stage, the learned counsel for the claimant stated that the insurer has already deposited the amount before the Tribunal. He placed on record the particulars of bank account of the claimant and prayed that the Tribunal be directed to release the amount in favour of the claimant through the said bank account. Accordingly, the Tribunal is directed to release the amount in favour of the claimant through his bank account. The Registry is directed to send down the record forthwith alongwith a copy of this judgment and a copy of the claimant's bank account particulars to the Tribunal forthwith.

14. The appeal stands disposed of.

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

Smt. Sharestha Devi and others …Appellants.
Versus
Kishori Lal and others …Respondents.

FAO No. 465 of 2009
Reserved on: 24.06.2016
Decided on: 01.07.2016

Motor Vehicles Act, 1988- Section 166- It was pleaded by claimants that deceased was unloading the marble slabs- marble slab slipped and hit the deceased - vehicle was stationary for unloading - held that the accident had taken place due to use of the motor vehicle and the claim petition is maintainable- deceased was driver by profession and his income cannot be less than

Rs. 6,000/-- 1/3rd amount was to be deducted towards personal expenses- multiplier of '15' is applicable- claimants are entitled to Rs. 4,000/- x 12 x 15 = Rs. 7,20,000/- under the head 'loss of dependency'- claimants are also entitled to Rs. 10,000/- each under the heads 'loss of consortium', 'loss of love and affection', 'loss of estate' and 'funeral expenses'- thus, claimants are entitled to total compensation of Rs. 7,20,000/- + Rs. 10,000/- + Rs. 10,000/- + Rs. 10,000/- + Rs. 10,000/- = Rs. 7,60,000/- with interest @ 7.5% per annum from the date of the claim petition till its realization. (Para-25 to 43)

Cases referred:

N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc., AIR 1980 Supreme Court 1354
Sohan Lal Passi versus P. Sesh Reddy and others, AIR 1996 Supreme Court 2627
Dulcina Fernandes and others versus Joaquim Xavier Cruz and another, (2013) 10 Supreme Court Cases 646
Madan Gopal Kanodia versus Mamraj Maniram and others, (1977) 1 Supreme Court Cases 669
United India Insurance Company Ltd. Versus Sh. Talaru Ram and others, ILR 2015 (VI) HP 1109
B. Fathima versus S.M. Umarabba & ors., II (2007) ACC 613 (DB)
Rajan versus John, 2009 (2) T.A.C. 260 (Ker.)
Insurance Co. Ltd., through its Senior Divisional Manager, Jammu versus Smt. Nirmala Devi and others, 2009 (3) T.A.C. 684 (J&K)
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 SCWE 3105

For the appellants: Mr. Ajay Dhiman, Advocate.
For the respondents: Mr. H.S. Rana, Advocate, for respondent No. 1.
Nemo for respondent No. 2.
Mr. Ashwani K. Sharma, Senior Advocate, with Mr. Ishan Thakur, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

Challenge in this appeal is to judgment and award, dated 29th August, 2009, made by the Motor Accident Claims Tribunal (II), Kangra at Dharamshala, H.P. (for short "the Tribunal") in MACP No. 31-J/2006 titled as Smt. Sharestha Devi and others versus Kishori Lal and others, whereby the claim petition filed by the appellants-claimants came to be dismissed (for short "the impugned award").

2. In order to determine this appeal, it is necessary to give a brief resume of the case, the womb of which has given birth to the instant appeal.

3. The appellants-claimants invoked the jurisdiction of the Tribunal by the medium of the claim petition for grant of compensation to the tune of ₹ 10,00,000/-, as per the break-ups given in the claim petition, on the ground that their sole bread earner, namely Parhlad, husband of appellant-claimant No. 1 and son of appellants-claimants No. 2 & 3, became victim of the accident arising out of use of the motor vehicle, i.e. truck, bearing registration No. HP-69-0747, on 15th September, 2005, at about 10.30 A.M. near 33 Miles, on Pathankot-Manali National Highway.

4. It has been averred in the claim petition that when the deceased was unloading marble slabs from the offending vehicle, one of the marble slabs slipped, hit the deceased near the truck, who sustained injuries and succumbed to the said injuries.

5. The claim petition was resisted by the driver, owner-insured and the insurer of the offending vehicle on the grounds taken in the respective memo of objections.

6. The replies filed by the respondents are evasive and not as per the mandate of Order VIII of the Code of Civil Procedure (for short "CPC"). Thus, it is deemed that they have admitted the averments contained in the claim petition.

7. On the pleadings of the parties, following issues came to be framed by the Tribunal on 11th December, 2007:

> *"1. Whether the death of the deceased had taken place due to the rash and negligent act of the respondent No. 2 by moving the truck No. HP-69-0747 at 33 Miles on Pathankot-Manali National Highway as alleged? 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. Whether the petition is not maintainable in the present form as alleged? OPR*
>
> *4. Whether the respondent No. 2 being driver of the offending vehicle was not having valid and effective driving licence as alleged? OPR-3*
>
> *5. Relief."*

8. Parties have led evidence.

9. The Tribunal, after scanning the evidence, oral as well as documentary, held that the claimants have failed to prove that the accident was outcome of rash and negligent driving of the offending vehicle by its driver. The Tribunal dismissed the claim petition, however, has assessed the compensation and held that the claimants are entitled to compensation to the tune of ₹ 5,25,000/-, as per the details given in para 15 of the impugned award.

<u>Issue No. 1:</u>

10. The moot question is – whether the Tribunal has rightly determined issue No. 1 and dismissed the claim petition? The answer is in the negative for the following reasons:

11. The appellants-claimants have specifically averred in the claim petition that deceased-Parhlad was unloading the marble slabs from the offending vehicle at the relevant point of time, one of the marble slabs slipped and hit deceased-Parhlad near the truck, have led evidence to this effect.

12. The appellants-claimants have examined HHC Des Raj as PW-1, who has proved the report under Section 174 of the Code of Criminal Procedure (for short "CrPC"), filed before the Court of competent jurisdiction, which has been exhibited as Ext. PW-1/A.

13. The Tribunal has made mention of the said report in para 8 of the impugned award. The Tribunal has also held in the same para that there is no dispute about the death of deceased-Parhlad. It would be profitable to reproduce relevant portion of para 8 of the impugned award herein:

> *"8. ....The responsibility of unloading the material is always that of the owner of the material. Police had reached the Hospital and there they found deadbody of Prahlad. Police conducted proceedings under Section 174 CrPC and the same is Ex. PW1/A. A perusal of it would show that Prahlad was unloading the marvel of his employer and he was working with Shri Shan Singh.*
>
> *xxx xxx xxx*
>
> *There is no dispute qua the death of Prahlad and autopsy report is Ex. PW2/A and deceased had died on account of internal injury to trachea filled with blood leading to suffocation causing death due to asphyxia in due course."*

14. Admittedly, the offending vehicle was parked and stationary at the relevant point of time for the purpose of unloading the marble slabs, as has also been mentioned by the Tribunal in para 9 of the impugned award, the relevant portion of which reads as under:

> *"9. While filing petition, the claimants relied on report prepared by the police which is Ext.PW1/A and it recited that deceased Prahlad was unloading the marvel slabs of his owner Shan Singh and he suffered injuries while unloading........"*

15. The said finding has not been questioned by the owner-insured, driver and insurer of the offending vehicle, has attained finality.

16. It is also admitted fact that the offending vehicle was stationery for the purpose of unloading the marble slabs, as discussed hereinabove. Thus, the question is – whether the claim petition was maintainable?

17. The compensation was to be granted irrespective of the fact as to whether the claim petition was filed under Section 166 of the Motor Vehicles Act, 1988 (for short "MV Act") or Section 163A of the MV Act for the following reasons:

18. The MV Act has gone through a sea change in the year 1994 and in terms of Sections 158 (6) and 166 (4) of the MV Act, the Tribunal can treat even a police report as a claim petition.

19. The purpose of granting compensation is just to ameliorate the sufferings of the victims of the motor vehicular accident and the niceties, hypertechnicalities, procedural wrangles and tangles and mystic maybes have no role to play and that should not be a ground to dismiss the claim petition and to defeat the rights of the claimants.

20. The same principle has been laid down by the Apex Court in the cases titled as **N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc.,** reported in **AIR 1980 Supreme Court 1354; Sohan Lal Passi versus P. Sesh Reddy and others,** reported in **AIR 1996 Supreme Court 2627;** and **Dulcina Fernandes and others versus Joaquim Xavier Cruz and another**, reported in (**2013) 10 Supreme Court Cases 646.**

21. This Court has also laid down the same principle in a series of cases.

22. It is the duty of the Tribunal/Appellate Court to achieve the aim and object of the granting of compensation. The strict proof is not required and discrepancies or pleadings or loose pleadings cannot be made a ground to dismiss the claim petition. These proceedings are summary in nature, do not require strict compliance of the rules of evidence and pleadings. The Tribunal has to take special care to see that innocent victims do not suffer and it cannot wash its hands of the responsibility and duty by dismissing the claim petition. It is to be kept in mind by the Tribunal that it is dealing with a claim petition which is outcome of social welfare legislation.

23. It is well established principle of law that the Tribunal, while dealing with claim petition, has to keep in mind that it is outcome of a social legislation, has to follow the principles of justice, equity and good conscience and has to apply a more realistic, pragmatic and liberal approach.

24. The Apex Court in a case titled as **Madan Gopal Kanodia versus Mamraj Maniram and others,** reported in **(1977) 1 Supreme Court Cases 669,** held that the Courts should not scrutinize the pleadings with such meticulous care resulting in genuine claims being defeated on trivial grounds. It is apt to reproduce para 13 of the judgment herein:

> *"13. ...... It is well-settled that pleadings are loosely drafted in the Courts and the Courts should not scrutinise the pleadings with such meticulous care so as to result in genuine claims being defeated on trivial grounds. In our opinion the finding of the High Court that there was wide gap between the pleadings and the proof is not at all borne out from the record of the present case."*

25. Having glance of the above discussions, one comes to an inescapable conclusion that the deceased was unloading marble slabs at the relevant point of time, one of the marble slabs slipped and hit the deceased near the truck. Thus, it is a case of accident arising 'out of use of motor vehicle'.

26. This Court, while dealing with a case of similar nature in **FAO No. 537 of 2008,** titled as **United India Insurance Company Ltd. Versus Sh. Talaru Ram and others,** decided on 18th December, 2015, held that claim petition is maintainable. It is apt to reproduce paras 25 to 31 and 33 of the judgment herein:

> "25. The Apex Court in the case titled as **Shivaji Dayanu Patil and another versus Vatschala Uttam More,** reported in **1991 ACJ 777,** has interpreted the words and expression 'use of motor vehicle' and held that these have a wide connotation. It is apt to reproduce paras 31 to 36 of the judgment herein:
>
> > *"31. The words "arising out of" have been used in various statutes in different contexts and have been construed by Courts widely as well as narrowly, keeping in view the context in which they have been used in a particular legislation.*
> >
> > *32. In Heyman v. Darwins Ltd., 1942 AC 356, while construing the arbitration clause in a contract, Lord Porter expressed the view that as compared to the word 'under', the expression 'arising out of' has a wider meaning. In Union of India v. E.B. Aaby's Rederi A/S, 1975 AC 797, Viscount Dilhorne and Lord Salmon stated that they could not discover any difference between the expression "arising out of" and "arising under" and they equated "arising out of" in the arbitration clause in a Charter Party with "arising under."*
> >
> > *33. In Samick Lines Co. Ltd. v. Owners of the Antonis P. Lemos, (1985) 2 WLR 468, the House of Lords was considering the question whether a claim for damages based on negligence in tort could be regarded as a claim arising out of an agreement under section 20(2)(1)(h) of the Supreme Court Act, 1981 and fell within the admiralty jurisdiction of the High Court. The words "any claim arising out of any agreement relating to the carriage of goods in a ship or to the use of hire of a ship" in section 20(2)(1)(h) were held to be wide enough to cover claims, whether in contract or tort arising out of any agreement relating to the carriage of goods in a vessel and it was also held that for such an agreement to come within paragraph (h), it was not necessary that the claim in question be directly connected with some agreement of the kinds referred to in it. The words "arising out of" were not construed to mean "arising under" as in Union of India v. E.B. Aaby's A/S, 1975 AC 797, which decision was held inapplicable to the "The words" injury caused by or ar ising out construction of S. 20(2)(1)(h) and it was observed by Lord Brandon:*
> >
> > *"With regard to the first point, I would readily accept that in certain contexts the expression 'arising out of' may, on the ordinary and natural meaning of the words use, be the equivalent of the expression 'arising under', and not that of the wider expression 'connected with'. In my view, however, the expression 'arising out of' is, on the ordinary and natural meaning of the words used, capable, in other contexts, of being the equivalent of the wider expression 'connected with'. Whether the expression 'arising out of' has the narrower or the wider meaning in any particular case must depend on the context in which it is used."*

Keeping in view the context in which the expression was used in the statute it was construed to have the wider meaning viz. 'connected with'.

34. In the context of motor accidents the expressions 'caused by' and 'arising out of' are often used in statutes. Although both these expressions imply a causal relationship between the accident resulting in injury and the use of the motor vehicle but they differ in the degree of proximity of such relationship. This distinction has been lucidly brought out in the decision of the High Court of Australia in Government Insurance Office of N.S.W. v. R.J. Green & Lloyd Pty. Ltd., 1967 ACJ 329 (HC, Australia), wherein Lord Barwick, C.J., has stated :

"Bearing in mind the general purpose of the Act I think the expression' arising out of' must be taken to require a less proximate relationship of the injury to the relevant use of the vehicle than is required to satisfy the words caused by'. It may be that an association of the injury with the use of the vehicle while it cannot be said that that use was causally related to the injury may yet be enough to satisfy the expression 'arise out of' as used in the Act and in the policy."

35. In the same case, Windeyer, J. has observed as under :

"The words 'injury by or arising out of the use of the vehicle' postulate a causal relationship between the use of the vehicle and the injury. 'Caused by' connotes a 'direct' or 'Proximate' relationship of cause and effect. 'Arising out of' extends this to a result that is less immediate; but it still carries a sense of consequence."

36. This would show that as compared to the expression 'caused by', the expression 'arising out of' has a wider connotation. The expression 'caused by' was used in sections 95(1)(b)(i) and (ii) and 96(2)(b)(ii) of the Act. In section 92-A, Parliament, however, chose to use the expression 'arising out of' which indicates that for the purpose of awarding compensation under section 92-A, the causal relationship between the use of the motor vehicle and the accident resulting in death or permanent disablement is not required to be direct and proximate and it can be less immediate. This would imply that accident should be,connected with the use of the motor vehicle but the said connection need not be direct and immediate. This construction of the expression "arising out of the use of a motor vehicle" in section 92-A enlarges the field of protection made available to the victims of an accident and is in consonance with the beneficial object underlying the enactment."

26. While going through the judgment (supra), one comes to an inescapable conclusion how the accident and injury/death have relationship with use of motor vehicle.

27. The Apex Court in another case titled as **Rita Devi (Smt) and others versus New India Assurance Co. Ltd. and another,** reported in **(2000) 5 Supreme Court Cases 113,** has discussed the scope of Section 163A of the MV Act and the expression 'death due to accident arising out of the use of motor vehicle' occurring in Section 163A of the MV Act. It is profitable to reproduce paras 9 to 18 of the judgment herein:

"9. A conjoint reading of the above two sub-sections of Sec. 163-A shows that a victim or his heirs are entitled to claim from the owner / insurance company a compensation for death or permanent disablement suffered due to accident arising out of the use of the motor vehicle (emphasis supplied), without having to prove wrongful act or neglect or default of anyone. Thus, it is clear, if it is established by the claimants that the death or disablement was caused due to an accident arising out of the use of motor vehicle, then contention of the Insurance Company which was accepted by the High Court is that the death of the deceased (Dasarath Singh) was not caused by an accident arising out of the use of motor vehicle. Therefore, we will have to examine the actual legal import of the words "death due to accident arising out of the use of motor vehicle".

10. The question, therefore is, can a murder be an accident in any given case? There is no doubt that "murder", as it is understood, in the common parlance is a felonious act where death is caused with intent and the perpetrators of that act normally have a motive against the victim for such killing. But there are also instances where murder can be by accident on a given set of facts. The difference between a "murder" which is not an accident and a "murder" which is an accident, depends on the proximity of the cause of such murder. In our opinion, if the dominant intention of the act of felony is to kill any particular person, then such killing is not an accidental murder, but is a murder simpliciter, while if the cause of murder or act of murder was originally not intended and the same was caused in furtherance of any other felonious act, then such murder is an accidental murder.

11. In Challis v. London and South Western Rly. Co., (1905) 2 KB 154, the Court of Appeal held where an engine driver while driving a train under a bridge was killed by a stone wilfully dropped on the train by a boy from the bridge, that his injuries were caused by an accident. In the said case, the Court rejecting an argument that the said incident cannot be treated as an accident held :

> *"The accident which befell the deceased was, as it appears to me, one which was incidental to his employment as an engine driver, in other words, it arose out of his employment. The argument for the respondents really involves the reading into the Act of a proviso to the effect that an accident shall not be deemed to be within the Act, if it arose from the mischievous act of a person not in the service of the employer. I see no reason to suppose that the legislature intended so to limit the operation of the Act. The result is the same to the engine driver, from whatever cause the accident happened; and it does not appear to me to be any answer to the claim for indemnification under the Act to say that the accident was caused by some person who acted mischievously.*

12. In the case of Nisbet v. Rayne & Burn, (1910) 2 KB 689, where a cashier, while travelling in a railway to a colliery with a large sum of money for the payment of his employers' workmen, was robbed and murdered. The Court of Appeal held :

> *That the murder was an accident from the standpoint of the person who suffered from it and that it arose out of an employment which involved more than the ordinary risk, and consequently, that the widow was entitled to compensation under the Workmen's Compensation Act, 1906. In this case, the Court followed its earlier*

judgment in the case of Challis (supra). In the case of Nisbet (supra) the Court also observed that it is contended by the employer that this was not an accident within the meaning of the Act, because it was an intentional felonious act which caused the death, and that the word accident negatives the idea of intention. In my opinion, this contention ought not to prevail, I think it was an accident from the point of view of Nisbet, and that it makes - no difference whether the pistol shot was deliberately fired at Nisbet or whether it was intended for somebody else and not for Nisbet."

13. The judgment of the Court of Appeal in Nisbet case (supra) was followed by the majority judgment by the House of Lords in the case of Board of Management of Trim Joint District School v. Kelly, 1914 AC 667.

14. Applying the principles laid down in the above cases to the facts of the case in hand, we find that the deceased, a driver of the auto-rickshaw, was dutybound to have accepted the demand of fare-paying passengers to transport them to the place of their destination. During the course of this duty, if the passengers had decided to commit an act of felony of stealing the auto-rickshaw and in the course of achieving the said object of stealing the auto-rickshaw, they had to eliminate the driver of the auto-rickshaw then it cannot but be said that the death so caused to the driver of the auto-rickshaw was an accidental murder. The stealing of the auto-rickshaw was the object of the felony and the murder that was caused in the said process of stealing the auto-rickshaw is only incidental to the act of stealing of the auto-rickshaw. Therefore, it has to be said that on the facts and circumstances of this case the death of the deceased (Dasarath Singh) was caused accidentally in the process of committing theft of the auto-rickshaw.

15. Learned Counsel for the respondents contended before us that since the Motor Vehicles Act has not defined the word "death" and the legal interpretations relied upon by us are with reference to the definition of the word "death" in the Workmen's Compensation Act the same will not be applicable while interpreting the word death in the Motor Vehicles Act, because according to her, the objects of the two Acts are entirely different. She also contends that on the facts of this case no proximity could be presumed between the murder of the driver and the stealing of the auto-rickshaw. We are unable to accept this contention advanced on behalf of the respondents. We do not see how the object of the two Acts, namely, the Motor Vehicles Act and the Workmen's Compensation Act are in any way different. In our opinion, the relevant object of both the Acts is to provide compensation to the victims of accidents. The only difference between the two enactments is that so far as the Workmen's Compensation Act is concerned, it is confined to workmen as defined under that Act while the relief provided under Chapter X to XII of the Motor Vehicles Act is available to all the victims of accidents involving a motor vehicle. In this conclusion of ours, we are supported by Sec. 167 of the Motor Vehicles Act as per which provision, it is open to the claimants either to proceed to claim compensation under the Workmen's Compensation Act or under the Motor Vehicles Act. A perusal of the objects of the two enactments clearly establishes that both the enactments are beneficial enactments operating in the same field, hence the judicially accepted

interpretation of the word death in the Workmen's Compensation Act is, in our opinion, applicable to the interpretation of the word death in the Motor Vehicles Act also.

16. In the case of Shivaji Dayanu Patil v. Vatschala Uttam More, (1991) 3 SCC 530 this Court while pronouncing on the interpretation of Section 92-A of the Motor Vehicles Act, 1939 held as follows : (SCC p. 532, para 12)

"... Section 92-A was in the nature of a beneficial legislation enacted with a view to confer the benefit of expeditious payment of a limited amount by way of compensation to the victims of an accident arising out of the use of a motor vehicle on the basis of no-fault liability. In the matter of interpretation of a beneficial legislation the approach of the Courts is to adopt a construction which advances the beneficent purpose underlying the enactment in preference to a construction which tends to defeat that purpose."

17. In that case, in regard to the contention of proximity between the accident and the explosion that took place, this Court held : (SCC pp. 549-50, para 36)

"36. This would show that as compared to the expression 'caused by', the expression 'arising out of' has a wider connotation. The expression 'caused by' was used in Sections. 95(1)(b)(i) and (ii) and 96(2)(b)(ii) of the Act. In Section 92-A, Parliament, however, chose to use the expression 'arising out of' which indicates that for the purpose of awarding compensation under Section 92-A, the causal relationship between the use of the motor vehicle and the accident resulting in death or permanent disablement is not required to be direct and proximate and it can be less immediate. This would imply that accident should be connected with the use of the motor vehicle but the said connection need not be direct and immediate. This construction of the expression arising out of the use of a motor vehicle in Section 92-A enlarges the field of protection made available to the victims of an accident and is in consonance with the beneficial object underlying the enactment."

18. In the instant case, as we have noticed the facts, we have no hesitation in coming to the conclusion that the murder of the deceased (Dasarath Singh) was due to an accident arising out of the use of motor vehicle. Therefore, the trial Court rightly came to the conclusion that the claimants were entitled for compensation as claimed by them and the High Court was wrong in coming to the conclusion that the death of Dasarath Singh was not caused by an accident involving the use of motor vehicle."

28. In this judgment, the Apex Court has also discussed the intention, motive and other aspects in order to make a distinction and to arrive at a *prima facie* finding whether the accident falls within the expression 'use of motor vehicle'. The case in hand is squarely covered by para 10 of the judgment (supra).

29. In the case titled as **Union of India versus Bhagwati Prasad (D) and others,** reported in **AIR 2002 Supreme Court 1301,** the Apex Court has discussed the concept of joint tortfeasor and maintainability of claim petition, jurisdiction of the Claims Tribunal and the expression 'accident arising out of use of motor vehicle'. Though, the judgment is not directly applicable to the facts of the case, but the principle is

applicable for the reason that the expression 'use of motor vehicle' stands thrashed out. It is apt to reproduce relevant portion of para 3 of the judgment herein:

"3. .... In our considered opinion, the jurisdiction of the Tribunal to entertain application for claim of compensation in respect of an accident arising out of the use of a motor vehicle depends essentially on the fact whether there had been any use of motor vehicle and once that is established, the Tribunals jurisdiction cannot be held to be ousted on a finding being arrived at a later point of time that it is the negligence of the other joint tortfeasor and not the negligence of the motor vehicle in question. We, are therefore, of the considered opinion that the conclusion of the Court in the case of Union of India v. United India Insurance Co. ltd., 1997 (8) SCC 683 to the effect -

"It is ultimately found that mere is no negligence on the part of the driver of the vehicle or there is no defect in the vehicle but the accident is only due to the sole negligence of the other parties/agencies, then on that finding, the claim would go out of Sec. 110(1) of the Act because the case would men become one of exclusive negligence of the Railways. Again, if the accident had arisen only on account of the negligence of persons other than the driver/ owner of the motor vehicle, the claim would not be maintainable before the Tribunal" is not correct in law and to that extent the aforesaid decision must be held to have not been correctly decided."

30. The Apex Court in another case titled as **Malikarjuna G. Hiremath versus Oriental Insurance Co. Ltd. & Anr.,** reported in **II (2009) ACC 738 (SC),** has discussed the scope of Section 3 of the Workmen's Compensation Act, 1923 and the expression 'accident arising out of and in the course of employment'. The Apex Court has also discussed the entire law dealing with the principles for grant of compensation, which are applicable in this case also. It is apt to reproduce paras 10 to 19 of the judgment herein:

"10. The expression "accident" means an untoward mishap which is not expected or designed. "Injury" means physiological injury. In Fenton v. Thorley & Co. Ltd. (1903) AC 448, it was observed that the expression "accident" is used in the popular and ordinary sense of the word as denoting an unlooked for mishap or an untoward event which is not expected or designed. The above view of Lord Macnaghten was qualified by the speech of Lord Haldane A.C. in Trim Joint District, School Board of Management v. Kelly (1914) A.C. 676 as follows:

"I think that the context shows that in using the word "designed" Lord Macnaghten was referring to designed by the sufferer."

11. The above position was highlighted by this Court in Jyothi Ademma v. Plant Engineer, Nellore and Anr., V (2006) SLT 457=III(2006) ACC 356 (SC)=III(2006) CLT 178(SC)=2006(5) SCC 513.

12. This Court in ESI Corpn. v. Francis De Costa, 1996 (6) SCC 1 referred to, with approval, the decision of Lord Wright in Dover Navigation Co. Ltd. v. Isabella Craig, 1940 AC 190, wherein it was held: (All ER p. 563)

"Nothing could be simpler than the words `arising out of and in the course of the employment . It is clear that there are two conditions to be fulfilled. What arises `in the course of the employment is to be

distinguished from what arises `out of the employment . The former words relate to time conditioned by reference to the man s service, the latter to causality. Not every accident which occurs to a man during the time when he is on his employment--that is, directly or indirectly engaged on what he is employed to do - gives a claim to compensation, unless it also arises out of the employment. Hence the section imports a distinction which it does not define. The language is simple and unqualified."

13. We are not oblivious that an accident may cause an internal injury as was held in Fenton (Pauper) v. J. Thorley & Co. Ltd., 1903 AC 443 by the Court of Appeal:

"I come, therefore, to the conclusion that the expression `accident is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed."

Lord Lindley opined:

"The word `accident is not a technical legal term with a clearly defined meaning. Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss. But it is often used to denote any unintended and unexpected loss or hurt apart from its cause; and if the cause is not known the loss or hurt itself would certainly be called an accident. The word `accident is also often used to denote both the cause and the effect, no attempt being made to discriminate between them. The great majority of what are called accidents are occasioned by carelessness; but for legal purposes it is often important to distinguish careless from other unintended and unexpected events."

14. There are a large number of English and American decisions, some of which have been taken note of in ESI Corpn.'s case (supra) in regard to essential ingredients for such finding and the tests attracting the provisions of Section 3 of the Act. The principles are:

(1) There must be a causal connection between the injury and the accident and the accident and the work done in the course of employment.

(2) The onus is upon the applicant to show that it was the work and the resulting strain which contributed to or aggravated the injury.

(3) If the evidence brought on records establishes a greater probability which satisfies a reasonable man that the work contributed to the causing of the personal injury, it would be enough for the workman to succeed, but the same would depend upon the fact of each case.

15. An accident may lead to death but that an accident had taken place must be proved. Only because a death has taken place in course of employment will not amount to accident. In other words, death must arise out of accident. There is no presumption that an accident had occurred.

16. In a case of this nature to prove that accident has taken place, factors which would have to be established, inter alia, are:

(1) stress and strain arising during the course of employment,

(2) nature of employment,

(3) injury aggravated due to stress and strain.

17. In G.M., B.E.S.T. Undertaking v. Agnes, 1964 (3) SCR 930 referring to the decision of the Court of Appeal in Jenkins v. Elder Dempster Lines Ltd., 1953 (2) All ER 1133, this Court opined therein that a wider test, namely, that there should be a nexus between accident and employment was laid down. It also followed the decision of this Court in Saurashtra Salt Mfg. Co. v. Bai Valu Raja, AIR 1958 SC 881.

18. In Mackinnon Mackenzie & Co. (P) Ltd. v. Ibrahim Mohd. Issak, 1969 (2) SCC 607, this Court held:

"5. To come within the Act the injury by accident must arise both out of and in the course of employment. The words `in the course of the employment mean `in the course of the work which the workman is employed to do and which is incidental to it . The words `arising out of employment are understood to mean that `during the course of the employment, injury has resulted from some risk incidental to the duties of the service, which, unless engaged in the duty owing to the master, it is reasonable to believe the workman would not otherwise have suffered . In other words there must be a causal relationship between the accident and the employment. The expression `arising out of employment is again not confined to the mere nature of the employment. The expression applies to employment as such--to its nature, its conditions, its obligations and its incidents. If by reason of any of those factors the workman is brought within the zone of special danger the injury would be one which arises `out of employment . To put it differently if the accident had occurred on account of a risk which is an incident of the employment, the claim for compensation must succeed, unless of course the workman has exposed himself to an added peril by his own imprudent act."

19. The above position was again highlighted in Shakuntala Chandrakant Shreshti v. Prabhakar Maruti Garvali and Anr., VIII (2006) SLT 654=IV (2006) ACC 769 (SC)=2007 (11) SCC 668."

31. The Apex Court in the case titled as **Surinder Kumar Arora & another versus Dr. Manoj Bisla & others,** reported in **2012 AIR SCW 2241,** held that rash and negligent driving of the driver is *sine qua non* for maintaining claim petition under Section 166 of the MV Act, which is not the essential ingredient for maintaining claim petition under Section 163A of the MV Act. It is apt to reproduce paras 9 and 10 of the judgment herein:

"*9.Admittedly, the petition filed by the claimants was under Section 166 of the Act and not under Section 163-A of the Act. This is not in dispute. Therefore, it was the entire responsibility of the parents of the deceased to have established that respondent No.1 drew the vehicle in a rash and negligent manner which resulted in the fatal accident. Maybe, in order to help respondent No.1, the claimants had not taken up that plea before the Tribunal. Therefore, High Court was justified in sustaining the judgment and order passed by the Tribunal. We make it clear that if for any reason, the claimants had filed the petition under Section 163-A of the Act, then the dicta of this Court in the case of Kaushnuma Begum (Smt.) & Ors. (AIR 2001 SC 485 : 2001 AIR SCW 85) (supra) would have come to the assistance of the claimants.*

> *10. In our view the issue that we have raised for our consideration is squarely covered by the decision of this Court in the case of Oriental Insurance Co. Ltd. (AIR 2007 SC 1609 : 2007 AIR SCW 2362) (supra). In the said decision the Court stated:*
>
> *"....Therefore, the victim of an accident or his dependents have an option either to proceed under Section 166 of the Act or under Section 163-A of the Act. Once they approach the Tribunal under Section 166 of the Act, they have necessarily to take upon themselves the burden of establishing the negligence of the driver or owner of the vehicle concerned. But if they proceed under Section 163-A of the Act, the compensation will be awarded in terms of the Schedule without calling upon the victim or his dependants to establish any negligence or default on the part of the owner of the vehicle or the driver of the vehicle."*
>
> 32. ....
>
> 33. The Apex Court has examined the scope of Sections 163A and 166 of the MV Act in the case titled as **Oriental Insurance Company Limited versus Premlata Shukla & others,** reported in **2007 AIR SCW 3591,** and **Bimla Devi & Ors. versus Himachal Road Transport Corpn. & Ors.,** reported in **2009 AIR SCW 4298,** and made a fine distinction."

27. The same question came up for consideration before the Hon'ble Karnataka High Court in a case titled as **B. Fathima versus S.M. Umarabba & ors.,** reported in **II (2007) ACC 613 (DB),** wherein wooden logs were being unloaded from a lorry at a saw-mill, the rope tied as a grip to the said logs was untied negligently, due to which a wooden log fell on the deceased who was near the lorry for the purpose of unloading. It was held that the accident occurred when the lorry was in use, deceased was a third party and the insurer was saddled with liability.

28. The Hon'ble Kerala High Court in a case titled as **Rajan versus John,** reported in **2009 (2) T.A.C. 260 (Ker.),** wherein the claimant sustained injury while unloading marble from a stationed truck, held that any accident arising during loading and unloading is an accident arising on account of use of vehicle and claim petition was maintainable.

29. The High Court of Jammu and Kashmir in the case titled as Oriental **Insurance Co. Ltd., through its Senior Divisional Manager, Jammu versus Smt. Nirmala Devi and others,** reported in **2009 (3) T.A.C. 684 (J&K)** has laid down the same principle.

30. Having said so, it is held that deceased-Parhlad died 'in the use of motor vehicle'. Viewed thus, the findings returned by the Tribunal on issue No. 1 are set aside and is determined accordingly.

31. Before dealing with issue No. 2, I deem it proper to determine issues No. 3 and 4.

Issue No. 3:

32. It was for the respondents, i.e. the owner-insured, driver and insurer of the offending vehicle, to prove that the claim petition was not maintainable, have not led any evidence to this effect, thus, have failed to discharge the onus. Even otherwise, in view of the findings returned by this Court on issue No. 1, the claim petition was maintainable. Accordingly, the findings returned by the Tribunal on issue No. 3 are set aside and it is held that the claim petition was maintainable.

Issue No. 4:

33. It was for the insurer to plead and prove that the driver of the offending vehicle was not having a valid and effective driving licence to drive the same and the owner-insured has committed a willful breach.

34. In the given facts and circumstances of the case, the question whether the driver of the offending vehicle was not having a valid and effective driving licence is irrelevant for the reason that at the relevant point of time, the driver was not driving the offending vehicle, but, the same was parked and stationary in order to unload the marble slabs. The question of valid and effective driving licence has no connection with the death of the deceased. Thus, the findings returned by the Tribunal on issue No. 4 are set aside and the same is decided accordingly.

Issue No. 2:

35. Admittedly, the deceased was 27 years of age at the time of the accident. The claimants have pleaded that the monthly income of the deceased was ₹ 8,000/- per month. The Tribunal, while applying the minimum wages formula, has held that the deceased was earning ₹ 3,000/- per month and deducted ₹ 500/- towards his personal expenses, which is not legally correct.

36. The claimants have led evidence and have proved that the deceased was a driver by profession. However, by guess work, it is held that he was a labourer and would have been earning not less than ₹ 6,000/- per month. One third was to be deducted towards his personal expenses keeping in view the law laid down by the Apex Court in the case titled as **Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another,** reported in **AIR 2009 SC 3104** and upheld by a larger Bench of the Apex Court in the case titled as **Reshma Kumari & others versus Madan Mohan and another,** reported in **2013 AIR SCW 3120.** Thus, it can be safely said and held that the claimants have loss source of dependency to the tune of ₹ 4,000/- per month.

37. The Apex Court in the case titled as **Munna Lal Jain & another versus Vipin Kumar Sharma & others,** reported in **2015 AIR SCWE 3105,** held that the multiplier has to be applied while keeping in view the age of the deceased.

38. In view of the law laid down by the Apex Court in **Sarla Verma's case (supra)** and upheld by a larger Bench of the Apex Court in **Reshma Kumari's case (supra),** and **Munna Lal Jain's case (supra)** read with Second Schedule appended with the MV Act, multiplier of '15' is just and appropriate.

39. Having said so, the appellants-claimants are held entitled to compensation under the head 'loss of dependency' to the tune of ₹ 4,000/- x 12 x 15 = ₹ 7,20,000/-.

40. The appellants-claimants are also held entitled to compensation to the tune of ₹ 10,000/- each under the heads 'loss of consortium', 'loss of love and affection' 'loss of estate' and 'funeral expenses'.

41. The question is – who is to be saddled with liability?

42. Admittedly, the offending vehicle was insured at the relevant point of time and the risk of third party was covered. As discussed hereinabove, the deceased was unloading the marble slabs and was hit by one of the marble slabs near the truck, is a third party. Thus, the risk was covered and the insurer was to be saddled with liability. Issue No. 2 is decided accordingly.

43. Having glance of the above discussions, the impugned award is set aside, the claim petition is granted, the appellants-claimants are held entitled to compensation to the tune of ₹ 7,20,000/- + ₹ 10,000/- + ₹ 10,000/- + ₹ 10,000/- + ₹ 10,000/- = ₹ 7,60,000/- with interest @ 7.5% per annum from the date of the claim petition till its realization and the insurer is saddled with liability.

44. The insurer is directed to deposit the awarded amount before the Registry within eight weeks. On deposition, one half share of the same be released in favour of appellant-claimant No. 1 and one half to appellants-claimants No. 2 & 3 in equal shares through payee's account cheque or by depositing the same in their respective bank accounts.

45. The appeal is allowed accordingly.

46. Send down the records after placing 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 AJAY MOHAN GOEL, J.

State of Himachal Pradesh .....Appellant.
Vs.
Alamgir Alias Aalo .....Respondents.

Cr. Appeal No.: 195 of 2012
Reserved on : 21.06.2016
Date of Decision: 01.07.2016

Indian Penal Code, 1860- Section 302 and 201- Husband of the informant went to a sawmill of R but did not return - his dead body was found on the next day- an FIR was registered – investigations revealed that accused had given lift to one K on motorcycle- deceased was found under the influence of liquor – accused was seen following the deceased- accused was tried and acquitted by the trial Court- held, in appeal that prosecution had relied upon the fact that a complaint of intimidation was filed in the year 2007, which furnished the motive for commission of crime- however, the incident had taken place in the year 2011- therefore, motive is not established- Chappal recovered from the spot was not connected to the accused- it was also not proved that accused was last seen with the deceased- circumstances do not lead to the inference of the guilt of the accused- trial Court had rightly acquitted the accused- appeal dismissed.
(Para-12 to 33)

Cases referred:
Vijay Thakur Vs. State of Himachal Pradesh, (2014) 14 Supreme Court Cases 609
Manthuri Laxmi Narsaiah Vs. State of Andhra Pradesh, (2011) 14 SCC 117

For the appellant: Mr. V.S. Chauhan, Addl. Advocate General, with Mr. Vikram Thakur, Dy. Advocate General.
For the respondent: Ms. Kanta 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 Court of learned Additional Sessions Judge (II), Kangra at Dharamshala dated 06.01.2012 in Sessions Case No. 22-J/2011 vide which, learned trial Court has acquitted the accused for commission of offences under Sections 302 and 201 of the Indian Penal Code.

2. The case of the prosecution was that on 18.04.2011, Sounki Ram, husband of complainant Nakhro Devi, R/o Village Chukhyal had gone to a sawmill of one Rashpal, but he did not return back in the evening. In routine, Sounki Ram used to come from his work at around 8:00/8:30 p.m. and he also used to give telephonic information in the neighbourhood in case he was not able to come back. However, on 18.04.2011, no such information was received from Sounki Ram by the complainant.

3. On 19.04.2011, in the morning one Guddo Devi and her son Sunil were going to Chukhyal jungle to bring grass and on their way they saw the dead body of Sounki Ram with

injuries on the face and head of the dead body. Guddo Devi called Reena Devi, daughter of Sounki Ram, who told her mother Nakhro Devi and consequently, they went to the spot. In the meanwhile, Sunil had called Kuldeep Vice President of the Gram Panchayat, who informed the police. Nakhro Devi raised suspicion on the accused as in the past accused had beaten Nakhro Devi as well as her daughter and threatened to kill them. On the basis of the statement of Nakhro Devi recorded under Section 154 Cr. P.C., an FIR was lodged and the body of the deceased was sent for post mortem. From the spot, police took into possession sample of the soil, currency notes, mobile telephone, one diary, match box, cigarette packet, biddi bundle and two chappals.

4. During investigation, it transpired that on the evening of 18.04.2011 accused had given lift to one Kewal Krishan on motorcycle and they had met Sounki Ram, who was under the influence of liquor. Accused threatened and provoked Sounki Ram. Sounki Ram asked Kewal Krishan to leave him ahead of the house of Jeevan because Sounki Ram was afraid of the dog of Jeevan. Accused parked his motorcycle in the courtyard of Jeevan and Kanta Devi, wife of Jeevan, saw Sounki Ram going through the path adjacent to her house and she also saw accused following Sounki Ram. Investigation also revealed that one of the chappals recovered near the dead body of Sounki Ram belonged to the accused.

5. After completion of the investigation, challan was presented in the Court. As a prima facie case was found against the accused, he was charged for the commission of offences under Sections 302 and 201 of the Indian Penal Code, to which he pleaded not guilty and claimed to be tried.

6. On the basis of material placed on record by the prosecution, learned trial Court came to the conclusion that the prosecution had not been able to prove the liability of the accused for offences punishable under Sections 302 and 201 beyond the scope of reasonable doubt and accordingly, it acquitted the accused for commission of offences under Sections 302 and 201 of the Indian Penal Code.

7. We have heard the learned counsel for the parties and also perused the records of the case as well as the judgments passed by the learned trial Court.

8. The case of the prosecution is based on circumstantial evidence. There is no eye witness who has seen the accused committing the crime with which he has been charged.

9. The Honble Supreme Court on circumstantial evidence in **Vijay Thakur** Vs. **State of Himachal Pradesh**, (2014) 14 Supreme Court Cases 609 has carved out the following salient points on the basis of which guilt of the accused can be brought home in the case of circumstantial evidence:

> *"(i) The circumstances from which the conclusion of guilt is to be drawn must or should be and not merely 'may be' fully established;*
>
> *(ii) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;*
>
> *(iii) The circumstances should be of a conclusive nature and tendency;*
>
> *(iv) They should exclude every possible hypothesis except the one to be proved; and*
>
> *(v) Thee 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."*

10. Further, the Hon'ble Supreme Court in **Manthuri Laxmi Narsaiah** *Vs.* **State of Andhra Pradesh**, *(2011) 14 SCC 117* has held as under:

> *"6. It is by now well settled that in a case relating to circumstantial evidence the chain of circumstances has to be spelt out by the prosecution and if even one link in the chain is broken the accused must get the benefit thereof. We are of the opinion that the present is in fact a case of no evidence."*

11. Where a case rests upon circumstantial evidence, such evidence in order to base conviction, must be complete and incapable of explanation of any other hypothesis than that of 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.

12. In these circumstances because it is a case of circumstantial evidence, this Court has to satisfy its judicial conscience as to whether by way of circumstantial evidence produced on record by the prosecution, it has been able to link the commission of the offence with the accused or not.

13. Now, we will apply the above salient features to the facts of the present case in order to ascertain as to whether there is any infirmity or perversity with the judgment passed by the learned trial Court in the present case.

14. According to the appellant, the accused was having motive to do away with the deceased. As per the prosecution, dead body of Sounki Ram was recovered in the morning of 19.04.2011 by PW-10 Guddo Devi and her son PW-4 Sunil Kumar at 9:00 a.m. when they were going to Chukhyal jungle to bring grass and on their way, they saw the dead body of the deceased. Thereafter, PW-2 Reena Devi, daughter of the deceased was called. She also called her mother PW-1 Nakhro Devi and accordingly, they reached the spot. PW-5 Kuldeep Singh, Vice President of the Panchayat reached the spot on the basis of telephonic intimation given to him by Sunil Kumar.

15. It has come in the testimony of complainant Nakhro Devi that the accused was inimical towards her family. According to her, earlier also accused had beaten the complainant and her daughter and in this regard a criminal case was pending against the accused.

16. According to PW-2 Reena Devi, daughter of the deceased, this quarrel with the accused had taken place in the year, 2007.

17. There is no material placed on record by the prosecution nor there is any deposition by PW-2 that after 2007 also there was either any threatenings given or intimidation made to the deceased or his family members by the accused.

18. A perusal of the statement of PW-18 Inspector Parkash Chand demonstrates that in fact cases were filed and were pending both against accused Alamgir as well as deceased Sounki Ram for beating each other.

19. Keeping this aspect of the matter in view that the cases of alleged intimidation pertain as far back as in the year 2007 and Sounki Ram was killed on 19.04.2011, it cannot be concluded that the deceased was killed by the accused to take revenge of the criminal cases so pending against him pertaining to the year, 2007. In this view of the matter, the contention of the appellant that the accused was having a motive to do away with the deceased is not proved beyond reasonable doubt.

20. It has been further urged that another circumstance which links the accused with the commission of the offence is recovery of his chappal. According to the prosecution, this circumstance has been proved by PW-2 Reena Devi, PW-5 Kuldeep Singh and PW-6 Subash Chand.

21. PW-5 Kuldeep Singh has deposed that he runs a shop in the Village and accused had purchased Chappal Ex.-P9 from his shop 1 ½ months back. In his cross-examination, he has stated that he brings 8/10 pairs of Chappal in his shop for sale. His answer to the Court question was that he remembers the names of all his customers because all of them are local. He

has further stated that in 15 days, he sells about 5 to 8 pairs of chappals. He has also deposed that during those days, he sold 7 number chappal to Dinesh Kumar which was country made Eva Chappal and 6 number chappal to Balwinder. He has thereafter said that in those days, he had not sold Chappal to Alamgir. He has further stated that he sold 9 number Chappal to Alamgir about nine months back. He has also admitted it to be correct that he was a witness in a criminal case between the accused and the wife of the deceased. The deposition of this witness reveals that he has made contradictory statements in his examination-in-chief and in his cross-examination. While in Chief, he has stated that Ex. P9 was purchased by the accused from his shop about 1 ½ months back, however in cross-examination, he has stated that he sold 9 number chappals about nine months back to Alamgir. Keeping in view the fact that he is an interested witness because he has admitted that he is a witness in a criminal case pending between the accused and the wife of the deceased, the possibility of the said witness not deposing the truth cannot be ruled out. Incidentally, a perusal of the judgment passed by the learned trial Court will demonstrate that the learned trial Court had disbelieved his testimony on the ground that whereas according to PW-5, the chappal was sold to Alamgir about 1 ½ months back, the fact of the matter was that Ex. P9 was an old chappal and the size number of the same was also not decipherable.

22. PW-6 Subhash Chand in his cross-examination has also corroborated what PW-5 Kuldeep Singh has stated in his examination-in-chief and said that the chappal was purchased by the accused from the shop of Kuldeep Singh about 1 ½ months back. In his cross-examination, he has admitted that Kuldeep is his real brother. Thus, if the testimony of PW-6 is to be believed, then the same is contrary to what his brother PW-5 Kuldeep Singh has stated in his cross-examination. The abovementioned contradiction in the statement of PW-5 has not been satisfactorily explained by the prosecution. In this view of the matter, the statement of PW-6 also does not inspires any confidence. As far as PW-2 Reena Devi is concerned, she obviously is an interested witness being the daughter of the deceased and it is not the case of the prosecution that she was present in the shop of PW-5 when the accused had purchased the chappal allegedly from the shop of PW-5. Therefore, in our considered view, the prosecution has not been able to prove this circumstance also against the accused beyond reasonable doubt. Therefore, it cannot be conclusively said that the chappal so recovered from the spot by the prosecution was that of the accused.

23. Now we will test the last seen theory propounded by the appellant as a link evidence connecting the accused with the commission of the crime. As per the prosecution, the accused was last seen in the company of the deceased in the evening of 18.04.2011 and this stood proved by PW-3 Om Nath and PW-17 Kanta Devi.

24. PW-3 has deposed in the Court that on 18.04.2011, he had gone to Tehsil Jawali and at 6:30 p.m. near Bateru accused met him on his motorcycle. He boarded the motorcycle of the accused and started proceeding towards Nana. On their way, Sounki Ram met them who was under the influence of liquor. Accused threatened and provoked Sounki by saying 'Oye Sounki'. He further deposed that accused purchased some articles at Nana and thereafter they come to the house of Jeevan Kumar at around 7:00/7:15 p.m. Sounki also reached there and told him that dog of Jeevan bites, so he asked him (PW-3) to leave him ahead of the house of Jeevan. Alamgir parked his motorcycle in the courtyard of Jeevan. He inquired from the wife of Jeevan as to where was Jeevan. Alamgir consumed liquor. It was raining at that time. Thereafter, as per PW-3, he went to his house. He has further deposed that next day, he was to go to Jawali with some documents. He further deposed that Guddo Devi was calling wife of Sounki and she told that her husband was lying in the jungle. He has further deposed that he went to the spot where Pradhan and other persons had reached. In his cross-examination, he has stated that the house of Sounki was situated at a distance of 100-150 meters from his house.

25. One thing which is pertinent to be taken note is this that it is not proved on record by prosecution that accused followed Sounki Ram beyond the house of Jeevan. On the other hand, if the testimony of PW-3 is read harmoniously, then what emerges is that in fact the

deceased was last seen not with the accused but with PW-3 because as per PW-3, Sounki Ram had requested him, i.e. PW-3 to leave him ahead of the house of Jeevan.

26. PW-17 Kanta, wife of Jeevan has stated that on the fateful night, Sounki Ram had come to her house and inquired about her husband. At the relevant time, she was preparing food. It was raining and there was no electricity. Thereafter, Kewal came and went away. Thereafter, accused came on motorcycle and parked the same in their courtyard. He asked for water and glass. He consumed liquor in the court yard. She has further deposed that Sounki Ram was going ahead and Alamgir was following him. In her cross-examination, she has admitted it to be correct that Kewal helped Sounki to pass their house because of the dog. She has also stated that thereafter Kewal had also gone following Sounki. She also admitted it to be correct that through the said path many people were passing. She also admitted it to be correct that Alamgir had come after half an hour of the departure of the said two persons.

27. In our considered view, on the basis of the deposition of PW-17 read with deposition of PW-3, it cannot be said that the prosecution has conclusively proved this circumstance against the accused that he was last seen with the deceased. It is no one's case that path leading from the house of Jeevan to the house of the deceased was a desolated path and was not frequented by people generally. On the other hand, PW-17 has stated in her cross-examination that Kewal had helped the deceased to cross her house and had followed him. Thereafter, according to her, Alamgir had reached her house half an hour after the said two persons had passed. Therefore, in our considered view, prosecution has not been able to prove this circumstance against the accused.

28. Now, we will refer to the testimony of PW-16 Muhammad Ali, which has been heavily relied upon by the appellant-State to link the accused with the commission of the offence.

29. PW-16 Mohammad Ali has deposed that he is milk vendor and sells milk at Jawali. According to him, on 19.04.2011 at 7:30 a.m., he boarded Patiyal bus with milk and got down at Kehrian. There accused came alongwith his wife. There was a liquor vend adjacent and accused called him 3-4 times. PW-16 went to him when accused called him third time and there accused told him that he had killed his neighbour Sounki Ram. He has further deposed that his statement was recorded by the learned Judicial Magistrate, which is Ex. PW-16/A. In his cross-examination, he has deposed that after selling milk, he had come back to his house and when he reached his house, police was present in the village. He has also deposed that the police had been visiting the village continuously for 2/3 days. He has denied the suggestion that he has deposed falsely under pressure of the police to save himself. He has admitted it to be correct that on 19th, 20th and 21st April, 2011, no such statement of his was recorded by the police.

30. On the face of it, the testimony of the said witness does not seem to be inspiring confidence. In our considered view, it will not be the normal behaviour of a person to confess commission of a murder in the mode and the manner as has been deposed by PW-16. Even otherwise, it is settled law that extra judicial confession which is made by the accused is admissible in evidence only as a corroborative piece of evidence. Hence in the absence of any substantive evidence against the accused which links him with the commission of the offence alleged against him, the said corroborative piece of evidence looses its significance and the same cannot be made the basis for convicting a person. According to PW-16, the confession was so made before him by the accused on 19.04.2011. It is a matter of record that his statement under Section 164 Cr. P.C. has been recorded on 21st May, 2011. It is also a matter of record that his statement under Section 161 Cr. P.C. has also been recorded by the police on the same date. No cogent explanation has come from the prosecution as to why the said witness remained quiet and did not reveal the alleged extra judicial confession made by the accused either to the police or any other person including members of the Gram Panchayat. In these circumstances, this possibility cannot be ruled out that PW-16 has deposed at the behest of the police and his statement is not true and whatever he has deposed has been stated to falsely implicate the accused. In view of the above, in our considered view, the said circumstances, i.e. extra judicial confession made by the

accused in the presence of PW-16 has also not been proved beyond doubt by the prosecution and, hence prosecution has not been able to prove this circumstance against the accused.

31. The post mortem of the deceased was conducted by PW-7 Dr. Mukesh Bhardwaj. According to him, the cause of the death of deceased was due to right lung laceration with right massive haemothorix with splinic rupture with massive haemoperitonum leading to hypovolumic shock and death. It is evident from his testimony that as per the Chemical Examiner's report, the deceased had consumed alcohol. It has also come in the testimony of PW-3 Kewal Krishan that on the fateful night the deceased was under the influence of liquor. Incidentally, a perusal of the testimony of the wife of the deceased PW-1 Nakhro Devi reveals that her stand is that her husband never used to drink. In other words, the deposition of the said witness does not depict the true facts because she has concealed the factum of her husband being a consumer of alcohol.

32. Therefore, when we assess all these circumstances together and take into consideration the material produced on record by the prosecution to prove the circumstances against the accused to link him with the commission of offence, the only conclusion which can be drawn is that the prosecution has miserably failed to prove any of the circumstance on the basis of which the accused could be linked with the commission of the offence alleged against him.

33. A perusal of the judgment passed by the learned trial Court demonstrates that all these aspects of the matter have been minutely gone into by the learned trial Court. It is on the basis of the careful appreciation of the evidence on record that the learned trial Court has come to the conclusion that the prosecution has not been able to prove beyond reasonable doubt that the accused was guilty of the offences charged against him. In our considered view, there is neither any perversity nor any infirmity with the judgment so passed by the learned trial Court. According to us also, the prosecution has miserably failed to prove beyond reasonable doubt that the accused is guilty of the offence with which he was charge. Therefore, we uphold the judgment passed by the learned trial Court and dismiss the present appeal being devoid of any merit.

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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
Budh Ram ….. Respondent

Cr. Appeal No. 304/2011
Reserved on: June 30, 2016
Decided on: July 1, 2016

N.D.P.S. Act, 1985- Section 18 and 20- Accused tried to run away on seeing the police- he was apprehended- search of his bag was conducted during which 5 kg charas and 1.5 kg opium were recovered – accused was tried and acquitted by the trial Court- held, in appeal that codal formalities were completed on the spot- case property was produced before SHO who re-sealed it and handed it over to MHC- Trial Court had acquitted the accused on the ground that no independent witness was associated by the police, whereas, prosecution witnesses had specifically stated that accused was apprehended at a secluded place- requests were made to the driver and occupants of the vehicle to become witnesses but nobody had agreed- this shows that police had made efforts to associate independent witness but had not succeeded- testimonies of police officials are creditworthy and inspire confidence- minor contradictions are not sufficient to make prosecution case doubtful- appeal allowed- judgment passed by the trial Court set aside and accused convicted of the commission of offences punishable under Sections 18 and 20 of N.D.P.S. Act. (Para-13 to 18)

Cases referred:
State of HP vs. Parkash Chand, 2010(1) Him. L.R. (DB)598
State of H.P. vrs. Mehboon Khan and analogous matters, Latest HLJ 2014 (HP) (FB) 900.

For the appellant : Mr. P.M. Negi, Deputy Advocate General
For the respondent : Mr. Anup Chitkara, Advocate.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

The State has come in appeal against Judgment dated 30.4.2011 rendered by learned Presiding Officer (Special Judge) Fast Track Court, Mandi, District Mandi, HP in Sessions Trial No. 28 of 2010, whereby respondent-accused (hereinafter referred to as 'accused' for convenience sake), who was charged with and tried for offence under Sections 18 and 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'Act' for convenience sake), has been acquitted by the learned trial Court.

2. Prosecution case, in a nutshell, is that on 7.1.2010, ASI Ram Lal, the then IO Police Station, Sadar, Mandi, alongwith ASI Mohan Lal, HHC Dharam Pal, LHC Narpat Ram, Constable Kashmir Singh and Constable Suresh Kumar was present at Khoti Nala on patrolling and *Nakabandi*. At about 12.30 PM, accused came from Aut side. He was carrying a bag on his shoulder. On seeing the police party, he tried to run. He was apprehended. The place was secluded. No independent witnesses were available. Vehicles passing through the road were stopped and occupants were requested to become witnesses. However, they expressed their unwillingness. ASI Ram Lal, in the presence of ASI Mohan Lal and HHC Dharam Pal searched the bag carried by the accused. It was found to be containing another plastic bag like *Boru* of light blue colour containing black coloured material in it, in the shape of sticks. It was found to be cannabis. Besides this, two plastic packets were also found in the *Boru* containing brown coloured liquid material. It was found to be opium. Cannabis weighed 5 kg. Opium weighed 1.500 kg. Recovered cannabis was put in the same plastic *Boru*. Packets containing opium were also put in that same plastic *Boru*. Plastic *Boru* was put in bag and bag was parceled and sealed with 16 seals of 'S'. NCB form in triplicate was filled in on the spot. Sample seal was separately taken. Facsimile of seal was also taken on NCB form. Seal after use was handed over to ASI Mohan Lal. Recovered cannabis and opium were taken into possession by the police vide memo Ext. PW-1/B. *Rukka* was sent to the police station through LHC Narpat Ram, on the basis of which FIR No. 16/2010 was recorded against the accused. Case property alongwith sample seals was handed over to Inspector Hari Pal Saini. He resealed the same with seal impression 'S' and thereafter deposited the case property alongwith sample seal, NCB form and other related documents with Incharge Malkhana Anil Kumar. Special report was prepared and sent to Additional SP Mandi. Case property was sent for chemical examination. Report of the FSL is Ext. PW-8/B. Investigation was completed. Challan was put in the Court after completing all the codal formalities.

3. Prosecution has examined as many as eleven witnesses to prove its case against the accused. Accused was also examined under Section 313 CrPC. He pleaded innocence. Accused was acquitted as noticed above. Hence, this appeal by the State.

4. Mr. P.M. Negi, Deputy Advocate General, has vehemently argued that the prosecution has proved its case against the accused.

5. Mr. Anoop Chitkara, Advocate, has supported Judgment dated 30.4.2011.

6. We have heard the learned counsel for the parties and also gone through the Judgment and record carefully.

7. ASI Mohan Lal (PW-1) testified that on 7.1.2010 he alongwith HHC Dharam Pal, LHC Narpat Ram, ASI Ram Lal, Constable Suresh Kumar and Constable Kashmir Singh was present at Khoti Nalla and had set up *Naka* at Khoti Nalla. Accused was seen coming on foot from Aut side towards Mandi. He was carrying a bag on his shoulder. He tried to run away. He was apprehended. Spot was secluded one so IO asked the drivers and conductors of the bus passing there for being associated as witnesses in the case. However, they refused to be associated as independent witnesses. Thereafter, he and HHC Dharam Pal were associated as witnesses in the case. Bag carried by accused was searched. A light blue coloured *Boru* containing black coloured material in the shape of sticks and other two polythene packets containing liquid black material was recovered. Black material was found to be cannabis and liquid material was found to be opium. Cannabis weighed 5 kg and opium weighed 1.5 kg. Recovered cannabis was put in a parcel alongwith *Boru*. Parcel was sealed with seal impression 'R' at 16 places. Opium packets were also put in same parcel and sealed with seal impression 'R' at 16 places. Recovery memo Ext. PW-1/B was prepared. NCB form in triplicate was also filled in at the spot. Seal was handed over to him. Sample seal Ext. PW-1/C was taken on a piece of cloth. In his cross-examination, he has admitted that they left the Police Station at 8.30 AM in a private Sumo Jeep driven by a private driver. They took the vehicle straight to Khoti Nalla They did not stop on the way. No *Naka* was laid before reaching the spot. Khoti Nala was 26 kms from PS Mandi on National Highway 21. After the proceedings were completed, they returned in a private bus to the Police Station. He did not know if tickets were purchased. He also deposed that *Naka* was laid at Khoti Nalla at 9.30 AM to 12.30 PM. He denied the suggestion that there were two shops and a residence at the alleged place of *Naka* They checked about 20-25 vehicles at Khoti Nala. About 15-20 buses were stopped by the IO and they had requested the drivers and conductors of the said buses to become independent witnesses.

8. LHC Narpat Ram (PW-2) deposed the manner in which search, seizure and sampling proceedings were completed at the spot. He was handed over *Rukka* by the IO. He took the same to the Police Station, on the basis of which FIR Ext. PW-2/A was registered. In his cross-examination, he has admitted that about 30-40 vehicles were checked by the IO before the accused was spotted. He denied the suggestion that there were two tea shops and a house at the alleged place of *Naka*. He denied that there was a temple at the place of incident. IO had stopped 8-10 vehicles and requested their drivers to become witnesses. IO had hired Sumo Taxi from Taxi Stand Mandi.

9. HC Anil Kumar (PW-3) deposed that on 7.1.2010 Inspector/ SHO Hari Pal Saini deposited with him case property alongwith relevant documents. He entered the case property in Malkhana Register at Sr. No. 953. He proved copy of abstract of Malkhana Register Ext. PW-3/A. Case property was sent to FSL through Constable Sanjeev Kumar vide RC No. 249/2010, copy of which is Ext. PW-3/B. Constable after obtaining receipt from FSL Junga, over RC, handed over the same to him on his return to the Police Station. Case property remained safe and intact during the period it remained in his custody. In his cross-examination, he has admitted that olumn No. 7 of the Malkhana Register did not contain the signature of the SHO. He admitted that this column was meant for signature of the person who received the case property. However, the property has remained in the safe custody from the date of its seizure till production in the Court and the column No. 7 being not signed by the SHO, has not prejudiced the case of the accused.

10. HC Sanjeev Kumar (PW-6) deposed that on 8.1.2010, Anil Kumar handed over to him one parcel alongwith related documents for delivering the same to FSL Junga vide RC No. 249/10, Ext. PW-3/B. He took the case property and delivered at FSL Junga on the same day. He obtained receipt over RC. He deposited the receipt with MHC Police Station on his return. Case property remained safe and intact during the period it remained in his custody.

11. Inspector Hari Pal (PW-8) deposed that on 7.1.2010, at about 5.30 PM, case property was deposited with him by ASI Ram Lal. He resealed the same with seal impression 'S' at nine places. Case property was already sealed with seal 'R' at 16 places and seals were intact. He

prepared reseal memo Ext. PW-8/A. He handed over the case property to the Incharge Malkhana Anil Kumar.

12. ASI Ram Lal (PW-11) deposed that on 7.1.2010, he alongwith ASI Mohan Lal, HHC Dharam Pal, LHC Narpat Ram, Constable Suresh Kumar and Constable Kashmir Singh proceeded towards Pandoh Khoti Nala for *Nakabandi*. They set up *Naka* at Khoti Nala on National Highway at about 11 AM. At about 12.30 PM a person was seen coming from Aut side towards Pandoh. He was coming on foot and was carrying a bag on his right shoulder. The person on seeing the police tried to flee. He was nabbed. ASI Mohan Lal and HHC Dharam Pal were associated as witnesses. Search of the bag carried by the accused was conducted. A plastic *Boru* light blue in colour was found and inside the *Boru* black coloured material in the shape of sticks was recovered. It was found to be cannabis. Two plastic envelopes containing black molten material were found which was found to be opium. Cannabis weighed 5 kg and opium weighed 1.5 kg. Cannabis and opium were packed and sealed with same *Boru* and plastic envelope alongwith bag. Parcel was sealed with seal impression 'R' at sixteen places. Sample seal Ext. PW-1/C was separately drawn over a piece of cloth. Seal after use was handed over to ASI Mohan Lal. He prepared *Rukka* Ext. PW-11/A and sent to the Police Station through LHC Narpat Ram for registration of the case. In his cross-examination, he has admitted that there were two shops located at Khoti Nala but these were located at a distance of about 200 metres from the place where *Naka* was laid. He admitted that there was a bridge on Khoti Nala. He further admitted that Mandi side of Khoti Nala, Pandoh town was situate and on the other side, towards Kullu, Aut town was situate. He denied the suggestion that there was a village near Khoti Nala at a height of 50-60 metres. He further admitted that the police party had gone to Khoti Nala in a public bus from Bus Stand Mandi. He did not remember whether it was a private bus or HRTC bus. He also did not remember if tickets were purchased for their journey. Khoti Nala was about 26 kms from Mandi. On the way they had got down from the bus and had also laid *Naka* at one or two places. He did not remember the places where *Naka* was laid. When they got down from first bus, they hired another bus for Khoti Nala. Accused was spotted when he had reached within 20 metres from them. Columns No. 1 to 8 of NCB form Ext. PW-8/C were filled by him on the spot.

13. Case of the prosecution, precisely, is that the accused was apprehended at a place near Khoti Nala. He was carrying a bag. He tried to flee. He was overpowered. 5 kg cannabis and 1.5 kg opium was recovered from the bag. All the codal formalities were completed on the spot. Case property was produced before PW-8 Inspector Hari Pal. He resealed the same with seal impressions of 'S'. Case property was produced before MHC Anil Kumar. He made entry in the Malkhana Register at Sr. No. 953. Case property was sent to FSL Junga through Constable Sanjeev Kumar (PW-6) by Anil Kumar (PW-3). Sanjeev Kumar (PW-6) has deposited the case property. It remained intact in their custody. Report of FSL is Ext. PW-8/B. Learned trial Court has acquitted the accused on the ground that the independent witnesses were not associated at the time when accused was arrested, search, seizure and sampling proceedings were completed at the spot. According to the learned trial Court, there were major contradictions in the statements of PW-1 ASI Mohan Lal and ASI Ram Lal (PW-11) at what time, *Naka* was laid. The ground for the acquittal of the accused is that the prosecution did not prove that the contraband recovered from the accused was cannabis and opium. He has relied upon 2010(1) Him. L.R. (DB)598, State of HP vs. Parkash Chand.

14. PW-1 Mohan Lal in his statement has specifically deposed that the place where accused was apprehended was a secluded place. IO had requested the drivers and conductors of the buses passing through the area to be associated as witnesses in the case but they were not ready and willing to be associated as witnesses. He has denied the suggestion, in the cross-examination that there were two shops and residence at the alleged place of *Naka* . PW-2 Narpat Ram has also deposed that no person from the locality came on the spot. IO had stopped 8-10 vehicles and requested their drivers to become witness. PW-11 Ram Lal has also deposed that since the place was secluded, no independent witnesses were available to become witnesses. He stopped vehicles and the occupants of the vehicles were requested to become witnesses, however

nobody was ready and willing to become witness. In these circumstances, HHC Dharam Pal and Mohan Lal were associated as witnesses. In his cross-examination, he has admitted that two shops and residence were situate at Khoti Nala but these were 200 metres from the place where *Naka* was laid.

15. It is, thus, evident that the police has tried to join independent witnesses but they were not available. Statements of the official witnesses i.e. PW-1 ASI Mohan Lal, HHC Narpat Ram (PW-2) and ASI Ram Lal (PW-11) are trustworthy and inspire confidence. Mohan Lal (PW-1) and Narpat Ram (PW-2) deposed that they have gone to the spot in Sumo Jeep. However, ASI Ram Lal (PW-11) has deposed that he has gone in bus. These are minor contradictions in the statements of PW-1 Mohan Lal, PW-2 Narpat Ram and PW-11 Ram Lal about the mode of transportation to reach the spot. There are bound to be minor contradictions when a case is registered and statements of the witnesses are recorded in the Court after a considerable gap of time. PW-1 Mohan Lal has deposed that *Naka* was laid at 9.30 AM, PW-11 Ram Lal deposed that *Naka* was laid at 11 AM. This is a minor contradiction. It will not help the case of the accused in any manner. Fact of the matter is that *Naka* was set up at Khoti Nala, from where accused was arrested at about 12.15 AM.

16. Learned trial Court has erred in law by relying upon judgment reported in 2010(1) Him. L.R. (DB)598, State of HP vs. Parkash Chand as the same has been overruled by this Court in the case of ***State of H.P. vrs. Mehboon Khan and analogous matters,*** reported in ***Latest HLJ 2014 (HP) (FB) 900.*** The Full Bench of this Court has categorically held that there is no legal requirement of the presence of particular percentage of resin to be there in the sample and the presence of the resin in purified or crude form is sufficient to hold that the sample was that of *Charas*. It has been held as follows:

> "………….The separated resin is cannabis resin not only when it is in 'purified' form, but also when in 'crude' form or still mixed with other parts of the plant. Therefore, the resin mixed with other parts of the plant i.e. in 'crude' form is also charas within the meaning of the Convention and the Legislature in its wisdom has never intended to exclude the weight of the mixture i.e. other parts of the plant in the resin unless or until such mixture proves to be some other neutral substance and not that of other parts of the cannabis plant. Once the expert expressed the opinion that after conducting the required tests, he found the resin present in the stuff and as charas is a resinous mass and after conducting tests if in the opinion of the expert, the entire mass is a sample of charas, no fault can be found with the opinion so expressed by the expert nor would it be appropriate to embark upon the admissibility of the report on any ground, including non-mentioning of the percentage of tetrahydrocannabinol or resin contents in the sample…………
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> f. We are also not in agreement with the findings recorded by the Division Bench in Sunil's case that " mere presence of tetrahydrocannabinol and cystolithic hair without there being any mention of the percentage of tetrahydrocannabinol in a sample of charas is not an indicator of the entire stuff analyzed to be charas" for the reason that the statute does not insist for the presence of percentage in the stuff of charas and mere presence of tetrahydrocannabinol along with cystolithic hair in a sample stuff is an indicator of the same being the resin of cannabis plant because the cystolithic hair are present only in the cannabis plant. When after observing the presence of tetrahydrocannabinol and cystolithic hair, the expert arrives at a conclusion that the sample contains the resin contents, it is more than sufficient to hold that the sample is of charas and the view so expressed by the expert normally should be honoured and not called into question. Of course, neutral material which is not obtained from cannabis plant cannot be treated as resin of the cannabis plants. The resin rather must have been obtained from the cannabis plants may be in 'crude' form or 'purified' form. In common parlance charas is a hand made drug made from extract of cannabis plant. Therefore, any mixture with or without any neutral material

> of any of the forms of cannabis is to be considered as a contraband article. No concentration and percentage of resin is prescribed for 'charas' under the Act.."

17. Prosecution has proved beyond reasonable doubt that cannabis and opium were recovered from the conscious and exclusive possession of the accused.

18. Accordingly, the appeal is allowed. Judgment dated 30.4.2011 rendered by learned Presiding Officer (Special Judge) Fast Track Court, Mandi, District Mandi, HP in Sessions Trial No. 28 of 2010 is set aside. The accused is convicted for offences punishable under Sections 18 and 20 of the Act. Accused be produced to be heard on quantum of sentence on 7.7.2016. Bail bonds of accused are cancelled.

19. Registry is directed to prepare and send the production warrant to the quarter concerned.

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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
Gian Chand ……Respondent

Cr. Appeal No. 317/2012
Reserved on: June 30, 2016
Decided on: July 1, 2016

Code of Criminal Procedure, 1973- Section 161- Keeping in view the fact that witnesses are resiling from their earlier statements, Principal Secretary (Home) directed to issue necessary directions to Superintendents of Police to follow proviso to Section 161 (3) in letter and spirit by recording statements of witnesses in writing as well as by audio/video/electronic means to curb the tendency of the witnesses resiling from/disowning their earlier statements. (Para-22)

N.D.P.S. Act, 1985- Section 20- A bus was stopped by the police for checking- accused was travelling in the bus on seat No. 23- he had kept a bag between his legs- bag was checked and was found to be containing 3.3 kg charas- accused was tried and acquitted by the trial Court- held in appeal, that driver and conductor had not supported the prosecution version- however, it was admitted that they had put signatures on the memo- statements of official witnesses inspire confidence- all the formalities were completed at the spot- case property remained intact- it was proved that contraband was recovered from the conscious and exclusive possession of the accused- appeal allowed and accused convicted of the commission of offence punishable under Section 20 of N.D.P.S. Act. (Para-17 to 20)

Case referred:
State of H.P. vrs. Mehboon Khan and analogous matters, Latest HLJ 2014 (HP) (FB) 900

For the appellant : Mr. Neeraj K. Sharma, Deputy Advocate General
For the respondent : Mr. Sat Parkash, Advocate.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

The State has come in appeal against Judgment dated 13.3.2012 rendered by the learned Special Judge-II, Solan, District Solan, Himachal Pradesh in Sessions Trial No. 13-S-7 of

2012/2010, 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 by the learned trial Court.

2. Prosecution case, in a nutshell, is that on the intervening night of 5/6.1.2010, a police party headed by ASI Santosh Kumar, the then Incharge, Traffic Barrier, Parwanoo started routine checking of vehicles passing through barrier. At about 12.15 AM (night) on 6.1.2010, a Haryana Roadways bus bearing registration No. HR-63-A-8394 came from Shimla side proceeding to Delhi. It was stopped for checking. Accused was travelling in the bus on seat No. 23. One more passenger was also sitting on the said bench. Accused had kept a *Pithoo* bag in between his legs. It was checked. It contained a packet wrapped with brown tape. One portion of the said packet was opened. It contained black coloured substance in the shape of sticks wrapped with plastic. It was found to be *Charas*. Balwan Singh was the driver and Om Kanwar was the conductor on the said bus. They were associated as witnesses. Accused alongwith bag was taken to the barrier at Parwano. Driver and conductor of the bus told that some of the passengers had to board train from Ambala and they were in a hurry therefore they could not take part in the investigation. Bus, alongwith passengers was allowed to go. *Charas* weighed 3.3 Kg. It was put in the same packet and packet was put in the bag. Bag was packed in a cloth parcel. It was sealed with four seal impressions of 'A'. Sample seal was separately taken on a piece of cloth. NCB form was filled in and facsimile of seal 'A' was also taken on it. Case property was taken into possession by the police. *Rukka* was prepared. It was sent to the Police Station through Constable Vijay Kumar. FIR No. 3/2010 was recorded against the accused. Case property was produced before the SHO Police Station Parwanoo. He resealed the same with five seal impressions of seal 'H'. Sample seal 'H' was separately taken. He also filled in relevant columns of NCB form and facsimile of seal 'H' was also taken on the NCB form. Case property, alongwith sample seals 'A' and 'H' and NCB form in triplicate was deposited with MHC Bhagi Rath, who made entry in the Malkhana Register. Case property was sent to laboratory through HHC Santosh Singh. It was found to be *Charas* vide Ext. PW-12/G. Special report was sent to SDPO Parwanoo. Investigation was completed. Challan was put in the Court after completing all the codal formalities.

3. Prosecution has examined as many as fourteen witnesses to prove its case against the accused. Accused was also examined under Section 313 CrPC. He pleaded innocence. Accused was acquitted as noticed above. Hence, this appeal by the State.

4. Mr. Neeraj K. Sharma, Deputy Advocate General, has vehemently argued that the prosecution has proved its case against the accused.

5. Mr. Sat Parkash, Advocate, has supported Judgment dated 13.3.2012.

6. We have heard the learned counsel for the parties and also gone through the Judgment and record carefully.

7. Balwan Singh (PW-1) deposed that he was working as a driver with the Haryana Roadways Jhajhar Depot. On 5.1.2010, he was coming from Shimla in Bus No. HR-63-A-8394 to Delhi. He was driving the bus. Om Kanwar was conductor on the bus. They started from Shimla at about 9 PM. They reached at about 12-12.15 AM on 6.1.2010 at Police Barrier Parwanoo. Police stopped the vehicle. Police started checking the bus. Passengers demanded that they should proceed further. He alongwith passengers entered the police booth. Police told that one person had been apprehended. He did not know from where the person was apprehended. He was declared hostile and cross-examined by the learned Public Prosecutor. In his cross-examination by the learned Public Prosecutor, he has admitted that Bus No. HR-63-A-8394 was enroute from Shimla to Delhi. It was searched on 6.1.2010 at about 12.15 AM at Parwanoo. He denied the suggestion that on seats No. 21, 22 and 23, only two passengers were sitting. Volunteered that 70 passengers were in the bus. It was a 52 seater bus. He denied the suggestion that Pithunuma bag was kept by the person who was sitting on window side of the bus on seat Nos. 21 to 23, and he was apprehended by the police. He denied the suggestion that

the recovered bag was wrapped with tape. Volunteered that nothing was shown to him. He denied the suggestion that accused was apprehended in Bus No. HR-63-A-8394. He admitted that he was in the bus, when bus was stopped. Conductor was also present in the bus. He denied portions 'A' to 'A', 'B' to 'B' and 'C' to 'C' of his statement mark X. He was also cross-examined by the learned defence Counsel. He admitted in his cross-examination that the bus was overcrowded. Many passengers were standing in the bus. He admitted that at Parwanoo barrier there were marketing office, Sales Tax Office and Forest Office. He also admitted that people were standing in queue to pay their taxes. There was a tea shop adjacent to the sales tax office.

8. Om Kanwar (PW-2) testified that on 5.1.2010, they started journey from Shimla to Delhi in Bus No. HR-63-A-8394. They started from Shimla at about 9 PM. At about 12.15 AM they reached Parwanoo on 6.1.2010. Police stopped the bus. Police checked the vehicle. Police were checking the luggage of the vehicle. Volunteered that he had deboarded the bus. There were 70 passengers in the bus. Two persons were sitting on seats No. 21, 22 and 23. He was also declared hostile and cross-examined by the learned Public Prosecutor. In his cross-examination by the Public Prosecutor, he denied the suggestion that there were 70 passengers in the bus and three persons were sitting on seats No. 21 to 23. He also denied the suggestion that police checked the persons sitting in the bus in his presence or in the presence of Driver. He has admitted that he has issued tickets amounting to `242/- to the passenger which are Exts. P1 to P8. However, he denied that he had issued tickets Ext. P1 to Ext. P8 to the accused. However, fact of the matter is that he has admitted his signatures on Ext. P1 to Ext. P8 in red circle. He denied portions 'A' to 'A', 'B' to 'B' and 'C' to 'C' of his statement mark X1.

9. Rati Bhan Sub Inspector, Haryana Roadways (PW-3) deposed that as per record, on 5.1.2010, Balwan Singh No. 98 was driver and Om Kanwar was the conductor on Bus No. HR-63-A-8394. They started from Shimla in the bus on 5.1.2010.

10. LHC Jai Nand (PW-4) deposed that at 12.15 AM, Bus No. HR-63-A-8394 enroute Shimla to Delhi came at Parwanoo. It was stopped for checking. IO entered the bus alongwith other officials. Luggage of passengers was checked. ASI Santosh Kumar after checking the luggage of passengers, reached near seats No. 21 to 23 and found that two persons were sitting there. Accused was sitting on seat No. 23. A *Pithunuma* bag was found in between legs of person sitting on seat No. 23. Bag was wrapped with tape. On opening the bag, black substance was found in the bag. It was found to be *Charas*. Driver Balwan Singh and Conductor Om Kanwar were associated during the search. Accused alongwith recovered bag, driver and conductor of the bus was taken to the barrier at Parwanoo. The bag was opened in his presence. On opening the bag, *Charas* was recovered. It weighed 3.3 kg. Search, seizure and sampling proceedings were completed at the spot. *Rukka* mark AB was prepared by the IO. *Rukka* alongwith other documents through Constable Vijay Kumar was sent to the Police Station Parwanoo. He admitted in his cross-examination that there were offices of Excise, RTO and Forest and Marketing Check Post at Parwanoo barrier and they remained open 24 hours. He admitted that there were persons on the private contractor barrier who charged entry fee from all vehicles entering Himachal Pradesh. Vehicles also remained parked 24 hours at the barrier for paying taxes.

11. HHC Santosh Singh (PW-7) deposed that he remained posted as HHC in Police Station, Parwanoo in the year 2010. On 6.1.2010, HHC Bhagi Rath PS Parwanoo handed over to him one sealed parcel which was resealed with seal impressions of 'H', five in number, vide RC No. 101/09-10 alongwith sample of seals' A' and 'H', NCB form, FIR and copy of memo. He deposited the case property alongwith above mentioned documents on 6.1.2010 at FSL Junga and handed over receipt to MHC Bhagi Rath.

12. HHC Vijay Kumar (PW-8) also deposed the manner in which accused was apprehended while sitting on seat No. 23 and contraband was recovered from his bag. It weighed 3.3 kg. *Rukka* was handed over to him. He took the same 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 admitted that 8-10 passengers told that they had to board train

from Ambala. He admitted that the IO directed the Driver and the Conductor of the bus to proceed the journey alongwith passengers as the passengers were in a hurry. He admitted that sealing proceedings were conducted in the presence of witnesses Devender Kumar and Jai Nand after allowing the bus to proceed further. He identified the case property in the Court. IO tried to associate independent witnesses but all the passengers refused to be associated in the proceedings. All the offices situate at Parwanoo were busy throughout. Since officials at the tax barrier remain busy in tax collection, they were not associated in the proceedings. Persons who were in the queue refused to join investigation. Nobody came to the police barrier from the queue. He admitted that due to the slip of tongue he has admitted that driver and conductor were allowed to proceed further after sealing.

13. HC Bhagi Rath (PW-9) deposed that on 6.1.2010, at 2.30 AM, SHO Govind Ram handed over to him one sealed parcel stated to be containing 3.3 kg *Charas* in the shape of sticks sealed with seal impressions of 'H', five in number alongwith samples of seals 'H' and 'A', NCB form in triplicate, two copies of seizure memos. Case property was kept by him in safe custody in the Malkhana. He entered the case property at Sr. No. 391/10 of Malkhana Register of Police Station, Parwanoo. On 6.1.2010, he handed over the parcel alongwith samples of seals 'H' and 'A', NCB form in triplicate, seizure memo to HHC Santosh Kumar vide RC No. 101/09 dated 6.1.2010 to be deposited with FSL Junga. He proved extract of Malkhana Register Ext. PW-9/B. He has not tampered with the case property during the time it remained in his possession.

14. HC Devender Sharma (PW-10) deposed the manner in which accused was apprehended while sitting in seat No. 23. Bag was searched. It contained *Charas*. In his cross-examination, he admitted that at Parwanoo Barrier there were Excise Office, RTO Office, Forest Department, which remained open 24 hours. He also admitted that the employees of the contractor who charged toll tax from the vehicles also remained present at Parwanoo barrier 24 hours. He also admitted that a number of vehicles remained parked at Parwanoo. Many people were standing in queue for paying their taxes.

15. ASI Santosh Kumar (PW-11) also deposed that the accused was found sitting on seat No. 23. He was carrying a bag. Bag was opened. It contained *Charas*. Codal formalities were completed at the spot. He also admitted that there were offices of Excise, RTO, Forest, which remained open 24 hours. Employees of the contractor remained present at the barrier for collecting toll tax from the vehicles coming towards Shimla. He has not associated any witness from the office of Excise, RTO, Forest or the employees of the contractor. Volunteered that they refused to join the investigation. He denied the suggestion that the accused was not travelling in the bus.

16. Govind Ram (PW-12) deposed that on 6.1.2010 at about 2.30 AM, Constable Vijay Kumar produced before him, a parcel sealed with seal 'A' having four impressions alongwith NCB form in triplicate and its columns No. 1 to 8 were filled by ASI Santsoh Kumar. The parcel was stated to be containing 3.3 Kg *Charas*. He found seal impressions intact. Case property was sent by ASI Santosh Kumar through Constable Vijay Kumar. Sealed parcel was put in another cloth parcel and was resealed with five seal impressions of 'H'. Sample of seal 'H' was drawn. He also filled in columns No. 9 to 11 of the NCB form. Specimen of seal 'H' was also taken on NCB form. Case property alongwith samples of seals 'A' and 'H' and NCB form in triplicate were entered in Malkhana Register of Police Station, Parwanoo by MHC Bhagi Rath. Case property was kept in safe custody. It was sent to FSL Junga. All the seals were found intact as per FSL report Ext. PW-12/G. Prosecution has given the explanation that why the independent witnesses could not be associated at 12.15 AM.

17. Bus bearing No. HR-63-A-8394 was on its way to Delhi. It was signalled to stop at 12.15 AM at Police Barrier Parwanoo on 6.1.2010. Accused was occupying seat No. 23. He was carrying a bag. Bag was checked. It contained *Charas*. All the codal formalities were completed at the spot. Case property was produced before SHO. He resealed the same and deposited with MHC Bhagi Rath. Case property was sent to FSL Junga. All the seals were found intact. Prosecution

case has not been supported by PW-1 Balwan Singh and PW-2 Om Kanwar in its entirety. They have resiled from their statements recorded under Section 161 CrPC. However, fact of the matter is that PW-2 Om Kanwar, in his cross-examination, has admitted his signatures on Exts. P1 to P8. These two witnesses were the employees of Haryana Roadways but have tried to help the accused by resiling from their earlier statements recorded by the police. In this case, surprisingly, PW-8 Vijay Kumar, the official witness, was also declared hostile. However, in his cross-examination by the learned Public Prosecutor he has supported the case of the prosecution. He has also deposed that the IO has tried to associate independent witnesses but all the passengers refused to be associated in the proceedings. He also deposed that the persons who were in the queues, refused to join investigation. Nobody came to the police barrier. He also deposed that the officials in tax barrier remained busy in tax collection that is why they were not associated in the proceedings. Statement of PW-4 Jai Nand inspires confidence in the manner in which accused was apprehended, codal formalities were completed at the spot. He has admitted that the offices of Excise, RTO and Marketing Check Post remained open 24 hours and employees of the contractor also used to work 24 hours. Similarly, PW-10 Devender Sharma deposed that the RTO office, Forest Office remained open 24 hours and employees of contractor also used to collect toll tax 24 hours. Vehicles were parked at Parwanoo. However, fact of the matter is that the police have tried earlier to join the passengers of the bus as witnesses but they were not ready and willing to be joined as witnesses. Officials of the RTO and Excise Offices were busy. Persons deployed in these offices could not be associated as independent witnesses. Statements of official witnesses i.e. PW-4 Jai Nand, PW-10 Devender Sharma and PW-11 Santosh Kumar duly prove that the accused was found in conscious possession of the contraband while he was travelling from Shimla to Delhi. No doubt, there is a defect in the investigation carried out by the police, however, accused can not take advantage of the defective investigation when entire evidence is taken into consideration.

18. Judgment relied upon by the learned trial Court in **Sunil vs. State** has been overruled by this Court in the case of **State of H.P. vrs. Mehboon Khan and analogous matters,** reported in **Latest HLJ 2014 (HP) (FB) 900.** The Full Bench of this Court has categorically held that there is no legal requirement of the presence of particular percentage of resin to be there in the sample and the presence of the resin in purified or crude form is sufficient to hold that the sample was that of Charas. It has been held as follows:

> "………….The separated resin is cannabis resin not only when it is in 'purified' form, but also when in 'crude' form or still mixed with other parts of the plant. Therefore, the resin mixed with other parts of the plant i.e. in 'crude' form is also charas within the meaning of the Convention and the Legislature in its wisdom has never intended to exclude the weight of the mixture i.e. other parts of the plant in the resin unless or until such mixture proves to be some other neutral substance and not that of other parts of the cannabis plant. Once the expert expressed the opinion that after conducting the required tests, he found the resin present in the stuff and as charas is a resinous mass and after conducting tests if in the opinion of the expert, the entire mass is a sample of charas, no fault can be found with the opinion so expressed by the expert nor would it be appropriate to embark upon the admissibility of the report on any ground, including non-mentioning of the percentage of tetrahydrocannabinol or resin contents in the sample…………..
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> f. We are also not in agreement with the findings recorded by the Division Bench in Sunil's case that " mere presence of tetrahydrocannabinol and cystolithic hair without there being any mention of the percentage of tetrahydrocannabinol in a sample of charas is not an indicator of the entire stuff analyzed to be charas" for the reason that the statute does not insist for the presence of percentage in the stuff of charas and mere presence of tetrahydrocannabinol along with cystolithic hair in a sample stuff is an indicator of the same being the resin of cannabis plant because the cystolithic hair are

present only in the cannabis plant. When after observing the presence of tetrahydrocannabinol and cystolithic hair, the expert arrives at a conclusion that the sample contains the resin contents, it is more than sufficient to hold that the sample is of charas and the view so expressed by the expert normally should be honoured and not called into question. Of course, neutral material which is not obtained from cannabis plant cannot be treated as resin of the cannabis plants. The resin rather must have been obtained from the cannabis plants may be in 'crude' form or 'purified' form. In common parlance charas is a hand made drug made from extract of cannabis plant. Therefore, any mixture with or without any neutral material of any of the forms of cannabis is to be considered as a contraband article. No concentration and percentage of resin is prescribed for 'charas' under the Act"

19. It was also not necessary to indicate the percentage of the Tetrahydrocannabinol in the report. Prosecution has proved beyond reasonable doubt that the contraband was recovered from the conscious and exclusive possession of the accused

20. Accordingly, the appeal is allowed. Judgment dated 13.3.2012 rendered by the learned Special Judge-II, Solan, District Solan, Himachal Pradesh in Sessions Trial No. 13-S-7 of 2012/2010 is set aside. The accused is convicted for the commission of offence punishable under Section 20 of the Act. Accused be produced to be heard on quantum of sentence on 7.7.2016. Bail bonds of the accused are cancelled.

21. Registry is directed to prepare and send the production warrant to the quarter concerned.

22. However, before parting with the judgment, it is pertinent to note that a number of witnesses resile from their statements recorded under Section 161 CrPC. In the present case, the police official and the employees of Haryana Roadways have resiled from their earlier statements recorded under Section 161 CrPC. It is a dangerous trend. Thus, in order to discourage the practice of the witnesses resiling from their earlier statements recorded under Section 161 CrPC, Principal Secretary (Home) to the Government of Himachal Pradesh is directed to issue necessary directions to all the Superintendents of Police in the State of Himachal Pradesh to ensure that Proviso-1 to Sub-section 3 of Section 161 CrPC inserted by Act 5 of 2009 (w.e.f. 31.12.2009) be followed scrupulously, in letter and spirit, in future by recording statements under Section 161 CrPC by the IO, in writing and also by audio/video/electronic means to curb the tendency of the witnesses resiling from/disowning their earlier statements recorded under Section 161 CrPC, in the interest of justice. A certified copy of this judgment be sent to the Principal Secretary (Home) to the Government of Himachal Pradesh, for doing the needful, as ordered herein above.

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

The New India Assurance Co**.** .....Appellant

Versus

Minakshi Sharma and others ... Respondents

FAO No.:203 of 2011 with
CO No.: 321 of 2011.
Decided on : 01.07.2016

Motor Vehicles Act, 1988- Section 149- It was contended that vehicle did not have valid permit and the insurer is not liable- held, that this issue was not pressed before the Tribunal and cannot

be agitated in appeal- otherwise no evidence was led to prove that there was no valid permit- appeal dismissed. (Para-7)

For the appellant: Mr.B.M. Chauhan, Advocate.
For the respondents: Ms.Seema Guleria, Advocate, for respondent No.1.
Mr.S.K. Banyal, Proxy Counsel, for respondents No.2 and 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

This appeal is directed against the award, dated 26th February, 2011, passed by the Motor Accident Claims Tribunal-II, Una, District Una, H.P. (for short, "the Tribunal") in Claim Petition No.11 of 2010, titled Minakshi Sharma vs. Balbir Singh and others, whereby the claim petition was allowed, compensation to the tune of Rs.2,83,,400/-, alongwith interest at the rate of 9% per annum from the date of filing of the claim petition till the realization thereof, 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 and the driver have not questioned the impugned award on any ground, thus, the same has attained finality so far as it relates to them.

3. Feeling aggrieved, the insurer has challenged the impugned award by the medium of instant appeal, while the claimant has questioned the impugned award by filing Cross Objections No.321 of 2011.

4. Heard and gone through the record.

5. The Tribunal, while deciding issue No.1, after making reference to the evidence, held that the claimant has proved that Rakesh Kumar had died in the accident which was the outcome of rash and negligent driving of driver, namely, Balbir Singh, while driving bus bearing No.PB-07U-6979. There is no challenge to the said findings. Accordingly, the same are upheld.

6. Qua issues No.3 and 4, the Tribunal has rightly held that the claimant had cause of action and the claim petition was maintainable. Accordingly, the said findings are upheld.

7. During the course of hearing, the learned counsel for the insurer only argued that the offending vehicle was not having a valid route permit and therefore, the insurer is not liable. The submission made by the learned counsel for the appellant revolves around issue No.6. Issues No.5 to 9 were decided before the Tribunal as not pressed, therefore, the appellant is precluded to lay any challenge to the said findings. Moreover, it was for the insurer to lead evidence and discharge the onus, has not led any evidence for which reason the insurer has not pressed issues No.5 to 9 before the Tribunal and were decided accordingly. Accordingly, the findings returned by the Tribunal on issues No.5 to 9 are upheld.

8. Coming to issue No.2 and the Cross Objections filed by the claimant for enhancement, I have gone through the assessment made by the Tribunal and am of the view that the Tribunal has rightly made the guess work and has rightly assessed the compensation. Accordingly, the findings returned by the Tribunal on issue No.2 are upheld.

9. Having said so, there is no merit in the appeal as well as Cross Objections and the same are dismissed.

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

FAO No. 184 of 2011
a/w FAO No. 227 of 2011
Decided on: 01.07.2016

FAO No. 184 of 2011

United India Insurance Company Limited ...Appellant
Versus
Smt. Kanta Rani alias Kanta Devi and others ...Respondents.

FAO No. 227 of 2011

United India Insurance Company Limited ...Appellant.
Versus
Smt. Bimla Devi and others ...Respondents.

Motor Vehicles Act, 1988- Section 149- It was contended that vehicle was not insured at the time of accident- owner had committed willful breach of the terms and conditions of the policy- held, that insurer had not pressed issues No. 3 and 4, burden of which was placed upon it- burden to prove the breach of the terms and conditions was upon the insurer but no evidence was led to discharge the burden- appeal dismissed. (Para-6 to 10)

For the appellant(s): Mr. Lalit K. Sharma, Advocate.
For the respondents: Mr. Abhishek Raj, Advocate, vice Mr. Rajan Kahol, Advocate, for respondent No. 1 in FAO No. 184 of 2011.
Mr. S.C. Sharma, Advocate, for respondent No. 1 in FAO No. 227 of 2011.
Mr. Ashok Tyagi, Advocate, vice Mr. Ramesh Sharma, Advocate, for respondent No. 2 in both the appeals.
Mr. Sanjay Parashar, Advocate, for respondent No. 3 in both the appeals.

The following judgment of the Court was delivered:

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

In terms of order, dated 2nd July, 2013, the ex-parte proceedings were drawn against respondent No. 3 in both the appeals, are recalled for the reason that Mr. Sanjay Parashar, Advocate, has filed power of attorney on behalf of the said respondent.

2. The challenge in both these appeals is to the judgments and awards of different dates, made by the Motor Accident Claims Tribunal-II, Una, District Una, Himachal Pradesh (for short "the Tribunal") in M.A.C.P. No. 06/2007, titled as Smt. Kanta Rani alias Kanta Devi versus Shri Pawan Kumar & others and M.A.C.P. No. 04/2007, titled as Smt. Bimla Devi versus Shri Pawan Kumar & others, whereby compensation to the tune of ₹ 85,000/- and ₹ 1,61,000/-, respectively, with interest @ 9% per annum from the date of institution of the claim petitions till realization alongwith costs assessed at ₹ 1,000/- in both the cases, came to be awarded in favour of the claimants and against the insurer (for short "the impugned awards").

3. Both these appeals are outcome of one motor vehicular accident, which was allegedly caused by the driver, namely Shri Pawan Kumar, while driving car, bearing registration No. PB-10 AP-6969, rashly and negligently on 25th November, 2006, at about 7.20 A.M. at Panjawar Chowk, thus, I deem it proper to determine both these appeals by this common judgment.

4. The claimants, the owner-insured and the driver of the offending vehicle have not questioned the impugned awards on any count, thus, the same have attained finality so far as the same relate to them.

5. The appellant-insurer has questioned the impugned awards on the grounds taken in the memo of the respective appeals.

6. Learned counsel for the appellant-insurer argued that the offending vehicle was not insured at the time of the accident and the owner-insured has committed a willful breach.

7. The argument of the learned counsel for the appellant-insurer is not correct for the following reasons:

8. The Tribunal, after scanning the pleadings of the parties, framed similar set of issues in both the claim petitions. I deem it proper to reproduce the issues framed in M.A.C.P. No. 06/2007 (subject matter of FAO No. 184 of 2011) herein:

> *"1. Whether the petitioner suffered injuries because of the rash and negligent driving of Car No. PB-10 AP-6969 by the respondent/driver Sh. Pawan Kumar as alleged? OPP*
>
> *2. If the issue No. 1 is proved in affirmative, whether the petitioner is entitled to the compensation as claimed. If so, its quantum and from whom? OP Parties*
>
> *3. Whether the respondent/driver Sh. Pawan Kumar was not holding and possessing a valid and effective licence to drive the car as alleged. If so, its effect? OPR*
>
> *4. Whether the liquor was being smuggled in the car as alleged? OPR*
>
> *5. Relief."*

9. The grounds projected in the memo of appeals revolve around issues No. 3 and 4. It was for the insurer to discharge the onus to prove the said issues. It is apt to record herein that the insurer has not pressed both these issues before the Tribunal and came to be determined against the insurer with the findings 'not pressed'.

10. I have gone through the memo of appeals. It is nowhere recorded in the memo of appeals that the said finding has wrongly been recorded by the Tribunal. Once the insurer has not pressed issues No. 3 and 4 before the Tribunal, it cannot lie in its mouth to say that the owner-insured has committed a willful breach or there was violation of the terms and conditions of the insurance policy read with the mandate of Sections 146, 147 and 149 of the Motor Vehicles Act, 1988 (for short "MV Act").

11. Having said so, the grounds taken in the memo of appeals do not survive.

12. Accordingly, the impugned awards are upheld and the appeals are dismissed.

13. Registry is directed to release the awarded amount in both the appeals in favour of the claimants strictly as per the terms and conditions contained in the respective impugned awards through payee's account cheque or by depositing the same in their respective bank accounts.

14. Send down the record after placing copy of the judgment on each of the Tribunal's files.

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

Veena Devi and others …..Appellants
Versus
State of H.P. and others … Respondents

FAO No.:202 of 2011.
Decided on :01.07.2016

Motor Vehicles Act, 1988- Section 166- Deceased was a government servant- he was earning Rs. 9,921/- per month, or say Rs. 10,000/- per month- claimants are 4 in number- 1/4th amount is to be deducted towards personal expenses – thus, loss of dependency is Rs. 7,500/- per month- age of the deceased was 40 years- multiplier of '14' is applicable- claimants are entitled to compensation of Rs. 7,500 x 12 x 14 = Rs.12,60,000/- 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. 12,60,000/- + Rs. 40,000/- = Rs. 13,00,000/- along with interest @ 7.5% per annum from the date of filing of the claim petition till its realization. (Para-4 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
United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, (2002) 6 Supreme Court Cases 281
Santosh Devi versus National Insurance Company Ltd. and others, 2012 AIR SCW 2892
Amrit Bhanu Shali and others versus National Insurance Company Limited and others, (2012) 11 Supreme Court Cases 738
Savita versus Binder Singh & others, 2014 AIR SCW 2053
Kalpanaraj & Ors. versus Tamil Nadu State Transport Corpn., 2014 AIR SCW 2982
Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, (2015) 4 Supreme Court Cases 433
Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, (2015) 4 Supreme Court Cases 434
Oriental Insurance Company versus Smt. Indiro and others, ILR 2015 (III) HP 1149

For the appellants: Mr.G.R. Palsara, Advocate.
For the respondents: Mr.Kush Sharma, Deputy Advocate General, for respondents No.1 and 2.
Mr.Surender Verma, 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 15th February, 2011, passed by the Motor Accident Claims Tribunal-II, Mandi, District Mandi, H.P. (for short, "the Tribunal") in Claim Petition No.79 of 2003, titled Veena Devi and others vs. State of H.P. and others, whereby compensation to the tune of Rs.10,00,000/-, alongwith interest at the rate of 6% per annum from the date of filing of the claim petition till the amount is deposited, came to be awarded in favour of the claimants and respondents No.1 and 2 were saddled with the liability, (for short the "impugned award").

2. Respondents have not questioned the impugned award on any ground, thus, the same has attained finality so far as it relates to them.

3. Feeling aggrieved, the claimants have challenged the impugned award by the medium of instant appeal on the ground of adequacy of compensation. Thus, the only question needs to be determined is – Whether the amount awarded by the Tribunal is inadequate? The answer is in the affirmative for the following reasons.

4. Admittedly, the deceased was a government servant, was serving with respondents No.1 and 2, and, as per the salary certificate proved on record as Ext.PW-5/A, was earning Rs.9,921/- per month, or say Rs.10,000/- per month.

5. The claimants, in the instant case, are four in number. Therefore, in view of the law laid by the Apex Court in the case of **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 was to be deducted towards the personal expenses of the deceased. Thus, the monthly loss of source of dependency to the claimants, after deducting 1/4th, can be said to be Rs.7,500/-.

6. The deceased was 40 years of age at the time of accident. Therefore, in view of the dictum of the Apex Court in the case of Sarla Verma (supra) and 2nd Schedule attached to the Act, multiplier of 14 is just and appropriate and is applied accordingly.

7. In view of the above, the claimants are held entitled to compensation to the tune of Rs.7,500x12x14=Rs.12,60,000/- under the head 'loss of source of dependency'. In addition, the claimants are also held entitled for Rs.10,000/- each (total Rs.40,000/-) under the heads 'loss of love and affection', 'loss of estate', 'loss of consortium' and ' funeral expenses'.

8. Accordingly, the claimants are held entitled to Rs.12,60,000/- + Rs.40,000/- = Rs.13,00,000/-.

9. Learned counsel for the appellants also submitted that the Tribunal has awarded interest at the rate of 6% per annum, which is on the lower side and prayed for enhancing the same.

10. 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**.

11. Having said so, it is held that the amount of compensation awarded by the Tribunal shall carry interest at the rate of 7.5% per annum from the date of filing of the claim petition till the same is deposited and the enhanced amount shall carry interest at the rate of 7.5% per annum from the date of passing of the impugned award till the final payment is made. Respondents No.1 and 2 are directed to deposit the amount of compensation, alongwith up-to-date interest, within a period of eight weeks from today and on deposit, the Registry is directed to release the amount in favour of the claimants, strictly in terms of the impugned award.

12. Viewed thus, the impugned award is modified and the appeal is allowed, as indicated hereinabove.

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

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE, AJAY MOHAN GOEL, J.

Bansari Lal …Appellant
Versus
State of Himachal Pradesh …Respondent

Criminal Appeal No. 363 of 2015
Judgment reserved on : 27.6.2016
Date of Decision : July 4 , 2016

Indian Penal Code, 1860- Section 376- **Protection of Children from Sexual Offences Act, 2012**- Section 4- Accused is uncle of prosecutrix- she went to the house of the accused to play with his son - prosecutrix was sleeping with the son of the accused- accused carried the prosecutrix to his bed and raped her- incident was narrated to PW-6 who informed father of the prosecutrix, grandmother and other members of the family- however, they instructed her not to talk to any one- PW-6 narrated the incident to her mother- matter was reported to the police- prosecutrix was minor at the time of incident- accused was tried and convicted by the trial Court- held, in appeal that age of the prosecutrix was proved by her birth certificate- her radiological age was also proved by Medical Officer- Medical Officer also found that prosecutrix was exposed to coitus- accused is uncle of the prosecutrix- mother had no motive to falsely implicate anyone- version of the sister of the prosecutrix that no action was taken by her father has gone unrebutted – delay of six days is not material in these circumstances - testimony of the prosecutrix is inspiring confidence and is corroborated by the testimony of her sister- minor contradictions are not sufficient to make the prosecution case doubtful- appeal dismissed. (Para-34 to 45)

Cases referred:

Krishan Kumar Malik vs. State of Haryana, (2011) 7 SCC 130
Jai Krishna Mandal & another vs. State of Jharkhand, (2011) 3 SCC (Cri) 842
State of Andhra Pradesh vs. Jalapathi Subbarayudu & others, (2010) 15 SCC 472
State of Himachal Pradesh vs. Ajay Kumar, 2010 Cri. L.J. 2990
Rama Nand Gandwal vs. State of Himachal Pradesh, 2010 Cri. L.J. 3005
Malkiat Singh & Anr. etc. vs. State of Himachal Pradesh, 2010 Cri. L.J. 635
Indian Woman Says Gang-Raped on Orders of Village Court Published in Business and Financial News Dated 23.10.2014, In Re, (2014) 4 SCC 786
Rajkumar v. State of Madhya Pradesh, (2014) 5 SCC 353)
Shyam Narain v. State (NCT of Delhi), (2013) 7 SCC 77, the Apex Court
Narender Kumar v. State (NCT of Delhi), (2012) 7 SCC 171
Munna v. State of Madhya Pradesh, (2014) 10 SCC 254
Madan Gopal Makkad v. Naval Dubey and another, (1992) 3 SCC 204
Mukesh v. State of Chhattisgarh, (2014) 10 SC 327)
State of Haryana v. Basti Ram, (2013) 4 SCC 200
O.M. Baby (Dead) by Legal Representative v. State of Keral, (2012) 11 SCC 362
State of U.P. v. Chhotey Lal, (2011) 2 SCC 550
Radhakrishna Nagesh v. State of Andhra Pradesh, (2013) 11 SCC 688

Mohd. Iqbal v. State of Jharkhand, (2013) 14 SCC 481
Rameshwar v. The State of Rajasthan, AIR 1952 SC 54
State of Punjab versus Jagir Singh (1974) 3 SCC 277
State of Rajasthan versus N. K. THE ACCUSED (2000) 5 SCC 30
State of Maharashtra versus Chandraprakash Kewalchand Jain, (1990) 1 SCC 550
State of Punjab versus Gurmit Singh and others, (1996) 2 SCC 384
Siriya @ Shri Lal vs. State of Madhya Pradesh, (2008) 8 SCC 72
State of M.P. v. Dharkole alias Govind Singh and others, (2004) 13 SCC 308 the Apex Court
Dattu Ramrao Sakhare v. State of Maharashtra (1997 (5) SCC 341)
Golla Yelugu Govindu vs. State of Andhra Pradesh (2008) 16 SCC 769
State of Himachal Pradesh vs. Suresh Kumar (2009) 16 SCC 697
Bharwada Bhoginbhai Hirjibhai v. State of Gujarat, (1983) 3 SCC 217
State of H.P. v. Asha Ram, (2005) 13 SCC 766

For the appellant	:	Mr. H. S. Rangra, Advocate, for the appellant.
For the respondent	:	Mr. Vikram Thakur, Deputy Advocate General with Mr. J. S. Guleria, Asstt. A.G. for the respondent-State.

The following judgment of the Court was delivered:

Sanjay Karol, J.

Assailing the judgment dated 6.4.2015/7.4.2015, passed by learned Special Judge, Kullu, Distt. Kullu, H.P., in Sessions Trial No. 43 of 2014, titled as *State of H.P. vs. Bansari lal,* whereby the accused stands convicted of the offences punishable under the provisions of Section 376 (2)(i) of the Indian Penal Code (hereinafter referred to as the IPC) and Section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as the POCSO Act) and sentenced to undergo rigorous imprisonment for a period of 10 years and pay fine of Rs.10,000/- and in default thereof to undergo rigorous imprisonment for a period of two months for offence under Section 376 (2)(i) of the IPC; and rigorous imprisonment for a period of 10 years and pay fine of Rs.10,000/- and in default thereof to undergo rigorous imprisonment for a period of two months for offence under Section 4 of the POCSO Act, he has filed the present appeal under the provisions of Section 374 (2) of the Code of Criminal Procedure, 1973.

2. It is the case of the prosecution that Sushma Devi (PW-1) was married to Asha Dutt some time in the year 1996 through whom she gave birth to two daughters Sunita (PW-6) and the prosecutrix (PW-2). Sometime in the year 2006, they separated and the marriage came to be dissolved by divorce when Sushma Devi started residing at Bhunter whereas the daughters continued to reside with their father at village Deori. Accused Bansari Lal, brother of Asha Dutt, who also resides in the very same village had two sons, one of whom used to reside in a different village, with his maternal aunt. On 2.2.2014, one of the sons of the accused namely Chand Parkash took the prosecutrix to his house where both played together. While prosecutrix was sleeping with Chand Parkash in one of the rooms, in the night, accused carried the prosecutrix to his bed and subjected her to forcible sexual intercourse. Such incident came to be repeated even the following day i.e. 3.02.2014. Prosecutrix narrated the incident to her elder sister (PW-6) who informed her father, grand mother and other members of the family. However they instructed her not to talk to anyone and that in future they would take care of the prosecutrix. On 9.02.2014 Sunita (PW-6) telephonically requested her mother to meet her and upon meeting, disclosed the incident to her, where after, the matter came to be reported to the police and F.I.R. No. 11/2014, dated 9.2.2014 (Ext. PW-1/A) came to be registered against the accused at Police Station Banjar (Seraj), Distt. Kullu, H.P. under the provisions of Sections 376 IPC and 4 POCSO Act. Police machinery was swung into action and the prosecutrix immediately got medically examined from Dr. Anu Devi (PW-11) who issued MLC (Ext. PW-11/A). Investigation so conducted by Const.

Mamta (PW-7) and SHO Chint Ram (PW-10) revealed that at the time of occurrence of the crime, prosecutrix who was studying in the sixth standard was a minor. During the course of investigation, on the basis of disclosure statement (Ext. PW-7/A) so made by the accused, who stood arrested by the police, incriminating articles in the form of clothes, blanket, bed sheet etc. came to be recovered. Clothes of the prosecutrix were also taken into possession. The incriminating articles were sent to the Regional Forensic Science Laboratory, Mandi, H.P. for chemical analysis and report (Ext. PW-10/F) taken on record. 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 offences punishable under the provisions of Section 376-G IPC and Section 4 POCSO Act , to which he did not plead guilty and claimed trial.

4. In order to prove its case, in all, prosecution examined twelve witnesses and statement of the accused under Section 313 Cr. P.C. also recorded, in which he took plea of innocence and false implication. No evidence in defence was led by the accused.

5. Appreciating the material on record, including the testimonies of the witnesses, trial Court convicted the accused of the charged offences and sentenced as aforesaid. Hence, the present appeal..

6. We have extensively heard learned counsel appearing on both the sides and perused the record.

7. Mr. H.S. Rangra, learned counsel for the appellant assails the judgment on the following grounds: (i) Inordinate delay in reporting the matter to the police, more so in the absence of any record pertaining to the telephonic conversion which Sunita (PW-6), sister of the prosecutrix had had with her mother Sushma Devi (PW-1), remains unexplained, rendering the prosecution case to be fatal; (ii) Contradictions and improvements in the testimonies of the prosecution witnesses have rendered their statements to be unbelievable and the witnesses unreliable; (iii) Ocular version stands contradicted through documentary evidence; (iv) Non association of independent witnesses has rendered the prosecution case to be doubtful; (v) Medical evidence does not corroborate and support the prosecution case of sexual intercourse; and (vi) Even by way of link/scientific evidence, prosecution case stands falsified.

8. In support, learned counsel has referred to and relied upon the following decisions: *Krishan Kumar Malik vs. State of Haryana,* (2011) 7 SCC 130; *Jai Krishna Mandal & another vs. State of Jharkhand,* (2011) 3 SCC (Cri) 842; *State of Andhra Pradesh vs. Jalapathi Subbarayudu & others,* (2010) 15 SCC 472; *State of Himachal Pradesh vs. Ajay Kumar,* 2010 Cri. L.J. 2990; *Rama Nand Gandwal vs. State of Himachal Pradesh,* 2010 Cri. L.J. 3005; *Malkiat Singh & Anr. etc. vs. State of Himachal Pradesh,* 2010 Cri. L.J. 635; and judgment dated 23.3.2011, passed by this Court in Cr. Appeal No. 220 of 2001, titled as *State of H.P. vs. Rajinder Singh.*

9. On the other hand, Mr. Vikram Thakur learned Deputy Advocate General assisted by Mr. J. S. Guleria, learned Assistant Advocate General, appearing for the respondent-State, have supported the judgment for the reasons set out therein.

10. At this juncture we deem it appropriate to deal with the statement of law on the point.

11. In *Indian Woman Says Gang-Raped on Orders of Village Court Published in Business and Financial News Dated 23.10.2014, In Re,* (2014) 4 SCC 786, the Apex Court has highlighted the need for having an effective State police machinery for curbing the menace of rape, for such crime is not only in contravention of the domestic laws, but is also in direct breach of obligations under International Law, treaties whereof stand ratified by the State, which is under an obligation to protect its women from any kind of discrimination.

12. The Apex Court has highlighted the need for prompt disposal of cases of crime against women and children. (*Rajkumar v. State of Madhya Pradesh,* (2014) 5 SCC 353).

13. In *Shyam Narain v. State (NCT of Delhi)*, (2013) 7 SCC 77, the Apex Court held as under:

> "27. Respect for reputation of women in the society shows the basic civility of a civilised society. No member of society can afford to conceive the idea that he can create a hollow in the honour of a woman. Such thinking is not only lamentable but also deplorable. It would not be an exaggeration to say that the thought of sullying the physical frame of a woman is the demolition of the accepted civilized norm, i.e., "physical morality". In such a sphere, impetuosity has no room. The youthful excitement has no place. It should be paramount in everyone's mind that, on one hand, the society as a whole cannot preach from the pulpit about social, economic and political equality of the sexes and, on the other, some pervert members of the same society dehumanize the woman by attacking her body and ruining her chastity. It is an assault on the individuality and inherent dignity of a woman with the mindset that she should be elegantly servile to men. Rape is a monstrous burial of her dignity in the darkness. It is a crime against the holy body of a woman and the soul of the society and such a crime is aggravated by the manner in which it has been committed. We have emphasised on the manner because, in the present case, the victim is an eight year old girl who possibly would be deprived of the dreams of "Spring of Life" and might be psychologically compelled to remain in the "Torment of Winter". When she suffers, the collective at large also suffers. Such a singular crime creates an atmosphere of fear which is historically abhorred by the society. It demands just punishment from the court and to such a demand, the courts of law are bound to respond within legal parameters. It is a demand for justice and the award of punishment has to be in consonance with the legislative command and the discretion vested in the court."

14. In *Narender Kumar v. State (NCT of Delhi)*, (2012) 7 SCC 171, the apex Court has cautioned the Court to adopt the following approach:

> "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 the witnesses which are not of a substantial character."

15. The Apex Court in Munna v. State of Madhya Pradesh, (2014) 10 SCC 254, has reiterated the principle that testimony of prosecutrix is almost at par with an immediate witness and can be acted upon without corroboration.

16. The Apex Court in Madan Gopal Makkad v. Naval Dubey and another*,* (1992) 3 SCC 204, has held as under:

> "34. A medical witness called in as an expert to assist the court is not a witness of fact and the evidence given by the medical officer is really of an advisory character given on the basis of the symptoms found on examination. The expert witness is expected to put before the court all materials inclusive of the data which induced him to come to the conclusion and enlighten the court on the technical aspect of the case by explaining the terms of science so that the court although, not an expert may form its own judgment on those materials after giving due regard to the expert's opinion because once the expert's opinion is accepted, it is not the opinion of the medical officer but of the court.

35. Nariman, J. in *Queen v. Ahmed Ally,* (1989) 11 Sutherland WR Cr 25, while expressing his view a on medical evidence has observed as follows:

> "THE evidence of a medical man or other skilled witnesses, however, eminent, as to what he thinks may or may not have taken place under particular combination of circumstances, however, confidently, he may speak, is ordinarily a matter of mere opinion."

36. Fazal Ali, J. in *Pratap Misra v. State of Orissa*, (1977 3 SCC 41, has stated thus:

> "... [l]t is well settled that the medical jurisprudence is not an exact science and it is indeed difficult for any Doctor to say with precision and exactitude as to when a particular injury was caused ... as to the exact time when the appellants may have had sexual intercourse with the prosecutrix."

37. We feel that it would be quite appropriate, in this context, to reproduce the opinion expressed by Modi in Medical Jurisprudence and Toxicology (Twenty-first Edition) at page 369 which reads thus:

> "THUS to constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed. Rape is crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is that there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one. "

38. In Parikh 's Textbook of Medical Jurisprudence and Toxicology, the following passage is found:

> "SEXUAL intercourse. In law, this term is held to mean the slightest degree of penetration of the vulva by the penis with or without emission of semen. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains."

39. In Encyclopedia of Crime and Justice (Vol. 4 at page 1356, it is stated:

> "... [E]ven slight penetration is sufficient and emission is unnecessary."

40. In Halsbury's Statutes of England and Wales, (Fourth Edition), Volume 12, it is stated that even the slightest degree of penetration is sufficient to prove sexual intercourse within the meaning of S. 44 of the Sexual Offences Act, 1956. Vide (1) *R. v. Hughes*, (1841) 9 C&P 752, (2) *R. v. Lines and R. v. Nicholls*, (1844) 1 Car & Kir 393.

41. See also Harris's Criminal Law, (Twenty-second Edition) at page 465.

42. In American Jurisprudence, it is stated that slight penetration is sufficient to complete the crime of rape. Code 263 of Penal Code of Califomia reads thus:

"RAPE; essentials Penetration sufficient. The essential guilt of rape consists in the outrage to the person and feelings of the victim of the rape. Any sexual penetration, however slight, is sufficient to complete the crime."

> 43. The First Explanation to S. 375 of Indian Penal Code which defines 'Rape' reads thus:
>
> > "EXPLANATION.PENETRATION is sufficient to constitute the sexual intercourse necessary to the offence of rape."
>
> 44. In interpreting the above explanation whether complete penetration is necessary to constitute an offence of rape, various High courts have taken a consistent view that even the slightest penetration is sufficient to make out an offence of rape and the depth of penetration is immaterial. Reference may be made to (1) *Natha v. Emperor,* (1925) 26 CrLJ 1185, *(2) Abdul Majid v. Emperor*, AIR 1927 Lah 735(2), *(3) Mst. Jantan v. Emperor,* (1934) 36 Punj LR 35, *(4) Ghanashyam Misra v. State,* 1957 CriLJ 469*, (5) Das Bernard v. State*, 1974 CriLJ 1098. In *re Anthony,* AIR 1960 Mad 308 it has been held that while there must be penetration in the technical sense, the slightest penetration would be sufficient and a complete act of sexual intercourse is not at all necessary. In Gour's The Penal Law of India, 6th Edn. 1955 (Vol. II), page 1678, it is observed, "Even vulval penetration has been held to be sufficient for a conviction of rape." ”

17. Also, it is a settled principle of law that absence of injuries on the external or internal parts of the victim by itself cannot be a reason to disbelieve the testimony of the prosecutrix. [*Mukesh v. State of Chhattisgarh,* (2014) 10 SC 327); *State of Haryana v. Basti Ram,* (2013) 4 SCC 200; *O.M. Baby (Dead) by Legal Representative v. State of Keral,* (2012) 11 SCC 362; and *State of U.P. v. Chhotey Lal,* (2011) 2 SCC 550]

18. The Apex Court in Puran Chand v. State of Himachal Pradesh, (2014) 5 SCC 689, observed that even non-rupture of hymen itself would be of no consequence and rape could be held to be proved even if there is slight penetration.

19. Mere fact that hymen is intact or that there is no actual wound on the private part of the prosecutrix is not conclusive of the fact that prosecutrix was not subjected to rape. (Radhakrishna Nagesh v. State of Andhra Pradesh, (2013) 11 SCC 688).

20. Reiterating its earlier view in Mohd. Iqbal v. State of Jharkhand, (2013) 14 SCC 481; Narender Kumar v. State (NCT of Delh), (2012) 7 SCC 171, the Apex Court in Mukesh v. State of Chhattisgarh, (2014) 10 SC 327, has held that sole testimony of prosecutrix is sufficient to establish commission of rape, even in the absence of any corroborative evidence.

21. In Radhakrishna *Nagesh v. State of Andhra Pradesh,* (2013) 11 SCC 688, the apex Court held as under:

> “33. It will be useful to refer to the judgment of this Court in the case of O.M. Baby v. State of Kerala, (2012) 11 SCC 362, where the Court held as follows:-
>
> > "17. ….. ‘16. A prosecutrix of a sex offence cannot be put on a par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to Illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place

implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence.'

18. We would further like to observe that while appreciating the evidence of the prosecutrix, the court must keep in mind that in the context of the values prevailing in the country, particularly in rural India, it would be unusual for a woman to come up with a false story of being a victim of sexual assault so as to implicate an innocent person. Such a view has been expressed by the judgment of this Court in the case *of State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384 and has found reiteration in a recent judgment in *Rajinder @ Raju v. State of H.P.*, (2009) 16 SCC 69, para 19 whereof may be usefully extracted:

> '19. In the context of Indian culture, a woman - victim of sexual aggression - would rather suffer silently than to falsely implicate somebody. Any statement of rape is an extremely humiliating experience for a woman and until she is a victim of sex crime, she would not blame anyone but the real culprit. While appreciating the evidence of the prosecutrix, the courts must always keep in mind that no self-respecting woman would put her honour at stake by falsely alleging commission of rape on her and therefore, ordinarily a look for corroboration of her testimony is unnecessary and uncalled for. But for high improbability in the prosecution case, the conviction in the case of sex crime may be based on the sole testimony of the prosecutrix. It has been rightly said that corroborative evidence is not an imperative component of judicial credence in every case of rape nor the absence of injuries on the private parts of the victim can be construed as evidence of consent.' "”

22. In *Rameshwar v. The State of Rajasthan,* AIR 1952 SC 54, the Supreme Court has held that previous statement of the raped girl to her mother, immediately after the occurrence, is not only admissible and relevant as to her conduct, but also constitutes corroboration of her statement under the provisions of section 157 of the Evidence Act. In order to come to the aforesaid conclusions, illustration (j) to section 8 of the Evidence Act was relied upon. In that case, the victim, named Purni, was 7/8 years old. She was not administered oath, but was held to be competent witness and, therefore, duly examined and believed.

23. In *State of Punjab versus Jagir Singh* (1974) 3 SCC 277 the apex Court held that:-

"A criminal trial is not like a fairy tale wherein one is free to give fight to one's imagination and fantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the Court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts. Although the

benefit of every reasonable doubt should be given to the accused, the Courts should not at the same time reject evidence which is ex facie trustworthy on grounds which are fanciful or in the nature of conjectures."

(Emphasis supplied)

24. The Apex Court in *State of Rajasthan versus N. K.* THE ACCUSED (2000) 5 SCC 30 has held that:-

"... ...It is true that the golden thread which runs throughout the cobweb of criminal jurisprudence as administered in India is that nine guilty may escape but one innocent should not suffer. But at the same time no guilty should escape unpunished once the guilt has been proved to hilt. An unmerited acquittal does no good to the society. If the prosecution has succeeded in making out a convincing case for recording a finding as to the accused being guilty, the Court should not lean in favour of acquittal by giving weight to irrelevant or insignificant circumstances or by resorting to technicalities or by assuming doubts and giving benefit thereof where none exists. A doubt, as understood in criminal jurisprudence, has to be a reasonable doubt and not an excuse for finding in favour of acquittal. An unmerited acquittal encourages wolves in the society being on prowl for easy prey, more so when the victims of crime are helpless females. It is the spurt in the number of unmerited acquittals recorded by criminal Courts which gives rise to the demand for death sentence to the rapists. The Courts have to display a greater sense of responsibility and to be more sensitive while dealing with charges of sexual assault on women."

(Emphasis supplied)

25. It is also a settled position of law that victim of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. If for some reason Court is hesitant to place implicit reliance on the testimony of the victim it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the victim must necessarily depend on the facts and circumstances of each case. If the totality of the circumstances appearing on the record of the case disclose that victim does not have a strong motive to falsely involve the person charged, Court should ordinarily have no hesitation in accepting her evidence. [*State of Maharashtra versus Chandraprakash Kewalchand Jain,* (1990) 1 SCC 550 and *O. M. Baby (dead) by Legal Representative vs. State of Kerala*, 2012 (11) SCC 362].

26. The Apex Court in *State of Punjab versus Gurmit Singh and others,* (1996) 2 SCC 384 has held that:-

"... ...The Courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a Court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the Courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the Courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult

to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion ?

---- --- ---

"21. Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The Court, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case." … …

(Emphasis supplied)

The Court again reiterated its view in Siriya @ Shri Lal vs. State of Madhya Pradesh, (2008) 8 SCC 72.

27. In *State of M.P. v. Dharkole alias Govind Singh and others,* (2004) 13 SCC 308 the Apex Court has held that:-

"9. … Eye witnesses' account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be credit-worthy; consistency with the undisputed facts; the 'credit' of the witnesses; their performance in the witness-box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."

"10. A person has, no doubt, a profound right not to be convicted of an offence which is not established by the evidential standard of proof beyond reasonable doubt. Though this standard is a higher standard, there is, however, no absolute standard. What degree of probability amounts to 'proof' is an exercise particular to each case?

> "The simple multiplication rule does not apply if the separate pieces of evidence are dependent. Two events are dependent when they tend to occur together, and the evidence of such events may also be said to be dependent. In a criminal case, different pieces of evidence directed to establishing that the defendant did the prohibited act with the specified state of mind are generally dependent. A junior may feel doubt whether to credit an alleged confession, and doubt whether to infer guilt from the fact that the defendant fled from justice. But since it is generally guilty rather than innocent people who make confessions and guilty rather than innocent people who run away, the two doubts are not to be multiplied together. The one piece of evidence may confirm the other."

"11. Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. To constitute reasonable doubt, it must be free from an over emotional response. Doubts must

be actual and substantial doubts as to the guilt of the accused persons arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and commonsense. It must grow out of the evidence in the case." [Emphasis supplied]

28. In *Dattu Ramrao Sakhare v. State of Maharashtra* (1997 (5) SCC 341) it held that:

'5. .....A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the Court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored'. The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher Court if from what is preserved in the records, it is clear his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make beliefs. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the Court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."

29. Law with regard to testimony of a child witness is now well established. In *Golla Yelugu Govindu* vs. *State of Andhra Pradesh* (2008) 16 SCC 769, while reiterating its earlier view the Apex Court held that:-

"11. 6.Indian Evidence Act, 1872 (in short the 'Evidence Act') does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages that all persons shall be competent to testify, unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age, disease whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. This position was concisely stated by Brewer J in Wheeler v. United States [159 U.S. 523 (1895)]. The evidence of a child witness is not required to be rejected per se; but the Court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon. [See Suryanarayana v. State of Karnataka (2001) 9 SCC 129].

30. In *State of Himachal Pradesh vs. Suresh Kumar* (2009) 16 SCC 697, the Apex Court was dealing with a case where victim was ravished by the accused on 15.3.2000 which incident was narrated by the victim to her sister later during the day. She also narrated the incident to her parents the following day and later on to the Doctors. Court accepted the statement of the sister, parents and the doctors while holding the accused guilty. Importantly, Apex Court reversed the finding recorded by the High Court wherein it was held that statement of the victim being minor was not worthy of credence.

31. The apex Court in *Radhakrishna Nagesh Versus State of Andhra Pradesh,* (2013) 11 SCC 688 had an occasion to deal with a case of a child victim. After considering its earlier decisions, the Court held that Court must examine the evidence of the prosecution in its entirely and then see its cumulative effect to determine whether offence of rape stands committed or not.

32. The apex Court in *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat,* (1983) 3 SCC 217 has held as under:

> "9. In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society. We must analyze the argument in support of the need for corroboration and subject it to relentless and remorseless cross-examination. And we must do so with a logical, and not an opinionated, eye in the light of probabilities with our feet firmly planted on the soil of India and with our eyes focussed on the Indian horizon. We must not be swept off the feet by the approach made in the western world which has its own social milieu, its own social mores, its own permissive values, and its own code of life. Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the western world. It is wholly unnecessary to import the said concept on a turnkey basis and to transplant it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian society, and its profile. The identities of the two worlds are different. The solution of problems cannot therefore be identical. It is conceivable in the western society that a female may level false accusation as regards sexual molestation against a male for several reasons such as :-
>
> > (1) The female may be a 'gold digger' and may well have an economic motive- to extract money by holding out the gun of prosecution or public exposure.
> >
> > (2) She may be suffering from psychological neurosis and may see an escape from the neurotic prison by phantasizing or imagining a situation where she is desired, wanted, and chased by males.
> >
> > (3) She may want to wreak vengeance on the male for real or imaginary wrongs. She may have a grudge against a particular male, or males in general, and may have the design to square the account.
> >
> > (4) She may have been induced to do so in consideration of economic rewards, by a person interested in placing the accused in a compromising or embarrassing position, on account of personal or political vendetta.
> >
> > (5) She may do so to gain notoriety or publicity or to appease her own ego or to satisfy her feeling of self-importance in the context of her inferiority complex.
> >
> > (6) She may do so on account of jealousy.
> >
> > (7) She may do so to win sympathy of others.
> >
> > (8) She may do so upon being repulsed.
>
> 10. By and large these factors are not relevant to India, and the Indian conditions. Without the fear of making too wide a statement, or of overstating the case, it can be said that rarely will a girl or a woman in India make false allegations of sexual assault on account of any such factor as has been just enlisted. The statement is generally true in the context of the urban as also rural society. It is also by and large true in the context of the sophisticated not so

sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because :- (1) A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred, (2) She would be conscious of the danger of being ostracized by the Society or being looked down by the society including by her own family members, relatives, friends, and neighbours, (3) She would have to brave the whole world. (4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered. (5) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. (6) It would almost inevitably and almost invariably result in mental torture and suffering to herself. (7) The fear of being taunted by others will always haunt her. (8) She would feel extremely embarrassed in relating the incident to others being overpowered by a feeling of shame on account of the upbringing in a tradition bound society where by and large sex is taboo. (9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy. (10) The parents of an unmarried girl as also the husband and members of the husbands' family of a married woman, would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour. (11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocent. (12) The reluctance to face interrogation by the investigating agency, to face the Court, to face the cross-examination by counsel for the culprit, and the-risk of being disbelieved, act as a deterrent.

11. In view of these factors the victims and their relatives are not too keen to bring the culprit to books. And when in the face of these factors the crime is brought to light there is a built-in assurance that the charge is genuine rather than fabricated. On principle the evidence of a victim of sexual assault stands on par with evidence of an injured witness. Just as a witness who has sustained an injury (which is not shown or believed to be self-inflicted) is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of a sex-offence is entitled to great weight, absence of corroboration notwithstanding. And while corroboration in the form of eye-witness account of an independent witness may often be forthcoming in physical assault cases, such evidence cannot be expected in sex offences, having regard to the very nature of the offence. It would therefore be adding insult to injury to insist on corroboration drawing inspiration from the rules devised by the Court's in the western world (obeisance to which has perhaps become a habit presumably on account of the colonial hangover). We are therefore of the opinion that if the evidence of the victim does not suffer from any basic infirmity, and the 'probabilities- factor' does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration except from the medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming, subject to the following qualification : Corroboration may be insisted upon when a woman having attained majority is found in a compromising position and there is a likelihood of her having levelled such an accusation on account of the instinct of self preservation. Or when the 'probabilities-factor' is found to be out of tune."

[Also: *State of H.P. v. Asha Ram,* (2005) 13 SCC 766]

33. We shall now discuss the evidence in view of the aforesaid settled proposition of law.

34. It is a matter of record that the accused, who pleaded false implication, did not lead any evidence. The fact that prosecutrix is daughter of his brother and the fact that his elder son used to live in another village and at the time of occurrence of the incident, on account of holidays in the school had come home, stands admitted by the accused.

35. Even though accused has admitted the prosecutrix to have been born on 25.03.2003, such fact stands conclusively established through birth certificate (Ext. PW3/A) issued under the provisions of Section 12/17 of the Registration of Births and Deaths Act, 1969 and Rule 8 of the Himachal Pradesh Registration of Births and Deaths Rules, 2003, so produced on record by Kavita (PW-3) Secretary, Gram Panchayat Kalwari. There is no challenge with regard to the date of birth of the prosecutrix. Radiological age of the prosecutrix also stands proved on record by Dr. Shailender Thakur (PW-5). Hence, as on the date of commission of crime, prosecutrix was 10 years and 10 months of age and accused was aged 45 years. That prosecutrix was studying in sixth class is also not in dispute and stands established on record.

36. Dr. Anu Devi (PW-11) who conducted medical examination of the prosecution on 10.02.2014, found her to be of average built. There was no evidence of external injury but however hymen was torn, old healed with no evidence of active bleeding. The victim did not allow vaginal examination. However, the Doctor found the prosecutrix to be exposed to coitus. Her opinion is definite to such effect. In any event, if the testimony of the prosecutrix is found to be convincing then, even in the absence of any corroborative medical evidence, as laid down in *Madan Gopal Makkad* (supra), conviction would be sustainable.

37. It is a matter of record that neither the father of the prosecutrix, nor any member of the family of the accused, stands examined in Court. None has come forward from the village to support either the prosecutrix or the accused. But then even such fact would not be fatal if the prosecution otherwise establishes its case beyond reasonable doubt. In any event, accused himself could have produced and examined such persons as witnesses to dislodge the presumption in law.

38. In the instant case, it has come through the testimony of the Sushma Devi (PW-1) mother of the prosecutrix, that the parents of the prosecutrix got divorced eight years prior to the incident in question. Though the prosecutrix and her sister were residing with their father in village Deori, yet they were on visiting terms with her. It is not the suggested case of the accused that relations between the mother and the father were either strained or hostile or that she was in a position to yield undue influence over her children. Mother had no motive to falsely implicate anyone, much less the accused, more so, in connection with the crime in question. No mother would put the honour of her daughter at stake without any sufficient cause or justifiable reason.

39. Version of Sunita (PW-6) to the effect that "I told this fact to my father and grandmother and other members of the family and they told it happens and I should not tell this fact to any one and, in future, they would take care of Lovely", goes unrebutted on record. According to this witness the incident in question came to be reported to her by the prosecutrix after two days and this was when she found her gait to be different. Yet despite having brought the matter to the notice of the elders nothing was done. It is in this background that this witness thought it prudent of reporting the matter to her mother which was so done on 9.02.2014. It is true that there is no record corroborating the version of this witness of having telephonically asked her mother to meet her. But the question which arises for consideration is as to whether it would make any difference? In our considered view, no. Witness has categorically deposed that she did try to call her mother through the cell phone of her father but the call could not mature and it was only later on that, through the cell phone of her maternal aunt, she was able to contact her mother. This witness who herself was studying in class tenth was dependent upon the elders for taking up the matter to its logical end. We are of the considered view that there is no delay in lodging the matter with the police, for the FIR came to be registered on 9.02.2014. Period of six days in reporting the matter to the mother, in our considered view stands sufficiently explained by the witness who herself is a school going child. Only when no action was

taken by the elders in the family, this witness mustered courage and prudently brought the matter to the notice of her mother. Also for two days children were busy in a function at the school.

40. Still the question which arises for consideration is as to whether the accused is guilty of having committed the crime or not? Answer to the same lies in the testimonies of the prosecutrix (PW-2) and her sister Sunita (PW-6). Principles laid down in the decisions referred to in paragraphs 20 to 24 (supra) would be relevant at this juncture.

41. In court, prosecutrix states that on 2nd/3rd February, 2014, on the asking of Chand Prakash, she went to the house of her uncle where they started playing. It is a matter of record that such house is just adjoining to the house of her father. Their relations appear to be normal. Innocently the child slept with Chand Parkash when in the night, accused took her to his bed. At that time, the elder son was sleeping in the kitchen. The witness is categorical that the accused made her sleep with him and by opening the clothes, sexually assaulted her as a result of which blood started oozing from her private part. The incident was repeated the following day. She is categorical that the accused had threatened to cut his head [here she refers to the elder son of the accused] and also threatened her not to disclose the incident either to her father or grand parents. She is categorical that the following day, the incident came to be reported to her sister who told her that she would inform their mother. She disclosed all such facts to her mother who had come to meet them after her sister had called her over phone. Now in cross examination we do not find her testimony to have been shattered or rendered uninspiring in confidence. In fact she is clear, categorical and her testimony consistent with her version so disclosed to the police and her statement recorded before the Magistrate (Ext.PW-2/A) during the course of investigation. It cannot be said that the witness is tutored or has deposed under some influence. She understands the consequences of all actions. Even though a child but she has deposed the events in the most natural manner. She meets the test laid down by the apex Court in the decisions referred to in paragraphs 28 to 31 (supra). She is categorical that the incident came to be noticed by the sons of the accused who had also woken up, whose heads the accused had threatened to cut off in case the incident came to be reported to anyone. One cannot lose sight of the fact that the parties are rustic villagers hailing from the remotest corner of the State where generally children are dependent upon their parents for survival. Village Deori is in the hinterland where generally decisions are taken by the elder members of house.

42. Version of the prosecutrix (PW-2) stands materially corroborated by her sister Sunita (PW-6) on all counts and her mother Sushma Devi (PW-1).

43. We do not find the contradictions in the testimonies of the prosecution witnesses to be significant enough to shatter their testimonies or impeach their credit. Whether their statements came to be recorded at the police station or on the spot is immaterial.

44. Also whether the recoveries were affected pursuant to the disclosure statement made by the accused or otherwise is immaterial, for prosecution case does not rest upon the link evidence which is not substantive evidence but only corroborative in nature. Report of the Forensic Science Laboratory does not advance the case of the prosecution, even though blood and hair was found on the respective clothes of the parties. Absence of spermatozoa on the vaginal swabs also does not render the prosecution case to be fatal for according to the Doctor (PW-11), prosecutrix was exposed to coitus. Site plan not depicting true position of the place of crime would also not render the version of the prosecutrix to be false. It is in the house which fact is evidently clear from the said document. Principle laid down in *Narender Kumar* (supra) is evidently clear, for minor contradictions need to be ignored. In any event, no material contradiction, rendering the genesis of the prosecution case to be fatal, stands pointed out.

45. Non association of independent witnesses would also not render the testimony of the prosecution witnesses to be doubtful.

46. Judgments relied upon by the learned counsel for the appellant/convict in no manner advance his case. They are based on relevant fact situation where the Court itself found the testimony of the prosecutrix to be shaky and unbelievable.

47. From the material placed on record, it stands established by the prosecution witnesses that the accused is guilty of having committed the offences he stands charged for. There is sufficient, convincing, cogent and reliable evidence on record to this effect. The circumstances stand conclusively proved by unbroken chain of unimpeachable testimony of the prosecution witnesses. The guilt of the accused stands proved beyond reasonable doubt to the hilt. It cannot be said that accused is innocent or not guilty or that he has been falsely implicated or that his defence is probable or that the evidence led by the prosecution is inconsistent, unreliable, untrustworthy and unbelievable. 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.

48. Thus, from the material placed on record, it stands established by the prosecution, beyond reasonable doubt, that accused committed rape on the prosecutrix, a minor girl, by leading clear, cogent, convincing and reliable piece of evidence.

49. For all the aforesaid reasons, we find no reason to interfere with the well reasoned 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. Findings of conviction cannot be said to be erroneous or perverse. Hence, the appeal is dismissed.

50. Appeal stands disposed of, so also pending application(s), if any.

Records of the Court below be immediately sent back.

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

Kamal Dev. …Applicant.

Versus

Ram Prakash and others. …Respondents

CMP (M) No. 806 of 2015
Decided on: 4.7.2016

Limitation Act, 1963- Section 5- An application for condonation of delay of one year, 6 months and 5 days has been filed pleading that applicant came to know that respondent No. 2 had sold some portion of the suit land – an inquiry was made on which, he came to know about passing of the decree- application was contested- held, that applicant has not assigned sufficient reasons for the condonation of delay- Court should be liberal in condoning the delay but the valuable right accrued to the opposite party cannot be taken away - Court should adopt strict approach while considering the case of inordinate delay- sufficient cause for delay should not override substantial justice - application dismissed. (Para-3 to 6)

Cases referred:

Oriental Aroma Chemical Industries Limited versus Gujarat Industrial Development Corporation and another, (2010) 5 SCC 459

Lanka Venkateswarlu (dead) by LRS versus State of Andhra Pradesh and others, (2011) 4 SCC 363

Maniben Devraj Shah versus Municipal Corporation of Brihan Mumbai, (2012) 5 SCC 157

For the Applicant : Mr. R.L. Chaudhary, Advocate.
For the Respondents: Mr. Varun Rana, Advocate for respondent No.2.
Mr. K.D. Sood, Sr. Advocate with Mr. Sanjeev Sood, Advocate for applicant in CMP No.9470/2015

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge (oral):

CMP (M) No. 806/2015

Applicant has filed a Regular Second Appeal against the judgment and decree dated 21.9.2013 passed by the learned Additional District Judge (1), Mandi in Civil Appeal No. 65 of 2012. The Regular Second Appeal is barred by one year, six months and five days. The applicant has moved an application under section 5 of the Limitation Act for condonation of delay. According to the averments made in the application, respondent No.2 has filed an appeal against the judgment and decree dated 12.6.2012 bearing Civil Appeal No. 65/2012. Appellant Kamal Dev was added as proforma respondent No.2 in the cause title of Civil Appeal No. 65 of 2012 alongwith other legal heirs of late Sh. Thenu Ram. They were proceeded *ex parte*. Thereafter, a compromise deed was executed by respondent Nos. 1 and 2. Except respondent Nos. 1 and 2, i.e. Ram Prakash and Himmat Ram, none have signed the compromise deed. Thereafter, compromise decree was passed on 21.9.2013. He came to know on 10.3.2015 that respondent No.2 Himmat Ram has sold some portion of the suit land. He made inquiry about the decree passed by the learned trial court dated 1.6.2012. Thereafter, he came to know that matter has been compromised. He applied for the judgment and decree passed by the first appellate court on 6.4.2015. It was attested on 17.4.2015 and delivered to him on 5.5.2015. He collected his brief from the local counsel of the trial court on 10.6.2015 and thereafter on 21.6.2015 engaged a counsel for filing the present appeal. The delay in filing the appeal was neither intentional nor deliberate.

2. The application was contested. It is averred in the reply that the present applicant was proceeded *ex parte* as he has failed to appear despite service on 21.8.2006 in the trial court. Kamal Dev was also served before the first appellate court, however, no appearance was put in and he was proceeded *ex parte*. It is evident that the applicant has neither contested the civil suit nor appeal. The Court has gone through order dated 21.9.2013 whereby the suit filed by Sh. Ram Prakash was dismissed as withdrawn and the appeal was compromised as per compromise deed Ex.CA. Compromise deed Ex.CA and Tatima Ex.CB were ordered to be form part of decree. The Regular Second Appeal is barred by one year, six months and five days. It is not believable that the applicant did not know about the judgment and decree dated 1.6.2012 of the trial court and compromise decree dated 21.9.2013 rendered by the Additional District Judge (I), Mandi in Civil Appeal No. 65 of 2012. The applicant has slept over his rights for considerable long time and it cannot be believed that he came to know about the passing of decree at the time of suit land being sold by respondent No.2-Himmat Ram. The applicant has remained negligent in pursuing the case. A valuable right has accrued to the opposite party.

3. It is true that the Court ought to be very liberal while considering the applications under section 5 of the Limitation Act, but at the same time the valuable rights accruing to the opposite party cannot be ignored. The applicant has not assigned sufficient reasons for the condonation of delay.

4. Their Lordships of the Hon'ble Supreme Court in ***Oriental Aroma Chemical Industries Limited*** versus ***Gujarat Industrial Development Corporation and another***, (2010) 5 SCC 459 have held that liberal approach in condoning delay of short duration and the strict approach in cases of inordinate delay should be applied. Their Lordships have held as under:

> **"14. We have considered the respective submissions. The law of limitation is founded on public policy. The legislature does not prescribe limitation**

with the object of destroying the rights of the parties but to ensure that they do not resort to dilatory tactics and seek remedy without delay. The idea is that every legal remedy must be kept alive for a period fixed by the legislature. To put it differently, the law of limitation prescribes a period within which legal remedy can be availed for redress of the legal injury. At the same time, the courts are bestowed with the power to condone the delay, if sufficient cause is shown for not availing the remedy within the stipulated time."

5. Their Lordships of the Hon'ble Supreme Court in ***Lanka Venkateswarlu (dead) by LRS*** versus ***State of Andhra Pradesh and others***, (2011) 4 SCC 363 have held that the liberal approach in considering sufficiency of cause for delay should not override substantial law of limitation, especially when court finds no justification for delay. Their Lordships have held as under:

"19. We have considered the submissions made by the learned counsel. At the outset, it needs to be stated that generally speaking, the courts in this country, including this Court, adopt a liberal approach in considering the application for condonation of delay on the ground of sufficient cause under Section 5 of the Limitation Act. This principle is well settled and has been set out succinctly in the case of Collector, Land Acquisition, Anantnag & Ors. Vs. Katiji & Ors. *((1987) 2 SCC 107).*

23. The concepts of liberal approach and reasonableness in exercise of the discretion by the Courts in condoning delay, have been again stated by this Court in the case of Balwant Singh (supra), as follows:-

"25. We may state that even if the term "sufficient cause" has to receive liberal construction, it must squarely fall within the concept of reasonable time and proper conduct of the party concerned. The purpose of introducing liberal construction normally is to introduce the concept of "reasonableness" as it is understood in its general connotation."

"26. The law of limitation is a substantive law and has definite consequences on the right and obligation of party to arise. These principles should be adhered to and applied appropriately depending on the facts and circumstances of a given case. Once a valuable right has accrued in favour of one party as a result of the failure of the other party to explain the delay by showing sufficient cause and its own conduct, it will be unreasonable to take away that right on the mere asking of the applicant, particularly when the delay is directly a result of negligence, default or inaction of that party. Justice must be done to both parties equally. Then alone the ends of justice can be achieved. If a party has been thoroughly negligent in implementing its rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to it in law as a result of his acting vigilantly."

26. Having recorded the aforesaid conclusions, the High Court proceeded to condone the delay. In our opinion, such a course was not open to the High Court, given the pathetic explanation offered by the respondents in the application seeking condonation of delay.

28. We are at a loss to fathom any logic or rationale, which could have impelled the High Court to condone the delay after holding the same to be unjustifiable. The concepts such as "liberal approach", "justice oriented approach", "substantial justice" can not be employed to jettison the substantial law of limitation. Especially, in cases where the Court

concludes that there is no justification for the delay. In our opinion, the approach adopted by the High Court tends to show the absence of judicial balance and restraint, which a Judge is required to maintain whilst adjudicating any lis between the parties. We are rather pained to notice that in this case, not being satisfied with the use of mere intemperate language, the High Court resorted to blatant sarcasms.

29. The use of unduly strong intemperate or extravagant language in a judgment has been repeatedly disapproved by this Court in a number of cases. Whilst considering applications for condonation of delay under Section 5 of the Limitation Act, the Courts do not enjoy unlimited and unbridled discretionary powers. All discretionary powers, especially judicial powers, have to be exercised within reasonable bounds, known to the law. The discretion has to be exercised in a systematic manner informed by reason. Whims or fancies; prejudices or predilections can not and should not form the basis of exercising discretionary powers."

6. The same principles have been reiterated by their Lordships of the Hon'ble Supreme Court in ***Maniben Devraj Shah*** versus ***Municipal Corporation of Brihan Mumbai***, (2012) 5 SCC 157 as under:

"15. The expression sufficient cause used in Section 5 of the Limitation Act, 1963 and other statutes is elastic enough to enable the Courts to apply the law in a meaningful manner which serve the ends of justice. No hard and fast rule has been or can be laid down for deciding the applications for condonation of delay but over the years this Court has advocated that a liberal approach should be adopted in such matters so that substantive rights of the parties are not defeated merely because of delay.

23. What needs to be emphasised is that even though a liberal and justice oriented approach is required to be adopted in the exercise of power under Section 5 of the Limitation Act and other similar statutes, the Courts can neither become oblivious of the fact that the successful litigant has acquired certain rights on the basis of the judgment under challenge and a lot of time is consumed at various stages of litigation apart from the cost."

7. Accordingly, in view of the observation and discussion made hereinabove, there is no merit in the application and the same is dismissed.

CMP No. 9470 of 2015

In view of the dismissal of CMP (M) No.806 of 2015, the present application stands disposed of.

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

Master Sanjeev Kumar(minor) through his natural guardian Smt. Leela Devi .....Petitioner.

Versus

Sh. Kehar Singh .....Respondent.

Cr.MMO No. 76 of 2008 and
Cr.MP No. 1023 of 2011.
Date of Decision : 4th July, 2016.

Code of Criminal Procedure, 1973- Section 125- A petition for maintenance was filed which was allowed by the trial court- a revision was preferred which was allowed by the Ld. Sessions Judge and the judgment of trial court was set aside on the ground that marriage was not proved- held, that version of the claimant was not corroborated by her witness regarding the marriage- she

had leveled allegations for the commission of offence punishable under Sections 420 and 376 of IPC in a complaint filed by her which was withdrawn- The Sessions Court had rightly reversed the judgment of the trial court- petition dismissed. (Para 3-8).

Case referred:
Nand Lal Wasudeo Badwaik versus Lata Nand Lal Badwaik and another, (2014)2 SCC 576

For the Petitioner: Mr. Gaurav Gautam, Advocate.
For Respondent : Mr. Janesh Gupta, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

The petitioner herein being minor through his natural guardian-cum-mother Smt. Leela Devi had instituted an application under Section 125 of the Code of Criminal Procedure (for short "Cr.P.C.") before the learned Chief Judicial Magistrate, Chamba claiming therein an order being rendered upon the respondent herein for the latter paying to him the necessary expenses for his maintenance. The application was allowed by the learned Chief Judicial Magistrate, Chamba and in a revision preferred therefrom by the respondent herein before the learned Sessions Judge, Chamba, the latter Court accepted the revision petition and also reversed the findings besides the verdict recorded by the learned Chief Judicial Magistrate, Chamba.

2. Since, the petition constituted before the learned Chief Judicial Magistrate, Chamba was laid therebefore under Section 125 of the Cr.P.C., hence, the petitioner herein was held by it to stand entitled to claim maintenance from the respondent herein, even if no clinching proof stood adduced therebefore by his mother of hers contracting a valid marriage with the respondent herein. However, the necessary ingredient for fastening liability upon the respondent herein to pay the necessary maintenance for the up keep and welfare of the petitioner herein was of, the mother of the petitioner and the respondent herein sexually accessing each other, also concomitant cogent proof in substantiation thereto stood enjoined to be adduced therebefore at the instance of the mother of the petitioner herein.

3. Be that as it may, the mother of the petitioner herein, Smt. Leela Devi in proof of hers solemnizing marriage with the respondent herein had while stepping into the witness box deposed of hers 3-1/2 years prior to her deposition standing recorded before the Court concerned hers solemnizing marriage with the respondent herein at Bhalei temple whereat both garlanded each other, in succession whereto one Bainsu, the maternal uncle of Smt. Leela Devi, the mother of the petitioner herein, stands deposed by her to have met her thereat who entreated them to accompany him to his house. The factum as deposed by AW-1 Smt. Leela Devi of hers in the manner aforesaid solemnizing marriage with the respondent herein, though stands corroborated by Bainsu Ram, who stepped into the witness box as AW-3, yet the latter has not corroborated AW-1 Smt. Leela Devi qua the factum of hers along with the respondent herein on entreaties made upon them by him, theirs proceeding to his house. Consequently, with AW-3 not supporting AW-1 qua the factum of his beseeching both to accompany him to his house whereat they, as contrarily deposed by AW-1, proceeded to, renders the deposition of AW-1 qua the factum aforesaid to stand obviously contrived by her, whereupon no reliance is imputable. In sequel, it is also to be concluded of even the factum of AW-3 witnessing the purported marriage solemnized inter se the mother of the petitioner, Smt. Leela Devi and the respondent herein holding no veracity. In aftermath, the solitary testimony of AW-1 qua hers purportedly solemnizing marriage with the respondent herein at Bhalei temple, testimony whereof stood concerted by her to be corroborated by AW-3 whereas with the testimony of AW-3 for the reasons aforestated standing concluded to be a contrived besides an interested testimony, whereupon the

testimony of AW-1 wherein she named AW-3 to be the person who witnessed her marriage with the respondent herein also is to be construable to be a concoction in its entirety. Also, the factum of Ex.PA, a complaint lodged by the mother of the petitioner against the respondent herein wherein she has constituted allegations against the respondent herein of his committing offences constituted under Sections 420 and 376 of the IPC being reticent qua the factum of hers solemnizing marriage with the respondent herein does per se repel the factum of hers holding any relationship as a spouse of the respondent herein. Furthermore, with no graphic display occurring therein of hers solemnizing a marriage with the respondent herein does for reiteration countervail the effect, if any, of her deposition qua hers in the manner besides at the venue enunciated therein solemnizing a marriage with the respondent herein. It is also stated by the learned counsel appearing for the parties of Ex.PA standing withdrawn on 3.05.2004 by the mother the petitioner, whereupon hence a conclusion can also stand erected of the allegations constituted therein against the respondent herein qua his holding her to sexual intercourse, in sequel whereof she conceived a child in her womb, losing efficacy.

4. Now the only evidence which is to be adverted to is the testimony of AW-2 Mutlabi, who is purported witness qua the factum of both the mother of the petitioner and the respondent herein holding a sexually compromising posture. Even, the testimony of AW-1 qua the factum aforesaid whereupon the counsel for the petitioner herein contends of the respondent herein sexually accessing the mother of the petitioner herein, in sequel, whereto she conceived a child in her womb begotten from the loins of the respondent herein cannot stand to be capitalized upon by the counsel for the petitioner, as given the factum aforesaid of the mother of the petitioner herein withdrawing Ex.PA, withdrawal whereof by her holding a consequential effect of the narrations occurring therein also standing nullified, renders the deposition of AW-1 to be bereft of veracity, rather a conclusion stand reared of his being an engineered witness.

5. The learned counsel appearing for the petitioner has contended with much vigour by placing reliance upon a decision of the Hon'ble Apex Court reported in **Nand Lal Wasudeo Badwaik versus Lata Nand Lal Badwaik and another, (2014)2 SCC 576**, relevant paragraphs whereof stand extracted hereinafter, to espouse before this Court of yet on his application standing preferred hereat under Section 482 of the Cr.P.C., an order, for unearthing the truth qua the factum of the petitioner herein standing begotten from the loins of the respondent herein, be rendered thereupon, for hence facilitating the impugned order wherefrom the instant petition stand filed hereat being concluded to be infirm. The relevant paragraphs No. 14 to 17 of the afore-referred judgment read as under:-

> “14. Now we have to consider as to whether the DNA test would be sufficient to hold that the appellant is not the biological father of respondent no. 2, in the face of what has been provided under Section 112 of the Evidence Act, which reads as follows:
>
> > "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."
>
> 15. From a plain reading of the aforesaid, it is evident that a child born during the continuance of a valid marriage shall be a conclusive proof that the child is a legitimate child of the man to whom the lady giving birth is married. The provision makes the legitimacy of the child to be a conclusive proof, if the conditions aforesaid are satisfied. It can be denied only if it is shown that the parties to the marriage have no access to each other at any time when the child could have been begotten. Here, in the present case, the wife had pleaded that the husband had access to her and, in fact, the child was born in the said

wedlock, but the husband had specifically pleaded that after his wife left the matrimonial home, she did not return and thereafter, he had no access to her. The wife has admitted that she had left the matrimonial home but again joined her husband. Unfortunately, none of the courts below have given any finding with regard to this plea of the husband that he had or had not any access to his wife at the time when the child could have been begotten.

16. As stated earlier, the DNA test is an accurate test and on that basis it is clear that the appellant is not the biological father of the girl- child. However, at the same time, the condition precedent for invocation of Section 112 of the Evidence Act has been established and no finding with regard to the plea of the husband that he had no access to his wife at the time when the child could have been begotten has been recorded. Admittedly, the child has been born during the continuance of a valid marriage. Therefore, the provisions of Section 112 of the Evidence Act conclusively prove that respondent No. 2 is the daughter of the appellant. At the same time, the DNA test reports, based on scientific analysis, in no uncertain terms suggest that the appellant is not the biological father. In such circumstance, which would give way to the other is a complex question posed before us.

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."

6. The aforesaid submission addressed before this Court by the learned counsel appearing for the petitioner herein would come to be accepted by this Court only in the event of material as exists on record hereat being bereft of any stain of premeditation, invention or contrivance on the part of the mother of the petitioner herein also unblemished evidence qua the respondent herein sexually accessing the mother of the petitioner herein would constrain this

Court to fasten a liability upon the respondent herein to maintain the petitioner herein given his being his purported biological father. However, when for reasons aforestated, the material as extantly exists on record pronounces with vividty of the mother of the petitioner herein inventing besides contriving evidence in display of the petitioner herein standing begotten from the loins of the respondent herein, renders the endeavour now concerted to by the learned counsel appearing for the petitioner to be unacceptable, rather its also likewise being construable to be a mere contrivance adopted by the mother of the petitioner to untenably claim maintenance from the respondent herein for the upkeep and welfare of the petitioner herein.

7. Be that as it may, even the Hon'ble Apex Court in the judgment (supra) dwelt upon the imperativeness qua the holding of the DNA test, its constituting conclusive evidence in rebuttal qua the presumption constituted under Section 112 of the Indian Evidence Act. Given fastening of conclusivity to the findings recorded by the expert concerned while holding the DNA test besides concomitantly its holding leverage to rebut the presumption constituted under Section 112 of the Indian Evidence Act renders its application hereat to be grossly inapposite given the apt provisions of Section 112 of the Indian Evidence Act standing bedrocked upon substantiation of the indispensable statutory tenet qua subsistence of a valid marriage inter se the spouses being peremptory for its provisions to hold play. The inappositeness qua pronouncement hereat of any order directing the holding of the relevant DNA test for the relevant purpose stands engendered by the prime factum of the mother of the petitioner herein not proving hers contracting a valid marriage with the respondent herein, imperatively when the aforesaid proof hereat is amiss, whereas the pronouncement of the Hon'ble Apex Court squarely with full might holds qua the imperativeness for the ordering for the holding of the DNA test for eroding the presumption constituted under Section 112 of the Indian Evidence Act, presumption whereof hereat cannot per se be held to be open to suffer erosion or rebuttal given the sine qua non for its facing the ill-fate of rebuttal by an opinion rendered by the expert concerned on holding the DNA test, when stands comprised in the evident fact of a valid subsisting marriage occurring vis-a-vis the mother of the petitioner herein and the respondent herein, whereas the aforesaid indispensable tenet for rendering workable Section 112 of the Indian Evidence Act remains hereat un-satiated, renders also any ordering by this Court qua the holding of the relevant DNA test to be inappropriate, fortifyingly when any ordering hereat for its being held is only for rebutting the presumption constituted under Section 112 of the Indian Evidence Act, rebuttal whereof would not emanate given the lack of proof of any valid subsisting marriage occurring inter se the mother of the petitioner herein with the respondent herein. Contrarily, when hereat for reasons alluded hereinabove the mother of the petitioner and the respondent herein never entered into a lawful wedlock nor ever held any sexual intimacy renders the petitioner herein to hold no leverage to foist any right upon the petitioner to stake any claim from the respondent herein for his maintenance by the latter on the ground of his standing begotten from the loins of the respondent herein, besides disables the learned counsel appearing for the petitioner herein to stake on the anchorage of the verdict of the Hon'ble Apex Court for any ordering hereat of the DNA test, amplifyingly when the pronouncement of the Hon'ble Apex Court with specificity stand confined to hold clouts besides legal might solitarily for rebutting the presumption constituted under Section 112 of the Indian Evidence Act, presumption whereof enjoins satiation by conclusive evidence of the indispensable statutory tenet of the mother of the petitioner herein and the respondent herein holding a valid marriage, whereas, with the aforesaid tenet being amiss hereat, there is obviously no occasion hereat to rebut the presumption constituted under Section 112 of the Act by this Court ordering for the holding of the DNA test.

8. True it is of the holding of the DNA test would firmly rests an entrenched conclusion qua the factum of the respondent herein being the biological father of the petitioner herein, nonetheless, the endeavour hereat is belated also its standing strived hereat alone whereas it was enjoined to be strived earlier either before the learned trial Court or before the learned Sessions Judge, Chamba, renders the belated concert hereat to be for reasons assigned hereinabove to be a mere ploy or a contrivance of the petitioner hereat. Also indubitably though a plenary jurisdiction stands vested in this Court under Section 482 of the Cr.P.C. to order for the

holding of a DNA test for determining the paternity of the petitioner herein besides for reversing the impugned rendition of the learned Sessions Judge, Chamba, yet again with lack of the apposite endeavours therebefore by the petitioner herein besetting hence a constraint upon the learned Sessions Judge to record an order for the holding of a DNA test for determining the paternity of the petitioner herein besides obviously his not holding the apposite material to pronounce qua the respondent herein being the biological father of the petitioner herein, renders the endeavour hereat for the purpose aforesaid tantamounting to collection of evidence by this Court for the petitioner for facilitating his claim for maintenance from the respondent herein. Also countenancing of the aforesaid endeavour by this Court would sequel an in-sagacious order from this Court of its proceeding to reverse the well reasoned findings of the learned Sessions Judge. In aftermath, with there existing ample and abundant proof in display of the respondent herein never holding the mother of the petitioner herein to sexual intercourse, renders the findings arrived at by the learned Sessions Judge to not suffer from any mis-appreciation and non appreciation of the apposite material on record. Consequently, the instant petition is dismissed as also Cr.MP No. 1023 of 2011 preferred hereat by the petitioner herein for seeking permission of this Court to order for the holding of the DNA test of the parties at contest stands dismissed. In sequel, the order of the learned Sessions Judge, Chamba is affirmed and maintained. All pending applications also stand disposed of.

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

Renu Sharma …Petitioner.

Versus

Brig.C.K.Maitra …Respondent.

CR No.67 of 2015 With
CR No.68 of 2015.
Reserved on: 02.06.2016.
Decided on: July 04, 2016.

Specific Relief Act, 1963- Section 28- A decree for specific performance of agreement was passed by the Court on the payment of Rs. 8 lakh in the Court- an appeal was preferred against the decree which was dismissed- the balance consideration was not deposited within one month but was deposited after the further lapse of 84 days - an application for rescission of contract was filed which was allowed- held in revision, Section 28 empowers the Court to extend the time for deposit of sale consideration- the Court should condone the delay liberally especially when there was sufficient cause for non deposit of the amount earlier- the decree was stayed by High Court and period of limitation will start running from the date of the judgment of the High Court- further the High Court had requisitioned the amount deposited before the Trial Court which would legalize the deposit- the application was wrongly allowed by the Trial Court- petition accepted. (Para 5-12)

Cases referred:

V.S.Palanichamy Chettair Firm versus C.Alagappan & Anr., (1999) 4 SCC 702
Lanka Venkateswarlu (Dead) by LRs versus State of Andhra Pradesh & Ors., (2011) 4 SCC 363
Kumar Dhirendra Mullick & Ors. Versus Tivoli Park Apartments Ltd., (2005) 9 SCC 262
P.R.Yelumalai versus N.M.Ravi (2015) 9 SCC 52

For the Petitioner: Mr.K.D.Sood, Sr.Advocate with Mr.Sanjeev Sood, Advocate.
For the Respondent: Mr.Ajay Kumar, Sr.Advocate with Mr.Gautam Sood, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J.

Civil Revision Petition No.67 of 2015 stands directed against the impugned order of the learned District Judge, Forest, Shimla whereby he allowed the application preferred thereat by the applicant-JD/respondent herein under Section 28 of the Specific Relief Act (for short hereinafter referred to as 'the Act'). In sequel, the agreement of sale recorded inter se the petitioner herein and the respondent herein stood set-aside, with a sequelling effect whereof of the rendition of the learned Additional District Judge, Fast Track Court recorded in Civil Suit No.72-S/1 of 2004/1999 rendition whereof stood affirmed by this Court in its decision recorded in RFA No.351 of 2005, standing also quashed and set-aside.

2. Civil Revision Petition No.68 of 2015 stands directed against the orders rendered on 30.03.2015 by the learned District Judge (Forests), Shimla on the Execution Petition preferred thereat by the decree holder-petitioner whereby her prayer for execution of the decree rendered by the learned Additional District Judge, Fast Track Court, Shimla, H.P., decree whereof stood affirmed by this Court in its decision recorded in RFA No.351 of 2005, stood declined to her.

3. Since both the orders impugned in the Civil Revision Petitions aforesaid stand hinged upon the decree of the learned Additional District Judge, Fast Track Court, Shimla, decree whereof stood affirmed in appeal by this Court in its judgment recorded in RFA No.351 of 2005 besides stand hinged upon apposite conditional decree, consequently when both also stand embroiled in a factual matrix common to each essentially the one impinging upon the effect of disobedience if any at the instance of the decree holder-petitioner herein of the mandate of the apposite conditional decree aforesaid, both warrant theirs standing disposed of by a common judgment.

4. The petitioner herein/decree holder, had from the Court of the learned Additional District Judge, Fast Track Court, Shimla, secured a decree for specific performance of agreement of 12.07.1997 recorded inter se her and the respondent herein qua property nomenclatured as Cottage No.24, MIG, H.P. Housing Board, Jakhoo, Shimla-1. The operative part of the judgment and decree recorded by the Court of the learned Additional District Judge, Fast Track Court, Shimla underlines the factum of the respondent herein/Judgment debtor standing directed to execute within a period of two months there-from a sale deed with the decree holder-petitioner herein qua the afore-referred suit property, also a condition stood mandated therein upon the petitioner-decree holder to within one month since thereat deposit a sum of Rs.8 lacs in the Court concerned. Furthermore, the relief claimed in the suit by the plaintiff of hers standing entitled to recover from the defendant a sum of Rs.50,000/- as damages stood accorded in her favour by the learned trial Court along with 9% interest being leviable thereon from the date of filing of the suit till realization of the amount aforesaid.

5. The judgment and decree of the learned trial Court stood appealed hereat by the aggrieved defendant-respondent herein. The appeal preferred hereat by the aggrieved defendant-JD against the judgment and decree of the learned trial Court, stood registered as RFA No.351 of 2005. This Court recorded therein a decision qua its dismissal. Consequently, the apposite judgment and decree recorded by the learned trial Court stood affirmed hereat. However, even though the defendant thereat appellant hereat omitted to in his apposite grounds of appeal urge therein of the apposite decree recorded by the learned trial Court suffering any impairment awakened by the factum of the plaintiff not within one month since thereat depositing before the Court concerned the balance sale consideration though hers standing enjoined by the mandate of the apposite decree yet the aforesaid facet of challenge was left open by this Court for its being urged by the defendant-JD before the learned Executing Court at the stage the apposite execution petition stood laid thereat by the plaintiff-decree holder. The plaintiff / decree holder palpably omitted to within one month of the apposite rendition of the learned Additional District Judge deposit the balance sale consideration thereat. She deposited the balance sale consideration

aforesaid in January 2006, hence its deposit by her occurred on 84 days standing elapsed since the elapsing of the relevant one month wherewithin she stood enjoined by the apposite rendition of the learned trial Court to deposit it thereat. The plaintiff did not hence beget compliance with the mandate of the decree of the learned trial Court affirmation whereof stood accorded by this Court in its rendition recorded in RFA No.351 of 2005. Also the deposit of the aforesaid amount by the plaintiff beyond a period of one month since 25.10.2005 stood un-accompanied by an apposite application preferred thereat yet the decree holder-plaintiff preferred an application before the Executing Court in the year 2010 under Sections 148 and 151 of the Code of Civil Procedure with a prayer therein of time being ordered to be extended to her by it for depositing the balance sale consideration of Rs.8 lacs, as stood enjoined to be deposited by her before the learned trial Court within one month from the date of its rendition, rendition whereof stood pronounced on 25.10.2005. Though narrations qua it occur in the order of the learned District Judge, (Forests) rendered in Civil Miscellaneous application No.151-S/6 of 2013/10 comprising the application constituted thereat by the judgment debtor under Section 28 of the Act for rescission of contract of agreement recorded inter se the plaintiff and the defendant on 12.7.1997 besides for setting aside the decree of the learned trial Court rendered on 25.10.2005, yet he discountenanced the belated endeavour of the plaintiff-decree holder to seek extension of time from it for hers begetting compliance qua the apposite rendition of the learned trial Court. Furthermore, the learned District Judge (Forests) also hence proceeded to dismiss the Execution Petition preferred thereat by the plaintiff/petitioner herein wherefrom Civil Revision No.68 of 20015 has arisen.

6. The quintessential/nerve centre of the controversy engaging the parties at contest hinges upon an interpretation of Section 28 of the Act, provisions whereof stands extracted hereinafter:

> "28. Rescission in certain circumstances of contracts for the sale or lease of immovable property, the specific performance of which has been decreed :- (1) Where in any suit or decree for specific performance of a contract for the sale or lease of immovable property has been made and the purchaser or lessee does not, within the period allowed by the decree or such further period as the court may allow, pay the purchase money or other sum which the court has ordered him to pay, the vendor or lessor may apply in the same suit in which the decree is made, to have the contract rescinded and on such application the court may, by order, rescind the contract either so far as regards the party in default or altogether, as the justice of the case may require.
>
> (2) Where a contract is rescinded under sub-section (1), the court-(a) shall direct the purchaser or the lessee, if he has obtained possession of the property under the contract, to restore such possession to the vendor or lessor, and
>
> (b) may direct payment to the vendor or lessor of all the rents and profits which have accrued in respect of the property from the date on which possession was so obtained by the purchaser or lessee until restoration of possession to the vendor or lessor, and, if the justice of the case so requires, the refund of any sum paid by the vendee or lessee as earnest money or deposit in connection with the contract.
>
> (3) If the purchaser or lessee pays the purchase money or other sum which he is ordered to pay under the decree within the period referred to in sub-section (1), the court may, on application made in the same suit, award the purchaser or lessee such further relief as he may be entitled to, including in appropriate cases all or any of the following reliefs, namely:-(a) the execution of a proper conveyance or lease by the vendor or lessor;
>
> (b) the delivery of possession, or partition and separate possession, of the property on the execution of such conveyance or lease.
>
> (4) No separate suit in respect of any relief which may be claimed under this section shall lie at the instance of a vendor, purchaser, lessor or lessee, as the case may be.

(5) The costs of any proceedings under this section shall be in the discretion of the Court."

A mandate stands enjoined therein of omission on part of the vendee/decree holder to deposit the sale consideration within the time allowed/granted to her by the learned trial Court or within such further validly extended period, empowering it hence to rescind the contract. Since the plaintiff omitted to within the time prescribed by the learned trial Court make the apposite deposit thereat of the balance sale consideration nor moved it with dispatch for further time being granted to her for meteing compliance thereto rather hers belatedly seeking enlargement of time from the learned Executing Court for its deposit thereat, by hers preferring an application thereat in the year 2010, constituted the prime ground for the learned District Judge (Forest), Shimla to discountenance her grossly procrastinated apposite endeavour whereupon it concluded of with the conditional decree of the learned trial Court hence standing infracted by the plaintiff, infraction whereof warranting it to order for rescission of the contract of 12.07.1997 qua the suit property recorded inter se the plaintiff and the defendant. The learned District Judge (Forest) while allowing the application preferred thereat under Section 28 of the Act had relied upon pronouncements of the Hon'ble Apex Court reported in **V.S.Palanichamy Chettair Firm** versus **C.Alagappan & Anr.,** (1999) 4 SCC 702, besides placed reliance upon a verdict of the Hon'ble Apex Court reported in **Lanka Venkateswarlu (Dead) by LRs** versus **State of Andhra Pradesh & Ors.,** (2011) 4 SCC 363. The tenacity of the rendition of the learned District Judge (Forests), Shimla recorded in Civil Miscellaneous Application No.151-S/6 of 2013/10 wherefrom Civil Revision Petition No.67 of 2015 has arisen would assume vigour only when this Court on analyzing the aforesaid judgments of the Hon'ble Apex Court whereupon he founded his impugned verdict, it holds of their respective *ratio decidendi* standing aptly applied in his impugned rendition before this Court by the learned District Judge (Forests). Hence this Court proceeds to engage itself in the onerous task of analyzing the import of the verdicts of the Hon'ble Apex Court reported in the law journals aforesaid besides this Court would hence unearth therefrom qua reliance thereupon by the learned District Judge (Forests) being apt or inapt, also its standing hence coaxed to concomitantly sustain or reverse his verdict. For this Court to efficaciously engage itself in the aforesaid task, the extraction of relevant paragraphs thereof is imperative. The relevant paragraphs of the rendition of the Hon'ble Apex Court reported in **V.S.Palanichamy's case (supra)** stand encompassed in paragraphs 16 and 17, paragraphs whereof stand extracted herein-after:-

"16. In view of the decision of this Court in Ramankutty Guptan's case (1994) AIR SCW 1533) (supra) when the trial Court and the executing Court are same, executing Court can entertain the application for extension of time though the application is to be treated as one filed in the main suit. On the same analogy, the vendor judgment-holder can also seek rescission of the contract of sale or take up this plea in defence to bar the execution of decree. One of the grounds on which the trial Court dismissed the execution application was that the decree holder did not pay the balance of consideration as per the sale agreement and also did not pay within the time stipulated by the Court in the decree. High Court could have certainly gone into this question when application for extension of time was filed before it. However, on the objection by the judgment-debtor, it chose to send back the matter to the executing Court for decision on these applications, which was perhaps, in the circumstances, was not correct procedure to adopt. But then, at the same time, the High Court put shackles on the discretion of the executing Court by observing that vendor might have felt that after the appeal filed by the vendor judgment-holder against the decree for specific performance was disposed of they can even then deposit the amount or at the time of seeking the execution of the sale deed.

17. The agreement of sale was entered into as far back on February 16, 1980, about 19 years ago. No explanation is forthcoming as to why the balance

amount of consideration could not be deposited within time granted by the Court and why no application was made under Section 28 of the Act seeking extension of time of this period. Under Article 54 of the Limitation Act, 3 years period is prescribed for filing the suit for specific performance of contract of sale from the date of the agreement or when the cause of action arises. Merely because a suit is filed within the prescribed period of limitation does not absolve the vendee-plaintiff from showing as to whether he was ready and willing to perform his part of agreement and if there was non-performance was that on account of any obstacle put by the vendor or otherwise. Provisions to grant specific performance of an agreement are quite stringent. Equitable considerations come into play. Court has to see all the attendant circumstances including if the vendee has conducted himself in a reasonable manner under the contract of sale. That being the position of law for filing the suit for specific performance, can the Court as a matter of course allow extension of time for making payment of balance amount of consideration in terms of a decree after 5 years of passing of the decree by the trial Court and 3 years of its confirmation by the appellate Court? It is not the case of the respondent-decree holder that on account of any fault on the part of the vendor-judgment-debtor, the amount could not be deposited as per the decree. That being the position, if now time is granted, that would be going beyond the period of limitation prescribed for filing of the suit for specific performance of the agreement though this provision may not be strictly applicable. It is nevertheless an important circumstance to be considered by the Court. That apart, no explanation whatsoever is coming from the decree-holder-respondents as to why they did not pay the balance amount of consideration as per the decree except what the High Court itself thought fit to comment which is certainly not borne out from the record. Equity demands that discretion be not exercised in favour of the decree holder-respondents and no extension of time be granted to them to comply with the decree."

7. The verdict of the Hon'ble Apex Court reported in **Lanka Venkateshwarlu's case (supra)**, relevant paragraphs whereof stand extracted herein-after:-

"19. We have considered the submissions made by the learned counsel. At the outset, it needs to be stated that generally speaking, the courts in this country, including this Court, adopt a liberal approach in considering the application for condonation of delay on the ground of sufficient cause under Section 5 of the Limitation Act. This principle is well settled and has been set out succinctly in the case of Collector, Land Acquisition, Anantnag & Ors. Vs. Katiji & Ors., 1987 2 SCC 107.

23. The concepts of liberal approach and reasonableness in exercise of the discretion by the Courts in condoning delay, have been again stated by this Court in the case of Balwant Singh (supra), as follows:-

"25. We may state that even if the term "sufficient cause" has to receive liberal construction, it must squarely fall within the concept of reasonable time and proper conduct of the party concerned. The purpose of introducing liberal construction normally is to introduce the concept of "reasonableness" as it is understood in its general connotation."

"26. The law of limitation is a substantive law and has definite consequences on the right and obligation of party to arise. These principles should be adhered to and applied appropriately depending on the facts and circumstances of a given case. Once a valuable right has accrued in favour of one party as a result of the failure of the other party to explain the delay by showing sufficient cause and its own conduct, it will be unreasonable to take

> away that right on the mere asking of the applicant, particularly when the delay is directly a result of negligence, default or inaction of that party. Justice must be done to both parties equally. Then alone the ends of justice can be achieved. If a party has been thoroughly negligent in implementing its rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to it in law as a result of his acting vigilantly."

28. We are at a loss to fathom any logic or rationale, which could have impelled the High Court to condone the delay after holding the same to be unjustifiable. The concepts such as "liberal approach", "justice oriented approach", "substantial justice" can not be employed to jettison the substantial law of limitation. Especially, in cases where the Court concludes that there is no justification for the delay. In our opinion, the approach adopted by the High Court tends to show the absence of judicial balance and restraint, which a Judge is required to maintain whilst adjudicating any lis between the parties. We are rather pained to notice that in this case, not being satisfied with the use of mere intemperate language, the High Court resorted to blatant sarcasms.

29. The use of unduly strong intemperate or extravagant language in a judgment has been repeatedly disapproved by this Court in a number of cases. Whilst considering applications for condonation of delay under Section 5 of the Limitation Act, the Courts do not enjoy unlimited and unbridled discretionary powers. All discretionary powers, especially judicial powers, have to be exercised within reasonable bounds, known to the law. The discretion has to be exercised in a systematic manner informed by reason. Whims or fancies; prejudices or predilections can not and should not form the basis of exercising discretionary powers."

8. The Hon'ble Apex Court had in its judgment recorded in **V.S.Palanichamy (supra)** vindicated the orders recorded by the learned Executing Court thereat whereby the learned Executing Court had dismissed the execution petition preferred thereat by the decree holder on the ground of the decree holder thereat constituting an apposite application thereat for execution of the decree after three years standing elapsed since the dismissal of the appeals by the High Court, appeals whereof stood preferred thereat by the aggrieved judgment debtors-defendants therein. Besides the aforesaid facet which constrained the Hon'ble Apex Court in **V.S.Palanichamy (supra)** to uphold the rendition of the learned Executing Court whereby the latter dismissed the apposite Execution Petition preferred thereat, the factum of the decree holders not depositing the sale consideration within the period enjoined upon them by the decree nor theirs within limitation preferring an apposite application thereat for seeking there-from enlargement of time to them for depositing the sale consideration, also constrained the Hon'ble Apex Court to validate the orders of the learned Executing Court whereby the latter Court dismissed the apposite Execution Petition constituted thereat by the decree holders. Even in the rendition of the Hon'ble Apex Court embodied in **Lanka Venkateshwarlu (supra)** the Hon'ble Apex Court had while dwelling upon the imperativeness qua launching of an appropriate remedy within time by an aggrieved, also had therein prescribed the adoption of a liberal approach by Courts of law while dealing with an application preferred under Section 5 of the Limitation Act yet the Hon'ble Apex Court therein enjoined Courts of law whereat an application under Section 5 of the Limitation Act stands preferred, to insist upon delay in the launching of an appropriate remedy by the aggrieved standing anchored upon an evident explicated sufficient cause whereupon alone they would hold empowerment to condone the apposite delay, contrarily lack of portrayals by the aggrieved in explication of delay occurring in his canvassing his remedy warranting the sequel of the apposite application of the aggrieved suffering the misfortune of dismissal, especially when the countenancing of the belated endeavour of the aggrieved without any evident explicated sufficient cause when precludes him to espouse his remedy would tantamount to a deprivation of a valuable right foisted in the party acting vigilantly. The verdict

of the Hon'ble Apex Court as relied upon by the learned District Judge (Forests) in **V.S.Palanichamy (supra)** for its standing approbated by this Court warrants congruity qua the factual matrix therein vis-à-vis the factual matrix hereat. The order of the learned Executing Court dismissing the application constituted thereat by the decree holders secured validation from the Hon'ble Apex Court in **V.S.Palanichamy (supra)** on the anvil of the decree holders thereat proceeding to prefer before the Executing Court concerned an apposite Execution Petition after five years standing elapsed since the rendition of the apposite decree by the trial Court besides its preferment thereat by the decree holders therein occurring beyond three years since the dismissal of the appeals of the aggrieved defendants by the High Court concerned. Hereat, it is imperative to allude to the relevant paragraph of the rendition of Hon'ble Apex Court in **V.S.Palanichamy (supra)** which stood extracted herein-after, wherein the view stood taken by it of with a period of three years standing prescribed as the period of limitation within which the apposite execution petition for execution of a decree of specific performance stands enjoined to be constituted by the decree holder before the learned Executing Court concerned, period whereof though stands mandated therein to be not strictly applicable nonetheless it being an important circumstance to be considered:-

> "…That being the position, if now time is granted, that would be going beyond the period of limitation prescribed for filing of the suit for specific performance of the agreement though this provision may not be strictly applicable. It is nevertheless an important circumstance to be considered by the Court. That apart, no explanation whatsoever is coming from the decree-holder-respondents as to why they did not pay the balance amount of consideration as per the decree except what the High Court itself thought fit to comment which is certainly not borne out from the record…"

Since with the Hon'ble Apex Court applying the aforesaid principle, it concluded thereupon of the decree of specific performance thereat becoming executable within three years of the rendition of the High Court concerned yet the apposite Execution Petition thereat standing constituted beyond three years hence palpably appears to garner a conclusion from the Hon'ble Apex Court qua the orders of dismissal of the learned Executing Court thereat of the apposite application preferred thereat by the decree holders apposite orders whereof standing anvilled upon the apposite applications being grossly time barred, consequently not suffering from any vice of invalidation. However, extantly the Execution Petition hereat stood constituted by the decree holder herein before the learned Executing Court on 15.7.2010 hence within less than nine months standing elapsed since the decree of the learned trial Court standing affirmed by this Court under its decision recorded on 11th November, 2009 in RFA No.351 of 2005. The decree in affirmation to the decree of the learned trial Court stood rendered by this Court on 11th November, 2009 hence became the executable decree predominantly when this Court had temporarily stayed the execution of the apposite decree of the learned trial Court, order whereof of this Court temporarily staying the operation of the apposite judgment and decree of the learned trial Court impugned hereat by the aggrieved defendant stood made absolute by this Court on 13.11.2006. Hence, consequently with this Court on 22.12.2005 temporarily staying the execution of the apposite decree of the learned trial Court whereafter it made absolute its ad interim order temporarily staying the execution of the apposite decree recorded by the learned trial Court obviously precluded the decree holder herein to since 22.12.2005 with dispatch therefrom up to the judgment recorded by this Court on 11th November, 2009 launch an apposite Execution Petition before the learned Executing Court concerned. The apposite Execution Petition constituted by the decree holder before the learned Executing Court would suffer the ill fate of dismissal only when she had constituted it thereat beyond three years which is the period mandated in the verdict of the Hon'ble Apex Court in **V.S.Palanichamy (supra)**, within which a decree holder of a decree of specific performance stands empowered to constitute an Execution Petition before the learned Executing Court concerned. In aftermath, with merely a delay of nine months occurring on part of the decree holder herein computable from the recording of a decision on 11th November, 2009 by this Court in RFA No.351 of 2005 cannot render her apposite

Execution Petition constituted before the learned Executing Court concerned to be beyond limitation. Also hence the aforesaid delay is minimal besides the apposite application of the decree holder herein is within limitation vis-à-vis the inordinate delay beyond limitation manifested in the judgment of Hon'ble Apex Court in **V.S.Palanichamy (supra),** procrastinated time barred delay whereof on part of the decree holders therein constrained the learned Executing Court thereat to refuse its execution, orders whereof of the learned Executing Court thereat stood affirmed by the Hon'ble Apex Court. Sequelly, hence with an apparent distinctivity occurring inter se the factual matrix hereat vis-à-vis the factual matrix existing in the judgment of the Hon'ble Apex Court in **V.S.Palanichamy (supra)** palpably of a visible display therein of an immense hiatus or a time barred gap occurring in the launching of the execution proceedings by the decree holders thereat vis-à-vis the minimal gap besides the relevant gap being not time barred hereat, qua the executable rendition of this Court recorded in RFA No.351 of 2005 on 11th November, 2009, besides reiteratedly with the decree holder hereat constituting the apposite Execution Petition before the learned Executing Court within limitation, the application of the principle enshrined in the verdict of the Hon'ble Apex Court in **V.S.Palanichamy (supra)** qua immensity of delay or any evident statutorily barred procrastinated delay occurring at the instance of the decree holder thereat since the apposite executable rendition therein vis-à-vis the launching of execution proceedings by the decree holders thereat, concomitantly barring the decree holders thereat to seek execution of the decree, was obviously unavailable for attraction hereat by the learned Court below preeminently when for reasons afore-stated, the immensity of delay as had occurred therein does not occur hereat. In sequel, its application hereat is grossly inapt. However, the principle also encapsulated therein of an omission on the part of the decree holder to within the time prescribed in the apposite decree deposit the sale consideration before the Court concerned operating as a bar upon the decree holder to seek execution of the apposite decree yet may also for reasons assigned herein-after remains un-attracted qua the facts at hand rendering hence also any reliance thereupon by the learned District Judge (Forests) to be inapt. However, before determining qua theirs occurring any deliberate willful omission on the part of the decree holder to beget compliance with the apposite rendition of the learned trial Court enjoining her to deposit the sale consideration within one month of its rendition, rendition whereof stood pronounced on 25.10.2005, for hence this Court standing constrained to accept the findings of the learned District Judge founded upon the verdicts of the Hon'ble Apex Court, an allusion to the factum of the plaintiff-decree holder depositing the sale consideration 64 days beyond the time prescribed in the apposite decree for its deposit by her besides the factum of the deposit aforesaid not resting upon any apposite order recorded by the learned trial Court yet rendering the aforesaid deposit by the decree holder being construable to be a valid or an invalid deposit, also enjoins an adjudication thereon by this Court. The pronouncement by this Court qua the validity or invalidity of deposit by the plaintiff of the sale consideration beyond the period prescribed for its deposit by the apposite decree of the learned trial Court of 25.10.2005 preeminently is imperative as on this Court rendering an adjudication qua the apposite deposit by her constituting a valid deposit would concomitantly render the preferment of an apposite application by the plaintiff-decree holder in the year 2010 before the Executing Court wherein she sought an order from it qua extension of time for its deposit thereat standing granted to her, to assume no significance rather it would be relegated to the limbo of oblivion, also reliance by the learned District Judge in his impugned rendition upon a verdict of the Hon'ble Apex Court in **Lanka Venkateshwarlu (supra)** wherein their Lordships interdict Courts of law against allowing application for condonation of delay when they omit to explicate therein a sufficient cause precluding the aggrieved to promptly avail the remedy especially when hence a right accrues to a vigilant litigant, would hence stand jettisoned or reliance thereupon by him would be amenable to a construction of it being an inapposite reliance by him also his thereupon holding a fallacious view of the belated endeavour made there-before by the decree holder for its ordering qua extension of time being granted to her for depositing the balance sale consideration before the Court concerned, warranting hence its standing discountenanced by this Court. Before alluding to the relevant records manifesting theirs impinging upon the validity of deposit by the decree holder of the balance sale consideration beyond 64 days of its standing enjoined by the apposite

conditional decree to be deposited by her before the Court concerned, it is imperative to also allude to the provisions engrafted in Section 28 of the Act, provisions whereof stand extracted herein-above, provisions whereof though warrant the Court to on an apposite application laid there-before by the defendant-judgment debtor to on availability of demonstrable affirmative evidence, allow it, provisions whereof also manifest of with the decree holder evidently not depositing the sale consideration within time granted in the apposite decree nor the decree holder seeking an order from the Court concerned for time standing extended to her/him for its deposit there-before by him/her, empowering hence the Court concerned to allow the application preferred thereat by the judgment debtor under Section 28 of the Act yet the import borne by the phrase 'as justice of the case may require' as occurs in Section 28 of the Act warrants its standing imputed its innate signification by this Court for thereupon its determining qua the impugned rendition of the learned Court below on an application constituted there-before by the judgment debtor-defendant under Section 28 of the Act, even if assumingly clinching proof for sustaining the relief ventilated therein stood evinced there-before qua the decree holder omitting to within the time purveyed to him by the apposite decree nor hers within the extended time afforded to her depositing the sale consideration before the Court concerned, while overlooking its existence/occurrence therein has committed a fallacy in recording its impugned decision. The parlance borne by the aforesaid words existing in Section 28 of the Act is of the Court concerned even when standing assumingly seized with demonstrable evidence of compliance not standing begotten by the decree holder with the mandate of an apposite decree nor the decree holder begetting necessary compliance within the time extended by the Court concerned for the purposes aforesaid yet the aforesaid non compliances by the decree holder not per se warranting it to rescind the contract, if the attending circumstances coagulated with the omissions aforesaid would sequel perpetuation of injustice whereas the Court concerned while even when assumingly standing seized with evidence warranting the rescission by it of the apposite contract, is yet enjoined to in the larger interest of justice omit to rescind it.

9. For gauging from the relevant records the prime factum of whether the order of the learned District Judge in Civil Misc. App. No.151-S/6 of 2013/10 whereby he rescinded the contract of sale qua the suit property recorded inter se the parties at lis stands percolated with a paragon virtue of justice dehors non-compliances, if any, by the decree holder within the time prescribed by the mandate of the learned trial Court of 25.10.2005, this Court ought not to remain oblivious to the factum of the aggrieved defendant preferring an appeal before this Court against the decree of the learned trial Court of 25.10.2005, appeal whereof came to be registered as RFA No.351 of 2005. The appeal aforesaid came to be instituted on 19.12.2005. On 22.12.2005 this Court stayed till further orders the operation of the decree of the learned trial Court impugned hereat by the aggrieved defendant. In the interregnum since 22.12.2005 till 13.11.2006 the plaintiff-decree holder deposited the balance of the sale consideration before the trial Court. On 13.11.2006 this Court recorded an order qua recalling of the aforesaid amount as stood deposited by the plaintiff- decree holder before the learned trial Court besides for its being invested in a fixed deposit. Furthermore, this Court on 13.11.2006 had made absolute its order of 22.12.2005 whereby it temporarily stayed the operation of the apposite decree of the learned trial Court impugned hereat by the aggrieved defendant also it on 13.11.2006 had mandated therein of its aforesaid rendition being subject to the defendant depositing Rs.50,000 plus interest @ 9% per annum from the date of filing of the suit till its deposit. The defendant abided by the aforesaid direction of this Court rendered on 13.11.2006. Also the defendant did not oppose the application preferred hereat by the plaintiff for its release being ordered in her favour whereupon this Court in its order recorded on 13.11.2006 directed the aforesaid sum of money deposited by the aggrieved defendant being released in her favour. The aforesaid manifestations bespeak of the acquiescence of the aggrieved defendant with the apposite renditions of the learned trial Court, effect whereof stands alluded herein-after to estop him to contest the execution application of the decree holder.

10. Be that as it may, before this Court proceeds to on the anvil of the previous herein-above referred renditions of this Court holds of theirs assumingly validating the deposit of

the balance sale consideration by the plaintiff before the Court concerned besides of hers hence begetting compliance with the rendition of the learned trial Court of 25.10.2005, an advertence to the judgment of the Hon'ble Apex Court reported in **Kumar Dhirendra Mullick & Ors.** Versus **Tivoli Park Apartments Ltd.,** (2005) 9 SCC 262, relevant paragraph 30 whereof stands extracted herein-after is imperative:-

> "30. In the case of Sardar Mohar Singh v. Mangilal4 it has been held that section 28 (1) postulates that the court does not lose its jurisdiction after the grant of the decree for specific performance nor it becomes functus officio Section 28 gives power to grant order of rescission of the agreement which itself indicates that till the sale deed is executed, the trial court retains its power and jurisdiction to deal with the decree of the specific performance. Therefore, the court has the power to enlarge the time in favour of the judgment-debtor to pay the amount or to perform the conditions mentioned in the decree for specific performance, despite the application for rescission of the agreement/decree."

In the verdict aforesaid, the Hon'ble Apex Court has postulated the diktat of the Court whereat applications under Section 28(1) of the Act are constituted not being *functus officious* rather its still standing invested with a power to enlarge time qua the decree holder for hers/his depositing the balance sale consideration before the Court concerned dehors hers/his omission to make the relevant deposit within time prescribed by the apposite renditions, diktat whereof read in coagulation with the diktat referred to herein-above comprised in the renditions of this Court made in proceedings occurring in RFA No.351 of 2005, constrain an imperative inference of theirs constituting validation by this Court qua the deposit of the sale consideration by the decree holder before the Court concerned even when the relevant deposit by her occurred beyond the time mandated in the apposite decree for its deposit thereat. In sequel, the apposite renditions of this Court occurring in proceedings drawn in RFA No.351 of 2005 did operate as a fiat upon the learned District Judge to formalize the deposit of a sum of Rs.8 lacs made by the decree holder before the Court concerned, deposit whereof constituted the balance sale consideration payable by the plaintiff to the defendant-judgment debtor, dehors the factum of the decree holder preferring an application thereat for extension of time or enlargement of time on five years standing elapsed since the rendition of the apposite decree of specific performance pronounced by the learned trial Court on 13.11.2006 preeminently when this Court had recalled from the learned trial Court a sum of Rs.8 lacs as stood deposited thereat by the plaintiff. Consequently, when the order of this Court of 13.11.2006 whereby it recalled from the learned trial Court a sum of Rs.8 lacs deposited thereat by the decree holder for it standing invested in a fixed deposit hereat hence tantamounts to its legalizing also its legitimizing the deposit of the aforesaid amount by the plaintiff/decree holder before the learned trial Court besides also gives leverage to an inference of hence this Court per se extending the time for its deposit thereat by her. In aftermath, the unequivocal communications existing in the verdict of the learned District Judge recorded in Civil Miscellaneous application No.151-S/6 of 2013/10 whereby he allowed the application preferred thereat by the judgment debtor under Section 28 of the Act, for reasons afore-stated his inappositely applying the mandate of the judgments comprised in **V.S.Palanichamy** and **Lanka Venkateswarlu (supra)** besides the view held by him of the deposit of the balance amount of sale consideration by her not occurring within the time for its deposit granted by the apposite rendition of the learned trial Court also his holding qua the apposite application of the decree holder preferred thereat wherein she sought a relief qua enlargement or extension of time standing granted to her without hers explicating therein a sufficient cause which precluded her to with dispatch institute it thereat hence entailing it to accord relief to the judgment debtor/defendant on his application preferred under Section 28 of the Act, stands concluded by this Court to hold no efficacy preeminently when palpably his verdict appears to undermine the efficacy of the renditions of this Court recorded on 13.11.2006 whereupon given the echoings therein hence the aforesaid inferences stand drawn by this Court, inferences whereof concomitantly *ipso facto* invalidate the impugned rendition recorded by the learned District Judge. Also the learned District Judge while holding a *stricto senso* interpretation of

Section 28 of the Act bereft of his perceiving the import of the phraseology 'as the justice of the case may require' as stands embodied therein, coinage whereof bear a signification, of the Court concerned though standing assumingly seized with evidence of the plaintiff not begetting compliance with the apposite decree yet the said non compliance being not persuasive enough to allow the application of the judgment debtor/defendant preferred thereat under Section 28 of the Act unless attending material warrants of justice being done to the plaintiff/decree holder. Significantly, with the plaintiff receiving an order from this Court on 13.11.2006 whereupon hence the deposit of the sale consideration by her before the Court concerned stood formalized, the belittling of its significance by the learned District Judge by his erroneously deciding Civil Miscellaneous application No.151-S/6 of 2013/10 has not done justice to the plaintiff rather has perpetuated injustice upon her especially when she has palpably manifested hence her readiness and willingness to perform the contract. Furthermore, with the defendant-judgment debtor portraying his acquiescence qua the rendition of this Court of 13.11.2006 whereupon he stood enjoined to deposit a sum of Rs.50,000 plus interest @ 9% per annum from the date of filing of the suit till its realization, besides his meteing compliance qua the condition precedent aforesaid foisted upon him qua the order of this Court making absolute its ad interim order staying the operation of the decree impugned hereat by the aggrieved defendant/judgment debtor, hence his fastening efficacy in its entirety qua it whereupon he too fastened conclusivity qua the order of this Court recorded on 13.11.2006, besides connoted his unwillingness besides his un-readiness to execute the decree of the learned trial Court, apart there-from when he contrarily also acquiesced to this Court ordering for a sum of Rs.50,000 deposited by him in the Registry of this Court alongwith up to date interest standing released to the plaintiff hence portrayed his acquiescence to the decree under execution, does estop him to contend of non compliances, if any, by the plaintiff with the apposite rendition of the trial Court being open for its standing rescinded spurring from hers omitting to deposit within the time mandated by the apposite decree a sum of Rs.8 lacs before the Court concerned. Even otherwise as apparent on a reading of the operative part of the judgment of this Court recorded in RFA No.351 of 2005, given the said facet standing not taken by the aggrieved defendant as an apposite ground of appeal in RFA No.351 of 2005 as stood preferred hereat by him against the impugned rendition of the learned trial Court, also does entail an inference from this Court of with the defendant waiving the said ground besides abandoning the aforesaid facet hence his holding no leverage for baulking the execution of the apposite decree by the plaintiff. Even if this Court in its decision recorded in RFA No.351 of 2005 did leave an option to the defendant to urge the facet aforesaid before the learned Executing Court yet thereunder with no right standing reserved in his favour to file a petition under Section 28 of the Act did obviously not foist in him any leverage to institute a petition under Section 28 of the Act before the learned District Judge. In aftermath for the reasons recorded hereinabove spurring an inference of this Court under its afore-referred rendition formalizing the deposit of the balance sale consideration by the plaintiff before the Court concerned of hence her concomitantly begetting compliance with the rendition recorded in her favour by learned trial Court also warranted the learned District Judge to reject the application preferred there-before by the defendant under Section 28 of the Act. The rejection of the application preferred thereat under Section 28 of the Act by the judgment debtor would given the in *extenso* narrations made herein-above whereupon an inference stands erected by this Court qua validation of the deposit of balance sale consideration by the plaintiff-decree holder before the Court concerned upsurging therefrom, apposite echoings therein when operating as a fiat upon the learned District Judge yet when stood overlooked by him ingrain his verdict with an aura of invalidation. Hence, given the imputation by this Court qua the signification borne by the parlance 'in the interest of justice' embodied in Section 28 of the Act of all the afore-referred attending circumstances standing enjoined to be borne in mind by him for doing justice to the plaintiff-decree holder, contrarily when they stood in the impugned rendition relegated to the limbo of oblivion, as a corollary, the impugned rendition is far away from doing justice to the plaintiff.

11. The learned counsel appearing for the defendant-respondent herein has relied upon a judgment of the Hon'ble Apex Court reported in **P.R.Yelumalai** versus **N.M.Ravi** (2015) 9 SCC 52, relevant paragraph-12 whereof stands extracted herein-after, for this Court standing constrained to not accept the revision petitions arising from the impugned renditions recorded by the learned trial Court:-

> "11. Arguments were also made by the learned counsel on both sides as to which Court had the power to grant extension of time and several authorities were cited on this point. However, we find that after the execution Court had dismissed the execution proceeding on the ground of delay in depositing the amount, the same question was dealt with by the original side of the Trial Court as well in the application for extension of time. Since both the Courts have given concurrent findings that the case for extension of time was not made out, we are of the opinion that dealing with the question as to which Court had the jurisdiction to decide this point, will be an exercise in futility. It would suffice to say that the Court has the discretion to extend the time upon an application made by the party required to act within a stipulated time period. Extension of time can be granted even after the expiry of the period originally fixed. In Johri Singh v. Sukh Pal Singh and Ors., 1989 4 SCC 403, this Court observed:
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>> "This Section empowers the Court to extend the time fixed by it even after the expiry of the period originally fixed. It by implication allows the Court to enlarge the time before the time originally fixed. The use of 'may' shows that the power is discretionary, and the Court is, therefore, entitled to take into account the conduct of the party praying for such extension."

wherein a formidable verdict stands recorded therein by their Lordships, of failure on the part of the decree holder holding a conditional decree, to deposit the balance sale consideration within the time as enjoined upon him by the apposite decree besides his omitting to make the apposite deposit within the validly extended time, sequelling the fate of the Hon'ble Apex Court validating the order of the Executing Court whereby it refused to execute the apposite decree. However, the aforesaid judgment relied upon by the learned counsel for the defendant is reflective of the factum of the conditional decree thereat recorded by the Court concerned in favour of the decree holder therein being a conditional decree mandating therein of with the decree holder omitting to deposit the balance sale consideration within the time stipulated therein, his relevant omissions sequelling the legal effect of his suit being deemed to be dismissed. However, extantly the apposite decree hereat of the learned trial Court though enjoins upon the decree holder to deposit the balance sale consideration within one month since its pronouncement before the learned trial Court nonetheless there is no further diktat therein of failure of the decree holder-plaintiff to deposit the balance sale consideration thereat within the time stipulated therein yet sequelling the effect of her suit being deemed to be dismissed. Predominantly hence with the judgment relied upon by the learned counsel for the defendant, the cascading effect of non deposit by the decree holder of the balance sale consideration before the Court concerned within the time stipulated by it stood also mandated therein inasmuch as the apposite omissions begetting the sequel of a deemed dismissal of the suit of the plaintiff-decree holder thereat whereas the aforesaid diktat is palpably amiss hereat. In aftermath, any reliance by the learned counsel for the defendant upon the aforesaid verdict of the Hon'ble Apex Court for his espousing hereat qua the failure on the part of the decree holder to within time or beyond the validly extended time deposit the balance sale consideration before the Court concerned not facilitating her to execute the decree rather validating the rendition of the learned trial Court recorded in Civil Miscellaneous application No.151-S/6 of 2013/10, holds no vigour and sinew. Also the aforesaid submission stands emaciated in view of the afore-referred ad nauseam discussion tellingly bespeaking the factum of with this Court formalizing the deposit of the balance sale consideration by the plaintiff-decree holder before the Court concerned even when the deposit aforesaid by her occurred beyond the

time prescribed by the apposite decree of specific performance recorded in her favour by the learned trial Court besides when the effect of formalizing by this Court qua the deposit of the balance sale consideration by the plaintiff is of hence time standing enlarged or extended by this Court to the plaintiff for begetting compliance qua the apposite rendition of the learned trial Court, the learned District Judge fell in gross error in belittling its significance also his overlooking its impact whereupon he untenably construed of with the plaintiff not begetting compliance with the apposite rendition of the decree of specific performance recorded in her favour by the learned trial Court within the time stipulated therein, the application preferred thereat by the judgment debtor under Section 28 of the Act warranting its standing allowed especially when the aforesaid verdict for all the reasons afore-stated has overlooked besides subtracted the import of the signification borne by the phraseology 'as the justice of the case may require' as occur in the apposite provisions of Section 28 of the Act. Imperatively when for carrying forward the spirit of the words 'as the justice of the case may require' occurring therein for reasons afore-stated this Court holds a view of the orders previously recorded by this Court on 13.11.2006 during the course of its holding proceedings in RFA No.351 of 2005 tantamounting to theirs being construed to be formalizing the deposit of the balance sale consideration by the plaintiff before the Court concerned besides extending the time afforded by the apposite decree for its deposit by her. As a corollary, hence the overlookings of the aforesaid facets by the learned District Judge necessitates when hence defeats the mission/spirit of the imputation by this Court to the coinage 'as the justice of the case may require' occurring in Section 28 of the Act, both his impugned renditions warrant interference by this Court.

12. In view of the above detailed discussions both the petitions stand allowed and the impugned orders recorded by learned District Judge (Forests), Shimla in Civil Misc. Application No.151-S/6 of 2013/10 rendered on 30.3.2015 and the impugned order rendered in Execution Petition on 30.3.2015 stand quashed and set aside. The Executing Court concerned is directed to decide the Execution Petition in accordance with law within three months. The parties are directed to appear before the learned Executing Court on 20th July, 2016. All pending applications stand disposed of. Records of the Courts below be sent down forthwith.

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

Sarabjeet Singh & ors. ……Appellants.

Versus

Rajesh Prashad & anr. …….Respondents.

RSA No. 268 of 2004
Reserved on: 20.6.2016.
Decided on: 4.7.2016.

Specific Relief Act, 1963- Section 5 and 34- Plaintiff filed a civil suit for declaration pleading that suit land was jointly owned and possessed by the plaintiff and D with their father as coparceners – father of the plaintiff died and plaintiff has got half share in the suit land- part of the suit land was purchased by the plaintiff from his earnings in the name of his father and it was thrown in the common pool- plaintiff has raised construction without any objection- sale deed was got executed without any consideration- suit was opposed by the defendants- suit was decreed by the trial Court- an appeal was preferred, which was dismissed- held, in second appeal that land was shown to be in the name of 'A', who was shown as the common ancestor- sufficient evidence was led to prove that property was coparcenery – property was thrown by 'S' in common stock- doctrine of blending is applicable- S had permitted plaintiff to raise construction over the property- property will devolve according to Section 6 of Hindu Succession Act by survivorship- defendant had failed to prove that S intended to keep the property purchased by him and

acquired by him by way of pre-emption decrees as separate- suit was rightly decreed- appeal dismissed. (Para-23 to 31)

Cases referred:

Lakkireddi Chinna Venkata Reddi and ors. vs. Lakkireddi Lakshmama, AIR 1963 SC 1601
G.Narayana Raju (dead) by his legal representative vs. G. Chamaraju and others, AIR 1968 SC 1276

For the appellant(s): Mr. Bhupinder Gupta, Sr. Advocate with Mr. Neeraj Gupta, Advocate.
For the respondents: Mr. K.D.Sood, Sr. Advocate, with Mr. Mukul Sood, 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 Addl. District Judge, Una, H.P. dated 31.3.2004, passed in Civil Appeal No. 149/2000/96.

2. Key facts, necessary for the adjudication of this regular second appeal are that the respondent-plaintiff (hereinafter referred to as the plaintiff) has filed a suit for possession of half share of the land described in the plaint and for declaration to the effect that the plaintiff is exclusive owner in possession of land measuring 0-14 marlas as 1/6 share of land measuring 4-4 kanals bearing khewat No. 297 Khatauni No. 430 and 431 and Kh. Nos. 2482/2277/1, 2263, 2259, including abadi consisting of two kacha posh rooms and one pucca room having plinth area measuring 45 sq. meters with *shaream rasta* to the East, house of Ravinder son of Satya Pal to the West, the land of Wattana son of Rania to the North and the land of Ganesh son of Sukhdev Ram to North and the land of Ganesh son of Sukhdev to the South situated in village Bhera, Tehsil Amb, Distt. Una, H.P. According to the averments made in the plaint, the suit land was jointly owned and possessed by the plaintiff and Dev Raj along with their father as coparceners. The father of the plaintiff has died, therefore, the plaintiff has got ½ share in the suit land. Some of the suit land has been purchased by the plaintiff from his earnings in the name of his father Satya Pal and it was thrown in the common pool of joint Hindu family property. It has become integral part of it. The plaintiff has constructed his abadi in Kh. No. 2263 and 2259 by spending huge amount with the consent of his father and appellants-defendants (hereinafter referred to as the defendants), who created permanent licence in favour of the plaintiff. The defendants have never raised any objection at the time of raising construction by the plaintiff. His father was never in need of any money nor he had any legal necessity to sell the part of the suit land. However, on 13.2.1989, defendant No. 2 Champa Devi, wife of Dev Raj in connivance with her husband got fictitious sale-deed executed by the father of the plaintiff without any sale consideration. Thus, the sale deed was null and void and has got no effect on the plaintiff's share in the joint Hindu coparcenary property. The father of the plaintiff had no right to alienate the house mentioned in headnote-II of the plaint since the plaintiff has constructed the house after spending huge amount with the consent of his father.

3. The suit was contested by the defendants. According to them, the suit land was not joint Hindu coparcenary property as the same was the self acquired property of Satya Pal. Sh. Satya Pal purchased some of the suit land through sale and some by way of preemption for consideration paid by him from his personal earnings. Defendant Dev Raj and his wife advanced money to him. They have denied that the plaintiff has purchased the land in the name of his father. The abadi in Kh. No. 2259 was raised by Satya Pal. No licence was created in favour of the plaintiff. Regarding sale deed dated 13.2.1989, the same was executed by Satya Pal in favour of Smt. Champa Devi for consideration of Rs. 24,000/-. The plaintiff was living separately from his father.

4. The learned Sub Judge Ist Class (II), Amb, H.P., framed the issues on 22.8.1990 and 8.4.1992 and suit was decreed on 1.7.1996. Feeling aggrieved, the appellants-defendants preferred an appeal bearing No. 149/2000/96 before the learned Addl. District Judge, Una. The learned Addl. District Judge, Una, dismissed the same on 31.3.2004. Hence, this regular second appeal.

5. This Regular Second Appeal was admitted on the following substantial question of law on 13.9.2004:

> "1. Whether both the courts below have misunderstood the provisions of Hindu Succession Act and wrongly held the devolution of property after the death of Shri Satya Pal to be governed under Section 6 of the Hindu Succession Act by ignoring the provisions of Section 8 of the said Act?"

6. Mr. Bhupinder Gupta, Sr. Advocate, for the appellants, on the basis of substantial question of law, has vehemently argued that the suit property was self acquired property of Satya Pal and not coparcenary property. Satya Pal has acquired property during his life time. The property was never thrown in joint stock. On the other hand, Mr. K.D.Sood, Sr. Advocate, has supported the judgments and decrees of both the Courts below.

7. I have heard the learned Senior Advocates for the parties and gone through the judgments and records of the case carefully.

8 PW-1 Surjeet Singh has proved site plan Ext. PW-1/A.

9. PW-2 Ravinder Prakash is the plaintiff. He testified that his father was owner of 38/39 kanals of land. It has come to him from his ancestors. Out of this, 2-3 kanals of land was purchased by his father from the earnings of joint family property. They belonged to joint Hindu family having ancestral property. He raised kucha house in the year 1969 and raised pucca construction in the year 1979. The land was given to him by his father. His father has also given land to defendant Dev Raj. His father has given land to him for construction of house bearing Kh. Nos. 2259 and 2263. He has also taken water and electricity connections. Defendant Dev Raj has also constructed his house on 4-5 kanals of land. This land was given to him by his father. Dev Raj has got executed sale deed in favour of his wife from his father on 13.2.1989.

10. PW-3 Onkar Singh has proved that electricity meter was sanctioned in the name of plaintiff.

11. PW-4 Subhash Chand has deposed that on 26.3.1981, the plaintiff had applied for water connection to his house. It was sanctioned in his favour on 25.5.1981.

12. PW-5 J.C.Sharma, has proved bills Ext. PW-5/A to PW-5/D regarding purchase of cement.

13. PW-6 Teja Ram has proved bill Ext. PW-6/A vide which plaintiff had purchased 30 bags of cement on 26.4.1982.

14. PW-7 Ram Lal, deposed that he worked as labourer when plaintiff constructed his house in the year 1979.

15. PW-8 Gian Singh is the mason. He deposed that in the year 1979, he constructed the house of the plaintiff.

16. PW-11 Sher Mohammad has proved bill Ext. PW-11/A whereby he has sold bricks to the plaintiff.

17. One of the defendants, Dev Raj has appeared as DW-1. According to him, the suit land was sold to his wife by Satya Pal vide registered sale deed for consideration of Rs. 24,000/-, which includes house situated on the suit land. The suit land was sold by his father

since he was in dire need of money. His father had incurred debts at the time of marriage of education of his younger son. The house situated on the suit land was constructed by his father in the year 1979. His father has also purchased the property on the basis of sale as well as through preemption. The plaintiff has never contributed any amount to his father. The suit land was self acquired property of his father. The plaintiff has never raised the construction of the house. After the sale, his wife came into possession of the suit land. His father was also owner of 10-15 kanals of land, mutation of which has already been sanctioned in his favour and in favour of the plaintiff.

18. DW-3 Suresh Kumar has scribed sale deed Ext. DW-2/A dated 13.2.1989.

19. DW-4 Hardyal was examined by the defendants to prove that in the record of the Panchayat, separate house tax was assessed in the name of the plaintiff and his father Satya Pal.

20. DW-5 Preme Ram is the attesting witness of sale deed Ext. DW-2/A.

21. DW-6 Ajeet Singh is the Secretary of the Cooperative Society, Bhera. He has been examined by defendants to prove that Satya Pal was the member of their society who took loan from the society on different dates.

22. DW-7 Parmeshwari Dass is another attesting witness of sale deed Ext. DW-2/A.

23. According to the copy of jamabandi for the year 1955-56, Ext. P-9 in respect of Mauja Bhera, Tehsil Amb, District Una, the common ancestor has been shown to be Sh. Anokha, father of Mehtaba. This entry with respect to the ancestor Anokha son of Manna also finds mention in the copy of mutation for the year 1970-71 Ext. P-3. According to the pedigree table, sons of Mehtaba Ram have been shown to have succeeded to the estate of Mehtaba Ram. Ext. P-10 is the copy of *Khatoni Istemal* which was prepared after consolidation and in the jamabandi Ext. P-15 for the year 1981-82, shares of different share holders have been described. Ext. P-13 is the copy of *Istemal* for the year 1965-66 and Ext. P-14 is the copy of *Bandobast Jadid.* In all these documents, there is categorical mention of the suit land apart from the fact that common ancestor was mentioned as Anokha father of Mehtaba. Anokha's father was Manna. Anokha was the common ancestor.

24. The defendants have also filed documents Ext. D-1 to D-6. Ext. D-1 and D-2 are copies of orders and decree sheet dated 8.8.1986 vide which suit for possession by way of preemption filed by Satya Pal against Rattni wife of Amrit Lal son of Jai Karan Dass was decreed. Ext. D-3 and D-4 are the copies of order and decree dated 2.1.1985 vide which suit filed by Satya Pal against Joginder Lal and Amar Nath for possession by way of preemption in respect of land measuring 6-11 kanals was decreed. Ext. D-5 and D-6 are the copies of order and decree sheet dated 14.12.1983 vide which suit filed by Satya Pal against Chhaju Ram for possession of land measuring 14 marlas by way of preemption was decreed in his favour.

25. The plaintiff has led ample evidence to prove that the property in the hands of Satya Pal was coparcenary. The defendants have not rebutted the revenue entries proved by the plaintiff. Satya Pal has also purchased land through sale deed dated 29.11.1971 Ext. DW-1/A from one Sukho and by virtue of another sale deed dated 11.1.1967 Ext. DW-8/A from Smt. Hukmi vide sale deed Ext. P-2 dated 15.1.1969 executed by Ram Krishan and sale deed Ext. P-1 dated 15.1.1969 also by one Parshotam. There is no evidence on record even remotely to suggest that Satya Pal has individually kept separate land purchased by him on the basis of sale and preemption decrees. This property was thrown by him in common stock. The defendants have also not led any evidence that Satya Pal has any separate source of income and he invested funds to purchase the property. In the present case, the *'doctrine of blending'* was attracted since Satya Pal has thrown his property into the common stock and the separate property has lost its significance and identity. It has become joint family property of the coparceners.

26. Their lordships of the Hon'ble Supreme Court in the case of ***Lakkireddi Chinna Venkata Reddi and ors. vs. Lakkireddi Lakshmama,*** reported in ***AIR 1963 SC 1601,*** have

held that law relating to blending of separate property with joint family property is well settled. Property separate or self- acquired of a member of a joint Hindu family may be impressed with the character of joint family property if it is voluntarily thrown by the owner into the common stock with the intention of abandoning his separate claim therein but to establish such abandonment a clear intention to waive separate rights must be established. It has been held as follows:

> "9. Law relating to blending of separate property with joint family property is well settled. Property separate or self- acquired of a member of a joint Hindu family may be impressed with the character of joint family property if it is voluntarily thrown by the owner into the common stock with the intention of abandoning his separate claim therein but to establish such abandonment a clear intention to waive separate rights must be established. From the mere fact that other members of the family were allowed to use the property jointly with himself, or that the income of the separate property was utilised out of generosity to support persons whom the holder was not bound to support, or from the failure to maintain separate accounts, abandonment cannot be inferred, for an act of generosity or kindness will not ordinarily be regarded as an admission of a legal obligation. It is true that Butchi Tirupati who was one of the devisees under the will of Venkata Konda Reddy was a member of the joint family consisting of himself, his five brothers and his father Bala Konda. It is also true that there is no clear evidence as to how the property was dealt with, nor, as to the appropriation of the income thereof, But there is no evidence on the record to show that by any conscious art or exercise of volition Butchi Tirupati surrendered his interest in the property devised in his favour under the will of Venkata Konda Reddy so as to blend it with the joint family property. In the absence of any such evidence, the High Court was, in our judgment, right in holding that Lakshmama was entitled to a fourth share in the property devised under the will of Venkata Konda Reddy."

27. Their lordships of the Hon'ble Supreme Court in the case of ***G.Narayana Raju (dead) by his legal representative vs. G. Chamaraju and others***, reported in ***AIR 1968 SC 1276,*** have held that it is a well- established doctrine of Hindu law that property which was originally self-acquired may become joint property if it has been voluntarily thrown by the coparcener into the joint stock with the intention of abandoning all separate claims upon it. But the question whether the coparcener has done so or not is entirely a question of fact to be decided in the light of all the circumstances of the case. It must be established that there was a clear intention on the part of the copareener to waive his separate rights and such an intention will not be inferred merely from acts which may have been done, from kindness or affection. The important point to keep in mind, is that the separate property of a Hindu coparcener ceases to be his separate property and acquires the characteristics of his joint family or ancestral property, not by mere act of physical mixing with his joint family or ancestral property, but by his own volition and intention, by his waiving or surrendering his special right it as separate property. The intention can be gathered only from his words and acts and conduct. It has been held as follows:

> "6. We pass on to consider the alternative argument put forward on behalf of the appellant, namely, that even if the business of Ambika Stores was started as, a separate business of Muniswami Raju, it became converted at a subsequent stage into joint family business. It was argued on behalf of the appellant that the business of Ambika Stores was thrown by Muniswami Raju into the common stock with the intention of abandoning all separate claims to it and therefore the business of Ambika Stores lost its character of a separate property and was impressed with the character of joint family property. It is a well- established doctrine of Hindu law that property which was originally self-acquired may become joint property if it has been voluntarily thrown by the coparcener into the joint stock with the intention of abandoning all separate claims upon it. The

doctrine has been repeatedly recognized by the Judicial Committee [See Hurpurshad v. Shea Dayal(1) and Lal Bahadur v. 'Kanhaiya Lal(-). But the question whether the coparcener has done so or not is entirely a question of fact to be decided in the light of all the circumstances of the case. It must be established that there was a clear intention on the part of the copareener to waive his separate rights and such an intention will not be inferred merely from acts which may have been done, from kindness or affection [See the decision in Lata Muddun Gopat v. Khikhinda Koer (3). For instance, in Naina Piltal v. Daiyanai (1) 3 I.A. 259. (2) 34 I. A. 65.(3) 18 I. A. 9.Ammal, (1) where in a series of documents, self-acquired property was described and dealt with as ancestral-joint family it was held by the Madras High Court that the mere dealing with self-acquisitions as joint family property was not sufficient but an intention of the coparcener must be shown to waive his claims with full knowledge of his right to it as his separate property. The important point to keep in mind, is that the separate property of a Hindu coparcener ceases to be his separate property and - acquires the characteristics of his joint family or ancestral property, not by mere act of physical mixing with his joint family or ancestral property, but by his own volition and intention, by his waiving or surrendering his special right it as separate prop". A man's intention can be discovered only from- his words or from his acts I and conduct. When his intention with regard to his separate property is not expressed in words, we must seek for it in his acts and conduct. But it is the intention that we must seek in every case, I the acts and conduct being no more than evidence of the intention. - In the present case, the High Court has examined the evidence adduced by the parties and has reached the conclusion that there was no intention on the part of Muniswami Raju to throw the separate business of Ambika Stores into the common stock, nor was it his intention to treat it as a joint family business. Counsel on behalf of the appellant referred to the recital, in Ex. E describing the properties being those of the executants and that the borrowings was for trade and benefit of the family and it was argued that there was a clear intention on the part of. Muniswaini Raju to treat the business as joint family business. We have already referred to this document and indicated that the recitals were probably made for the-purpose of securing a loan and cannot be construed as consent on the part of the members of the joint family to treat the business as the joint family business. Further, there is ample evidence to show that in all succeeding years before his death Muniswami Raju had always described himself and conducted himself as the sole proprietor of Ambika Stores, Such an attitude on the part of Muniswami Raju was not consistent with any intention on his part either to abandon his exclusive right to the business or to allow the business' to be treated as joint family business. Exhibits XXXV to XLVI are all documents executed by third parties in favour of Muniswami Raju in which Muniswami Raju has been described as the proprietor of Ambika Stores. Exhibits III, XXIII, XXIV, 51, 52, 56, 58, ZZ, AAA series and BBB -are all communications addressed by institutions like Banks etc., in which Muniswwni Raju has been described as the proprietor of Ambika Stores. It may be stated that the appellant himself has admitted in his evidence that he was not drawing any moneys from the business of Ambika Stores and that whenever he wanted any_money, he would ask Muniswami Raju and obtain (1) A.I.R. 1936 Mad .177.from him. If really the appellant had considered himself to be I co-owner equally with Muniswami Raju, such conduct on his part is not explicable. it was urged on behalf of the appellant that there was no documentary evidence to show that the appellant was being paid any salary 'Muniswami Raju, and that prior to Muniswami Raju's death, it was the appellant who was in the entire management of Ambike stores when Muniswami Raju was ill and after the death of Muniswami Raju also it was the appellant who had been in management. Al, the books of

> account and other documents pertaining to the business of Ambika Stores had been admittedly entrusted to the appellant. But it is not explained on behalf of the appellant as to why the documents were not produced on his behalf to disprove the Case of the respondents that he was a salaried servant. It is therefore not unreasonable to draw an inference from the conduct of the appellant that the Account Books, if produced in court, would not have supported his case. We accordingly reject the argument of the appellant that the business of Ambika Stores became converted into joint family business at any subsequent stage by the conduct of Muniswami Raju in throwing the business into the common stock or in blending the earnings of the business with the joint family income."

28. Sh. Satya Pal has permitted his son to raise construction over the property. Satya Pal rather had no intention to keep self acquired property for individual purpose. Satya Pal had abandoned his individual rights in the property so purchased by him and the same, as discussed hereinabove, was put in joint stock. Since the property in the hands of Satya Pal was joint Hindu coparcenary property the *inter se* succession has to take place in accordance with Section 6 of the Hindu Succession Act. Section 6 of the Hindu Succession Act reads as under:

> "6. Devolution of interest of coparcenary property. – When a male Hindus dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:"

29. The property will devolve upon the members of the coparcenary property by way of survivorship on surviving members of coparcenary and not by succession. In the present case, only Section 6 is attracted and not Section 8 of the Hindu Succession Act, as argued by Mr. Bhupender Gupta, Sr. Advocate.

30. The rule of survivorship applies to joint family property while the rule of succession applies to property held in absolute severally by the last owner. It is reiterated that Mehtaba was common male ancestor of the parties as per the revenue record. He was shown in exclusive ownership and possession of the suit land. The case of the plaintiff specifically was that the property was purchased by his father from the funds contributed by him. This plea has remained unrebutted. The defendants have not led any conclusive evidence that Satya Pal was living separately from his sons. The suit land was joint Hindu coparcenary property and not self acquired property of Satya Pal. There is also merit in the contention of Mr. K.D.Sood, Sr. Advocate that there was no need for Satya Pal to sell the land to Champa Devi on 13.2.1989. Champa Devi has not entered into the witness box to depose about the legal necessity. According to the plaintiff, there was no need for Satya Pal to sell the land. The plaintiff has raised the construction over Kh. Nos. 2259 and 2263. He has raised the construction in the year 1979. The water and electricity connections have been sanctioned in his favour. Defendant Dev Raj has admitted that electricity and water connections in the house in dispute were in the name of plaintiff. The mason and labourers have supported his case. He has placed on record the copies of bills of cement and bricks etc. There is no evidence on record to prove that during his life time the father of the plaintiff, Satya Pal raised any objection to the construction raised by the plaintiff. Even, defendant No. 2 has not raised any objection when the plaintiff raised construction in the year 1990. Thus, the sale deed entered into between Satya Pal and Champa Devi was without any legal necessity.

31. It was for the defendants to prove that the land purchased by Satya Pal through preemption decrees was kept separate from the joint holding. It cannot be conclusively proved from the evidence led and conduct of Satya Pal that he had no intention to keep the property purchased by him and by way of preemption decrees as separate. The substantial question of law is answered accordingly.

32. 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 RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE VIVEK SINGH THAKUR, J.

State of H.P. ……Appellant.

Versus

Makhan Singh alias Kalia …….Respondent.

Cr. Appeal No. 142 of 2013.
Reserved on: July 01, 2016.
Decided on: July 04, 2016.

N.D.P.S. Act, 1985- Section 15- Police party received a secret information that accused was selling poppy straw in his tea-stall/Khokha- information was sent to S.P.- search of the Khokha was conducted during which 2.250 Kgs poppy straw was recovered- accused was tried and acquitted by the trial Court- held, in appeal that independent witness had not supported the prosecution version- PW-4 admitted that he had not entered inside the khokha- it was also not proved that poppy straw belonged to the accused- no independent witness was associated, although, there are many shops around the place of recovery- accused was rightly acquitted by the trial Court- appeal dismissed. (Para-18 to 21)

For the appellant: Mr. P.M.Negi, Dy. AG.
For the respondent: Mr. N.K.Thakur, Sr. Advocate, with Ms. Jamuna Kumari, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 20.10.2012, rendered by the learned Special Judge, Fast Track Court, Una, H.P., in Sessions case No. 13-VII-2011, whereby the respondent-accused (hereinafter referred to as the accused), who was charged with and tried for offence punishable under Section 15 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 1.6.2011, police party headed by HC Sanjay Kumar, I.O. SIU, Una along with ASI Kuldeep Singh, HC Prem Singh, HHC Dharam Pal and others was on patrolling duty at Palkwah chowk at around 4:15 PM. HC Sanjay Kumar received secret information about the indulgence of the accused in illegal business of selling poppy straw in his tea-stall/Khokha at village Thakran. HC Sanjay Kumar prepared rukka Ext. PW-1/A and sent the same to PS Haroli through PW-1 Const. Ram Gopal, on the basis of which FIR Ext. PW-15/A was registered. Credible information report Ext. PW-3/A was prepared and sent through HHC Dharam Pal to Superintendent of Police, Una. The police team reached at village Thakran and local witnesses Surjeet Singh, Niranjan Kaur and Sushma were called. The I.O. formed the raiding party and the search of the Khokha was carried out. During search, one pink coloured polythene envelope lying underneath Almirah was recovered. The packet was opened and it was found to be poppy straw. It weighed 2.250 Kgs, including the weight of the packet. The same was wrapped in a cloth parcel and sealed with impression "J" at distinct places. IO also filled in column Nos. 1 to 8 of the NCB form in triplicate and affixed three seal impressions on the form. The I.O. took sample seal impression Ext. PW-4/B on separate

piece of cloth and seal after use was handed over to witness PW-5 Niranjan Kaur. The I.O. took the case property into possession vide memo Ext. PW-4/A. He also prepared the site plan. The case property was produced before PW-15 SHO Shakti Singh at Police Station, Haroli who resealed the same with three seals of impression "T" and filled in relevant columns of the NCB form and deposited the same with the MHC. The Khokha was got demarcated. 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 seventeen witnesses. The accused was also examined under Section 313 Cr.P.C. According to him, he was falsely implicated. He also examined two witnesses in defence. The learned trial Court acquitted the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. P.M.Negi, Dy. AG has vehemently argued that the prosecution has proved its case against the accused. On the other hand, Mr. Naresh Thakur, Sr. Advocate, has supported the judgment of the learned trial Court dated 20.10.2012.

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 Const. Ram Gopal, deposed that at around 4:15 PM on 1.6.2011, HC Sanjay Kumar received secret information which was reduced into writing and sent to the Police Station through him. He handed over the rukka Ext. PW-1/A at Police Station, Haroli and FIR was registered. In his cross-examination, he admitted that Palkwah chowk is busy and many shops are situated at the spot.

7. PW-2 Sushma Devi deposed that in the month of June, 2011, one Surjit Singh came to her house and told that her presence was required by S.I. Pathania in connection with search of Khokha of accused. She went to the spot where the police party was present and one polythene bag was in the hands of one police official. No search was conducted in her presence. She was declared hostile and cross-examined by the learned Public Prosecutor. In her cross-examination, she denied the suggestion that she was called by Ward Panch, Niranjan Kaur. She denied that police officials gave their personal search to the accused in her presence. She admitted that memo Ext. PW-2/A was prepared at the spot. Volunteered that the IO had not read over the contents of the memo to her. She was made to sign on the memo by SI/SHO Pathania believing him, she had signed the same. She denied portion A to A and B to B of her statement Mark-B. In her cross-examination by the learned defence counsel, she deposed that the Khokha of the accused was not situated in the land owned by the accused. The police party was consisting of 10-12 persons. The mother of the accused as well as his brother used to sit in the Khokha. The accused was called from his house to the Khokha. His house was at a distance of around 100 meters from Khokha.

8. PW-3 HHC Dharam Pal testified that on 1.6.2011 at around 4:15 PM, he along with the police party was present at Palkwah chowk. HC Sanjay Kumar received secret information which was reduced into writing and sent through Const. Ram Gopal to the Police Station for registration of a case. Reasons of belief under Section 42-1 (2) of ND & PS Act were handed over to him to be given to S.P. Una. He delivered the same at 6:00 PM at SP Office, Una vide Ext. PW-3/A.

9. PW-4 HHC Ashwani Kumar, deposed that on 1.6.2011 at around 4:15 PM, he along with ASI Kuldeep and other police officials was on patrolling duty in official vehicle. HC Sanjay Kumar received secret information which was reduced into writing. He prepared rukka Ext. PW-1/A and sent it through Const. Ram Gopal to Police Station, Reasons of belief under Section 42-1(2) of ND & PS Act were handed over to Dharam Pal. AT about 4:50 PM, the police party reached at village Thakran. The I.O. deputed him to bring public witnesses and he brought Smt. Niranjan Kaur, Sushma and Surjeet Singh. They went to the shop of the accused and apprised him about the reason of search of his shop. The Khokha of the accused was searched

leading to recovery of one polythene bag beneath the steel almirah lying in the shop. On opening the same, poppy straw was found. It weighed 2 kg.200 grams. The recovered poppy straw was wrapped in a cloth parcel and sealed with seal impression "J". He also clicked the photographs. In his cross-examination, he deposed that there were two shops in front of the shop of the accused. One shop was open and people were sitting in the shop of Surjeet Singh. Surjeet Singh was also present in his shop. He did not go inside the shop/khokha of the accused. They left the spot at 8:00 PM.

10. PW-5 Niranjan Kaur testified that she was Ward Panch of village Palkwah, Majra Thakran. She was called by the police. When she reached on the spot, she saw the police party having one polythene carry bag. Nothing was recovered from the shop of the accused in her presence. She was declared hostile and cross-examined by the learned Public Prosecutor. In her cross-examination she admitted that on 1.6.2011 at about 5:00 PM, she was called by the police to the shop of accused where Surjeet Singh and Sushma had come later on. She denied that the police informed them that it had information that accused had kept poppy husk in his Khokha. She denied that police gave personal search to accused. She admitted that rukka Ext. PW-1/A was prepared at the spot and she signed the same. She denied that the police searched the shop of the accused and a polythene bag containing poppy straw was found beneath steel almirah in the khokha/shop of the accused, though she admitted that the contraband weighed 2 kg. 250 grams. Volunteered that the bag was with the police. She also admitted that the polythene bag was wrapped in a cloth parcel and sealed. The police has obtained her signatures on Ext. PW-4/A as well as PW-4/B and parcel Ext. P-1.

11. PW-6 Surjeet Singh deposed that he used to sit in his father's shop at village Thakran. The police called him. Sanjay Sharma, asked him to call Sushma Devi and he accordingly brought her to the spot. No poppy straw was recovered in his presence from the shop of the accused. He was declared hostile and cross-examined by the learned Public Prosecutor. He denied the suggestion that the police told him that they have to search shop of accused on the suspicion that he possessed poppy husk. He admitted his signatures on Ext. PW-2/A. Volunteered that it was prepared later on. The poppy husk was weighed. He admitted his signatures on memos Ext. PW-4/A, PW-2/A and Ext. P-1. In his cross-examination by the learned defence counsel, he deposed that mother and brother of accused also used to sit in Khokha of the accused.

12. PW-7 ASI Kuldeep Singh also deposed the manner in which secret information was received by HC Sanjay Kumar. On this information, HC Sanjay Kumar prepared rukka and also recorded reasons of belief. The same were sent through HHC Dharam Pal to Superintendent of Police, Una. They reached at village Thakuran near Water tank. The shop of the accused was searched. One polythene bag was recovered from below the Godrej almirah. It contained poppy husk. It weighed 2.250 Kgs. All the codal formalities were completed on the spot, including filling up of NCB forms etc. In his cross-examination, he admitted that there is one shop near water tank.

13. PW-9 Satpal Singh, Kanungo deposed that he along with Halqa Patwari Sunil Kumar on the directions of Tehsildar visited the spot at village Thakran, Tehsil Haroli, Distt Una and demarcated the land comprised in Kh. No. 416, in which Khokha was constructed. According to the revenue record, Gram Panchayat Palkwah was recorded as owner in the column of possession. Entry of "Bartan Aam" was recorded. A tea stall was found on the spot run by a lady at that time. The local persons present on the spot informed them that Khokha belonged to the accused. The police officials identified the spot. He prepared demarcation report on the spot vide Ext. PW-9/A. In his cross-examination, he admitted that he did not record the separate statements of the local persons to the effect that Khokha was constructed by the accused.

14. PW-12 Const. Gurbax had gone to FSL to deposit the case property and other documents in FIR No. 157/11. On 28.6.2011, he collected the sealed parcel of result in case FIR No. 126 (present case).

15. PW-14 HC Vipan Kumar deposed that he remained posted as MHC at PS Haroli w.e.f. July, 2009 to August, 2011. On 1.6.2011, SI Shakti Singh Pathania deposited with him one cloth parcel containing 2 kg. 250 grams of poppy husk duly sealed with seals "J" and "T" along with sample seals "J" and "T", NCB form etc. He entered the same at Sr. No. 605/11 vide Ext. PW-14/A in the register. On 3.6.2011, he handed over the case property to HHC Dharam Pal vide RC No. 163/11. He also filled in relevant columns of the NCB form vide Ext. PW-14/C. HHC Dharam Pal after depositing the case property handed over the RC to him.

16. PW- 15 SI Shakti Singh Pathania deposed that on 1.6.2011 HC Sanjay Kumar and Const. Ram Gopal came at Police Station, Haroli in a private vehicle and regarding this rapat vide Ext. PW-11/A was entered in the daily diary. On the same day at around 5:00 PM, he received rukka Ext. PW-1/A. On the same day at 8:15 PM, HC Sanjay Kumar handed over the case property to him. He resealed the same with seal "T" at three places and also filled in relevant columns of NCB form. He also obtained seal impression on the NCB form and handed over the case property to the MHC, Police Station Haroli for further action.

17. PW-16 HC Sanjay Kumar deposed that he was posted as I.O., SIU Una. On 1.6.2011, he along with Const. Ram Gopal was in his car on patrolling duty. He asked SHO to provide some additional force for patrolling in the area about Narcotic drugs on which SHO provided ASI Kuldeep Singh, HC Prem Singhy, HHC Ashwani Kumar, HHC Dharam Pal, Const. Sanjay Kumar, HHG P.C. Vijay Kumar, etc. At 4:15 PM, they reached at Palkwah chowk. He received secret information about the indulgence of accused in narcotics. He was selling poppy husk illegally to the customers. No time was left to seek search warrant as there was apprehension that the accused would liquidate the contraband from his tea stall. The information was well founded. He scribed rukka Ext. PW-1/A and sent the same to the Police Station, Haroli and FIR Ext. PW-15/A was registered. He along with other police officials reached at village Thakran. The raiding party was constituted. The Khokha of accused was searched in the presence of accused leading to recovery of one polythene packet. It contained poppy husk. It weighed 2.250 Kgs. All the codal formalities were completed on the spot. The application Ext. PW-16/E was moved before the Tehsildar for demarcation of the Khokha. On 18.7.2011, Kanungo had demarcated the Khokha of the accused and report is Ext. PW-9/A. In his cross-examination, he admitted that there was abadi and shops near the spot.

18. The independent witnesses, namely, PW-2 Sushma Devi, PW-5 Niranjan Kaur and PW-6 Surjeet Singh have not supported the case of the prosecution except to the extent that they have appended their signatures on various documents.

19. According to PW-2 Sushma Devi when she went to the spot, the police party was present and one polythene bag was in the hands of one police official. No search was conducted in her presence. In her cross-examination, she admitted that the mother of the accused as well as his brother used to sit in the Khokha. The accused was called from his house to the Khokha. His house was at a distance of around 100 meters from the Khokha. PW-5 Niranjan Kaur deposed that she was called by the police. When she reached at the spot, she saw the police party having one polythene carry bag. Nothing was recovered from the shop of the accused in her presence. She was declared hostile and cross-examined by the learned Public Prosecutor. In her cross-examination she denied the suggestion that the police searched the shop of the accused and a polythene bag containing poppy straw was found beneath steel almirah in the Khokha/shop of the accused. PW-6 Surjeet Singh deposed that no poppy straw was recovered in his presence from the shop of the accused. 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 mother and brother of the accused also used to sit in Khokha of the accused.

20. The case of the prosecution is that the Khokha of the accused was searched in the presence of PW-2 Sushma Devi, PW-5 Niranjan Kaur and PW-6 Surjeet Singh, but they have denied that contraband was recovered from the khokha in their presence. Rather, PW-2 Sushma Devi and PW-5 Niranjan Kaur deposed that when they reached at the spot, the polythene bag was already in the hands of the police officials.

21. PW-9 Satpal Singh, Kanungo, as noticed hereinabove, has undertaken the demarcation of the Khokha/shop in question. According to him, entry of "*Bartan Aam*" was recorded. A tea stall was found on the spot run by a lady at that time. However, in his cross-examination, he admitted that he did not record the separate statements of the local persons to the effect that Khokha was constructed by the accused. PW-4 HHC Ashwani Kumar, deposed that the photographs were taken from outside the shop/Khokha. He did not go inside the Khokha. HC Sanjay Kumar had entered the Khokha of accused and he remained standing at the door. The investigation should have been carried by PW-7 ASI Kuldeep Singh who was superior to HC Sanjay Kumar. The prosecution has failed to prove that the accused was found in exclusive possession of the contraband inside his shop. The prosecution has also not proved that the Khokha belonged to the accused from where the alleged recovery was effected. The independent witnesses, as noticed hereinabove, have not supported the case of the prosecution. There were shops around the place where the alleged recovery was made, however, no independent witnesses were associated.

22. Thus, the prosecution has failed to prove its case against the accused beyond reasonable doubt and there is no occasion for us to interfere with the well reasoned judgment of the learned trial Court dated 20.10.2012.

23. 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

Krishan Kumar ....Respondent.

Cr. Appeal No.329 of 2010
Reserved on : 22.6.2016
Date of Decision: 04th July, 2016

Indian Penal Code, 860- Section 409, 420, 467, 468 and 471- Accused was working as Sub Inspector in Food and Civil Supply Office- charge was handed over to him on 8.6.1984- he had misappropriated 138 Qt. 67 K.G. wheat, worth Rs. 36,054.20/-- accused was tried and acquitted by the trial Court- held, in appeal that prosecution has failed to prove the entrustment and misappropriation of the wheat - preparation of forged record was also not proved- it was for the prosecution to prove the actual entrustment and distribution with the help of stock register- stock register was neither produced nor was taken into possession- trial Court had taken a reasonable view- appeal dismissed. (Para-10 to 14)

Cases referred:

K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258
T. Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401

For the appellant : Mr. Parmod Thakur, Additional Advocate General.
For the respondent : Mr. Lovneesh Kanwar, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeal is maintained by the appellant-State of Himachal Pradesh against the judgment of acquittal of the accused in a case under Sections 409, 420, 467, 468 and

471 of the Indian Penal Code, passed by the learned Addl. Chief Judicial Magistrate, Chamba, District Chamba, dated 17.12.2009, in Criminal Case No.429-I/05/2000/187-II/05/2000.

2. Briefly stating the facts giving rise to the present appeal are that accused/respondent (hereinafter referred to as accused) was working as Sub Inspector in Food and Civil Supply Office Chamba, District Chamba. On 2.6.1984, the accused was entrusted to control the charge of Tundah, Durgathi and Runukothi Food grains godown in District Chamba. As per the prosecution story, charge was duly handed over to the accused and had received the balance wheat which was lying in the said godown of department pertaining to the year 1984-85. Charge of godown of Tundah was handed over to the accused on 8.6.1984 by Shri Rakesh Kumar, Inspector Food and Civil Supply department at Holi. At the time of receiving the charge on 8.6.1984, there was 117 Qt. 79 K.G 500 grams wheat in the stock, in the godown of Tundah. In the intervening period 6/84 to 3/85, the accused had received 411 Qt. 44 K.G wheat for selling and distributing, therefore, total 529 Qt. 23 K.G 500 grams wheat was in the stock upto said period. Out of entire stock, 404 Qt. wheat was sold by accused upto 31.3.1985 and found that 125 Qt. 23 K.G 500 grams wheat was lying in the stock. As per entry, in the stock for the financial year 1985-86, 125 Qt. 23 K.G 500 grams wheat was in the balance of the said godown and accused received 340 Qt. 25 K.G 500 grams wheat in the said godown. On physical checking, an excess wheat of 16 K.G 500 gram was found in the stock of said godown. Therefore, in the stock total balance of wheat was 465 Qt. 68 K.G 500 grams. Out of said stock, accused had sold 440 Qt. plus 15 Qt. i.e. total 555 Qt. wheat and was left with 10 Qt. 68 K.G 500 grams wheat on 31.3.1986, as per the entries in the stock register.

3. Further the case of the prosecution is that on 6.3.1986, the accused received 420 Qt. 60 K.G. 500 grams wheat from Contractor, Ram Krishan, who was deployed by the department to carry the wheat and hand over to the said godown. After receiving the same 420 Qt. 60 K.G 500 grams wheat by the accused, he did not enter the same in the stock register and as per entry in the stock register on 31.3.1986, he had shown only 10 Qt. 68 K.G. 500 grams wheat in his stock. In the year 1986-87, after showing the wrong balance of 10 Qt. 68 K.G 500 grams wheat, on 3.6.1986 received 178 Qt. 67 K.G wheat from Shri Rishi Ram, Contractor, deployed by the department to carry and hand over the wheat to the accused. After receiving the wheat accused issued the receipt of receival to said Contractor on 16.12.1986. The accused, instead of entering 178 Qt. 67 K.G. wheat in the stock register, intentionally with object to cheat the department, entered 40 Qt. wheat in the stock register and remaining 138 Qt. 67 K.G. wheat was misappropriated by him. The value of the said wheat was Rs.260/- per Qt., on calculating at this rate, it comes out to Rs.36,054.20/- and the said amount is alleged to be misappropriated by the accused. It is alleged that in the stock register, the accused had wrongly mentioned 50 Qt. 68 K.G 500 grams wheat as a balance lying with him at Tundah godown, out of which, he had sold/distributed 20 Qt. wheat and as per balance on 31.5.1986, 30 Qt. 68 K.G 500, was lying balance in the said register. As per voucher No.2, dated 23.6.1986, Rs.2100/-, sale proceed of 15 Qt. wheat was deposited by the accused, which amount was less then actual sale proceed of said 15 Qt. of wheat and Rs.336/- were misappropriated by the accused. As per the stock 15 Qt. 68 K.G 500 grams wheat was lying in the godown of Tundah to which the accused deployed by the department, but on 5.6.1986, at the time of giving charge, vide letter No.FDS(B)-2-ESTT-86/3617-19 dated 4.6.1986, there was zero stock which was handed over by the accused to Mohinder Singh, Inspector Food and Civil Supply Department, Bharmour. The accused has misappropriated 15 Qt. 68 K.G. 500 grams wheat, which on calculating at the rate of Rs.260/- per Qt, comes out to Rs.4,078.10/- and the said amount was also misappropriated by the accused in the year 1986 relating to Tundah godown. It is further alleged that during the year 1984 to 1986, accused misappropriated the wheat and its sale proceed. Accused had received 420 Qt. 60 K.G 500 grams wheat at the rate of `264.25/- per Qt. from contractor Ram Krishan which he had misappropriated, which on calculating comes out to Rs.1,11,144.85/-. Similarly, the accused had received 138 Qt. 67 K.G wheat from Rishi Ram, contractor, the value of the said wheat was Rs.260/- per Qt, on calculating the said wheat, the sale proceed thereof comes out to Rs.36,054.20/- and accused misappropriated the said amount. Accused deposited the sale

proceed of 15 Qt. wheat in treasury, vide voucher No.2 dated 2.7.1986, which is `336/- less than the actual sale price and the said amount has been misappropriated by him. Further, 15 Qt. 68 K.G 500 gram was found less at the time of handing over the charge to Mohinder Chand, value of the said wheat was Rs.260/- per Qt. which comes to Rs.4,078.10/- and the said amount had been misappropriated by the accused. Further, during the period from 6/1984 to 6/1986 the accused had misappropriated 574 Qt. 96 K.G wheat from Tundah godown whose sale proceed was Rs.1,51,613.15/-. Therefore, case of the prosecution is that the accused has misappropriated a sum of Rs.1,51,613.15/- and has committed the offences punishable under Sections 409, 420, 467, 468 and 471 of the Indian Penal Code.

4. The prosecution in order to prove its case has examined as many as 22 witnesses. Statement of the accused was recorded under Section 313 Cr.P.C, wherein he has denied the prosecution case and claimed innocence. No defence evidence was led by the accused.

5. We have heard learned Additional Advocate General for the appellant/State and learned defence counsel for the respondent/accused.

6. To appreciate the arguments of learned Additional Advocate General and learned defence counsel, this Court has gone through the record in detail and has minutely scrutinized the statements of the prosecution witnesses.

7. PW-1, Rattan Chand, has deposed that accused was deployed to the godown of Runukothi, Durgathi and Tundah, belonging to Food and Civil Supply Department and the said godowns were mainly received wheat from District Chamba godown. As per the version of complainant, he found that, in stock the accused had shown less wheat in comparison to actual wheat supplied to him to which he verbally could not give the details. In examination-in-chief, the deposition of this witness Rattan Chand/PW-1 appears to be on verbal entrustment of the wheat and he failed to depose, in fact, how much wheat was supplied to the said accused during his tenure as Incharge, in the said godowns. He has stated that the accused misappropriated the sale proceed and the wheat, due to this fact, he lodged an FIR by writing a complainant Ex.PW1/A. In written complaint, it was alleged that time to time the accused had misappropriated the wheat, but while appearing as a witness, he did not support any word to show the entrustment of the wheat. Case of the prosecution as well as complainant depends upon the stock register, but the said register was not produced by the prosecution on record. In absence of such register and its entries, it cannot be held as to how much wheat was entrusted to the accused and in what manner he wrongly maintained the false record in his office. In his cross-examination, he admitted that he could not tell that how much wheat was supplied to the accused and for which period. He has further admitted that the wheat which was supplied from Chamba Office has been entered in the stock register at Chamba and after the supply of said food grains, it has to be entered in the stock register of the receiving depot. After going through the entire case of the prosecution, as the record of stock register of Chamba or alleged depots were not produced, gives inference that prosecution has failed to prove as to how much wheat was actually supplied to the accused from time to time from main depot at Chamba to godowns, to which the accused was deployed. In his cross-examination, PW-1 has admitted that all the godowns were under his control, but personally, he did not check any godowns. In absence of any checking of the godown by PW-1, it cannot be held that this witness has deposed rightly to the stock issued from Chamba to godown, where the accused was posted. In his cross-examination, he has admitted that he had not seen any stock register.

8. PW-12 Mohinder Chand, in examination-in-chief, has deposed that on 4.6.1986, on the written instructions of District Food & Supplies Controller, he and Krishan Dev/PW-22 went to take the charge of godowns those had to be physically verified by Krishan Dev/PW-22, as per stock register maintained by the accused. He has stated that as per stock register of Durgathi godown, on 5.6.1986, 40 Qt. 51 K.G 500 grams wheat was shown as balance. In the entire examination-in-chief, he does not support the case of prosecution, as per complaint Ex.PW1/A. He simply stated that on the spot, 1 Qt. 51 K.G 500 grams wheat was found missing and

thereafter Shri Krishan Dev physically verified the stock register and prepared the report. He has stated that Krishan Dev by his writing passed the order in the register for less stock of wheat as the accused had not deposited the sale proceed thereof. After going through the entire examination-in-chief, it is found that he has failed to depose as to how much stock was less in each godowns. In examination-in-chief, he has stated that the accused was given the charge of all the stocks at one time. Again deposed that on 7.6.1986, they returned and requested the accused to give charge of Tundah, but he has stated that he would give the charge after two holidays and went again to Durgathi depot on 10.6.1986, but the accused did not appear despite having been waited for. While going through such examination-in-chief, it is not clear how the prosecution connects the accused with the alleged entrustment of wheat as per story of the prosecution. This witness in examination-in-chief categorically admitted that copies of the stock register were not placed on record. He was unable to tell whether the sale proceed of 39 Qt. wheat was deposited by the accused or not and admitted that he did not lodge the FIR. Statement of PW-12/Mahinder Chand, is not convincing to convict the accused for the offence of breach of trust or cheating as he did not disclose the actual act of entrustment or misappropriation. This witness, on the one hand, stated the case of department and on the other hand, failed to disclose the actual stock. He has admitted that stock register was not produced, but he had seen it. It was the duty of the prosecution to prove entrustment, but while going through the entire deposition of PW-5/Madan Lal, there is nothing by which it can be held as to how much wheat from time to time was entrusted to the accused, out of which the accused had misappropriated.

9. PW-18/Krishan Dev, in examination-in-chief, has stated that he went to see the stock of godowns of village Durgathi, Tundah and Runukothi. He has stated that he was ordered to hand over the charge of said godown to witness Mahinder Chand/PW-12 and Satya Prakash/PW-8. In compliance of the order passed by District Food & Supplies Controller, Chamba, dated 5.6.1986, he verified the stock of Durgathi godown in the presence of the accused and as per actual stock on 5.6.1986, opening balance of wheat was 40 Qt. 51 K.G 500 grams, out of which 39 Qt. was sold to depot holders and on the spot, he found 1 Qt. 51 K.G 500 grams wheat was lying. In absence of documentary record, prosecution has failed to prove the guilt of the accused with the help of the statement of Krishan Dev. In further examination-in-chief, he has stated that on 7.6.1986, he directed the accused and Satya Prakash to show the accounts of Runukothi godown due to the reason that the accused, in his statement, has shown zero balance in the said godown. He has stated that thereafter the accused was told to show the stock of godown at Tundah on 8.6.1986, but he refused by stating that 8th and 9th June, 1986 were holidays. The accused was asked to accompany them to Tunda on 10.6.1986, but he did not come back after holidays. So, on 28.10.1986, in the absence of the accused, Mahinder Chand went to Tundah godown and verified the stock. He has stated that there should have been 30 Qt. 7 K.G wheat in the balance of stock register, but physically there was Nil wheat at the said godown. The entire examination-in-chief does not disclose how much wheat from time to time was received by the accused and how it was distributed. This witness did not depose that he had actually verified the stock register and admitted that the said stock register was not produced before the learned Court, so it is not clear how much wheat was actually entrusted to the accused from main godown Chamba for the godowns managed by the accused. This witness, in cross-examination, categorically admitted that he did not see the actual stock register. He has failed to depose whether District Food & Supplies Controller, was also suspended due to this wheat scam or not. He has admitted that he did not depose before the police that the accused has misappropriated the wheat or its sale proceed and admitted that he cannot tell how the accused had misappropriated the wheat in the said scam. He has stated that verification report to District Food & Supplies Controller, Chamba, was not shown to him at the time of his statement. So, the prosecution has failed to prove the necessary entrustment to the accused or as to how much actual wheat was possessed by the accused in the godowns of Durgathi, Tundah and Runukothi. Statement of PW-18/Krishan Dev is not convincing, so, it can be held that the accused had misappropriated the wheat of Food and Civil Supply Department.

10. The deposition of PW-1/Rattan Chand, PW-12/Mahinder Chand and PW-18/Krishan Dev, are not convincing and so prosecution has failed to prove the entrustment of the wheat and has failed to prove the actual stock. The prosecution has failed to prove the alleged misappropriation of wheat and preparation of forged record by the accused to commit the offence of cheating. It is upon the prosecution to prove the actual entrustment and its distribution by the help of stock register. Therefore, the accused is entitled to get the benefit of doubt and accordingly, benefit of doubt is granted to the accused. It is apparent from the perusal of record that neither the stock register was produced nor it was taken into possession by the prosecution for the reason best known to it.

11. PW-7/Surinder Kumar has admitted in his cross-examination that the said documents narrated in Ex.PW7/A, are photocopies and the originals were not found in the case file. The statement of this witness does not give any help to the prosecution to prove the alleged act of entrustment and further, the prosecution has failed to produce the original record.

12. The net result of the above discussion is that neither the entrustment of the wheat to the accused nor the act of deceiving any person by the accused is proved on record beyond reasonable doubt.

13. It has been held in **K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258,** that when two views are possible, appellate Court should not reverse the judgment of acquittal merely because the other view was possible. When judgment of trial Court was neither perverse, nor suffered from any legal infirmity or non consideration/misappreciation of evidence on record, reversal thereof by High Court was not justified.

14. The Hon'ble Supreme Court in **T. Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401,** has held that where two views are reasonably possible from the very same evidence, prosecution cannot be said to have proved its case beyond reasonable doubt.

15. In view of the aforesaid decisions of the Hon'ble Supreme Court and discussion made above, I find no merit in this appeal and the same is accordingly dismissed. Bail bonds of accused 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

Raj Kumar ....Respondent

Cr. Appeal No. 4099/2013
Reserved on: July 1, 2016
Decided on: July 4, 2016

Indian Penal Code, 1860- Section 363, 366 and 376- Prosecutrix went to Sundernagar but did not return- she was recovered from Tanda along with accused- accused was arrested – it was found on investigation that accused had taken away the prosecutrix with the promise to marry her and had sexual intercourse with her against her wishes- accused was tried and acquitted by the trial Court- held, in appeal that prosecutrix had admitted that she had not raised any alarm at Sundernagar Bus Stand or at Chandigarh Bus Stand- her date of birth is shown to be 4.6.1993 and her age was more than 17 years as per ossification test- it was not proved on what basis her date of birth was recorded- her age was more than 18-19 years at the time of incident- prosecutrix had numerous opportunities to raise alarm or to escape- injuries were not noticed on

her person- in these circumstances, prosecution version was doubtful and accused was rightly acquitted- appeal dismissed. (Para-16 and 17)

For the appellant : Mr. P.M. Negi, Deputy Advocate General.
For the Respondent : Mr. Harish Sharma, Advocate.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

The present appeal has been filed by the State against Judgment dated 22.3.2013 rendered by the learned Additional Sessions Judge, Mandi, District Mandi, HP, in Sessions Trial No. 12 of 2009, whereby respondent-accused (hereinafter referred to as 'accused' for convenience sake), who was charged with and tried for offences under Sections 363, 366 and 376 IPC, has been acquitted.

2. Case of the prosecution, in a nutshell, is that on 8.8.2009, Ghinder Singh reported the matter to the police on the basis of which an FIR No. 224/2009 was registered for offences under Sections 363, 366 and 376 IPC against accused on the allegations that his daughter (prosecutrix) aged 17 years, on 5.8.2009, at about 6.30 AM had gone to Sundernagar from home but has not returned to the home in the evening. He searched for his daughter at all possible places but she was not found. He suspected that she had been taken away by the accused with him forcibly for the purpose of marriage. Prosecutrix was recovered during the investigation from Tanda alongwith accused. Her medical examination was conducted. Her clothes, vaginal slides etc. were sent for chemical examination. Opinion of the Medical Officer was obtained. Accused was arrested. His medical examination was got conducted. Statements of the witnesses were recorded. Birth certificate of the prosecutrix was also obtained alongwith copy of parivar register. During investigation, it has come on record that on 5.8.2009, accused forcibly took away the prosecutrix with him to Chandigarh with the promise to marry and had sexual intercourse with her against her wishes. Investigation was completed. Challan was put in the Court after completing all the codal formalities.

3. Prosecution has examined as many as eleven witnesses to prove its case against the accused. Accused was also examined under Section 313 CrPC. He pleaded innocence. Trial Court acquitted the accused as noticed above. Hence, this appeal.

4. Mr. P.M. Negi, Deputy Advocate General has vehemently argued that the prosecution has proved its case against the accused person.

5. Mr. Harish Sharma, Advocate, has supported the judgment dated 22.3.2013.

6. We have heard the learned counsel for the parties and also gone through the judgment and record carefully.

7. Ghinder (PW-1) testified that he was a vegetable vendor. Prosecutrix was his daughter. She was found missing from the home on 5.8.2009 in the morning time. He searched for her on 5.8.2009 till evening time. After two days, he came to know that his daughter had been taken away by the accused to Punjab. On 8.8.2009, he got FIR lodged with PS Sundernagar vide Ext. PW-1/A. Prosecutrix told him that she was forcibly taken away by the accused.

8. Prosecutrix (name withheld) deposed that the accused was working at Chai Ka Dora since one year and was known to her. He used to ask her to marry him. She refused to him and told that without the consent of her parents she would not marry him. Accused insisted her to marry him. On 5.8.2009, she was away from her home to Sundernagar where accused met her and asked to marry him. He had come to take her. She again refused for marriage without the consent of her parents. He forcibly made her to sit in the bus and took her to Chandigarh. At Chandigarh, accused took her to the house of his sister who was married. They stayed there for

one day. On next day, accused took her to the house of his another sister at Tanda (Punjab). Accused committed sexual intercourse with her forcibly and without her consent despite her refusing not to perform sexual intercourse before marriage. They were alone in the room. Police took them from Tanda to Police Station, Sundernagar. Her medical examination was got done. Her clothes were taken into possession. In her cross-examination, she admitted that on 5.8.2009 she went to Sundernagar of her own. She admitted that so many people were present at Sundernagar Bus Stand. She did not raise any alarm. There were a number of passengers in the bus. Bus stopped on the way. She did not raise any alarm there. At Chandigarh also, many persons were present including police officials. She has also not raised any alarm there. She has not tried to escape.

9. Ramesh Kumar (PW-3) testified that the prosecutrix was his sister-in-law. She was taken by the accused to Punjab. Prosecutrix told him that she was forcibly taken away by the accused to Punjab. Nothing more was told to him by the prosecutrix. He was declared hostile and cross-examined by the learned Public Prosecutor. He denied the suggestion that the prosecutrix told him that the accused used to work at Chai Ka Dora in the house of Lal Singh and asked her to marry him. He also denied the suggestion that the clothes were taken into possession in his presence. He has signed Ext. PW-2/A. He also denied portions marked 'B' to 'B' and 'C' to 'C' of his statement mark 'Z'.

10. Leela Devi (PW-4) testified that the prosecutrix was her daughter. She did not come back home in the evening. They tried to search for her. She was not found. Later on she was traced in Punjab. She suspected that her daughter was taken away by Naresh and Bittu but she was taken away by the accused to marry her. Accused was not known to her. She was declared hostile and cross-examined by the learned Public Prosecutor.

11. Ramesh Kumar (PW-5) deposed that he prepared date of birth certificate Ext. PW-5/A of the prosecutrix as was demanded by the police. In his cross-examination, he has admitted that there was no certificate about the pagination of the register. It was not mentioned in the register on what basis date of birth was entered.

12. Hans Raj (PW-6) deposed that he was working as a Secretary, Gram Panchayat, Tihri. He prepared the birth certificate of the prosecutrix Ext. PW-6/A. Date of birth of the prosecutrix was 4.6.1993. In his cross-examination, he has admitted that the date of birth register is stitched with thread and is not properly bound. He admitted that there was no certificate on the register about number of pages. Entry was made as per order of SDM and as informed by the father of the prosecutrix. Order of the SDM was on record.

13. Dr. Hemender Mahajan (PW-9) examined the accused. He issued MLC Ext. PW-9/B.

14. Dr. Anupma Sharma (PW-10) examined the prosecutrix. She issued MLC Ext. PW-10/A.

15. ASI Surender Kumar (PW-11) deposed that he recorded the statement of the prosecutrix. She was medically examined. Accused was also medically examined. Site map was prepared. Case property was taken into possession. In his cross-examination, he has admitted that the call details of the prosecutrix were not obtained because she told that she was not having any mobile phone.

16. Prosecutrix has deposed that she had gone to Sundernagar. Accused met her. He insisted to marry her. She told him that she would not marry him without the consent of her parents. Accused took her to Chandigarh and thereafter from Chandigarh to Tanda. Prosecutrix has admitted, in her cross-examination, that many people were present at Sundernagar Bus Stand. She has not raised any alarm. She has not raised any alarm at Chandigarh Bus stand and also when she travelled from Chandigarh to Tanda. It has come in the statement of the father of prosecutrix, PW-1 that Tanda was thickly populated. People were present there. Date of birth of the prosecutrix has been shown to be 4.6.1993 in Ext. PW-5/A and Ext. PW-6/A. According to

MLC Ext. PW-10/A, as per ossification test, age of the prosecutrix was more than seventeen years. PW-5 Ramesh Kumar and PW-6 Hans Raj, have not deposed that on what basis, the date of birth of the prosecutrix was entered. Learned trial Court has rightly come to the conclusion that the age of the prosecutrix was 18-19 years at the time of alleged occurrence.

17. Surprisingly, the mother of the prosecutrix, Leela Devi (PW-4) and her brother Ramesh Kumar (PW-3) were declared hostile. It is apparent that the accused was known to the prosecutrix. They had intimate relations with each other. It is not the case of the prosecution that the accused has made the prosecutrix to sit in the bus from Sundernagar to Chandigarh and then from Chandigarh to Tanda, forcibly. She had numerous opportunities to raise alarm while going from Sundernagar to Chandigarh and then from Chandigarh to Tanda. She has not tried to escape. According to the opinion given by PW-10 Dr. Anupma Sharma, no injury was seen on labia majora, labia minora, thighs and there was no tenderness or injury in the vagina and cervix though hymen was ruptured. Duration of last sexual intercourse act could not be ascertained. There was no external injury on vagina including internal genitalia. In case, there was forcible sexual intercourse, there should have been some injury on the person of prosecutrix, external or internal. However, fact of the matter is that no injuries were found. Prosecutrix could also make complaint to the sister of the prosecutrix at Chandigarh or at Tanda but she has chosen not to do so.

18. Thus, the prosecution has failed to prove its case against the accused under charged sections.

19. Accordingly, we find no occasion to interfere with the well reasoned judgment passed by the learned trial Court. The appeal is dismissed. All pending applications, are also disposed of. Bail bonds of the accused are discharged.

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

Tarsem Kumar & Others ....Petitioners.
Versus
State of H.P. & Others ....Respondents.
Review Petition No. 135 of 2015.
Decided on: 4th July, 2016

Code of Civil Procedure, 1908- Order 47 Rule 1- Appeal preferred by the State was allowed- judgments passed by the Courts below were quashed- respondents No. 8, 9 and 17 had died during the pendency of appeal – deceased were duly represented by the Counsel who had failed to inform the Court about the death- judgment is sought to be recalled on this ground- held, that judgment had been passed without taking note of the death of respondents No. 8, 9 and 17- therefore, there is an error apparent on the face of the record, which is required to be corrected- appeal restored to its original number on the file. (Para-3 to 8)

For the petitioners : Mr. K.D. Sood, Senior Advocate with Mr. Rajnish K. Lall, Advocate.
For the Respondents: Mr. D.S. Nainta & Mr. Virender Verma, Additional Advocates General for the respondent-State.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

In this petition a prayer has been made to review the judgment dated 14.8.2015, passed by this Court in RSA No.138 of 2004.

2. The appeal preferred by the respondent-State was allowed and the judgment and decree passed by both Courts below quashed and set aside vide the judgment and decree sought to be reviewed. It is pertinent to note that respondents No.8, Onkar Chand, respondent No.9 Moti Ram and respondent No.17 Tilak Raj had already expired, when the appeal was heard and judgment announced. The deceased-respondents were duly represented by a counsel, however, learned counsel has failed to inform this Court qua the factum of death of the said respondent as required under Order 22 Rule 10-A of the Code of Civil Procedure. The State of Himachal Pradesh, appellant in the appeal, has also not taken any step qua their substitution. It is for this reason the appeal came to be heard and decided without taking note of the death of respondents No.8, 9 and 17.

3. This petition has been filed with a prayer to recall the judgment and decree and decide the appeal, after deciding the question of abatement of the appeal on the death of respondents hereinabove and substitution of their legal representatives.

4. A bare perusal of Order 47 Rule 1 CPC makes it crystal clear that a decree or order, from which an appeal is allowed, but no appeal has actually been preferred, should be reviewed on the discovery of new and important matter or evidence, which, after the exercise of due-diligence, was not within the knowledge of the review-petitioner or could not be produced at the time when the decree was passed on account of a mistake.

5. Since the judgment in the main appeal has been passed without taking note of the death of respondents No. 8, 9 and 17, therefore, there is an error apparent on the face of the record and in the ends of justice, the same is required to be corrected by reviewing the judgment and decree in the main appeal. It is worth mentioning that the surviving respondents came to know about non-substitution of the respondents No.8, 9 and 17 and deciding the question of abatement of the appeal on their death, after the appeal was finally heard and decided vide judgment and decree dated 14.8.2015, therefore, on discovery of such facts, this petition has been filed.

6. In the given facts and circumstances, the judgment and decree passed in the main appeal is required to be recalled and the appeal heard as well as decided afresh after deciding the question of abatement of the appeal, if any, on the death of respondents No.8, 9, and 17 and also there being necessity of substitution of their legal representatives, if any.

7. A co-ordinate Bench of this Court in an unreported judgment dated 26.2.2002 passed in ***CMP(M) (RSA No.294 of 2000) No.562 of 2001***, titled ***Karam Chand & Others*** versus ***Bakshi Ram and others***, in the similar circumstances has recalled the judgment and decree passed in the main appeal and the appeal heard afresh after deciding the question of abatement and the substitution of the legal representatives of deceased respondents.

8. In view of what has been said hereinabove, this petition is allowed. Consequently, the judgment dated 14.8.2015 passed in RSA No.138 of 2004 is hereby recalled and the appeal restored to its original number and file. The petition is accordingly disposed of. Pending application(s), if any, shall also stand disposed of.

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

Amzad Khan son of Sh.Azam Khan ….Appellant

Versus

State of Himachal Pradesh ….Respondent

Cr. Appeal No. 413 of 2014

Judgment Reserved on 29th June 2016

Date of Judgment 5th July 2016

N.D.P.S. Act, 1985- Section 22- Accused was found in possession of 28 capsules of Spasmo Proxyvon and 25 vials of Rexcof cough syrup without any permit/licence- accused was tried and convicted by the trial Court- held, in appeal that testimonies of prosecution witnesses corroborated each other- minor contradictions are bound to come with the passage of time- police officials had no inimical relation with the accused to falsely implicate him- personal search was not conducted- Section 50 of N.D.P.S. Act was not complied with- it was a chance recovery, which cannot be doubted due to non-examination of independent witnesses- link evidence was not completed and there was no tempering with the case property - testimonies of witnesses were corroborated by abstract of malkhana register, road certificate, special report, rukka, resealing of sample, NCB form, resealing certificate, seal impression, seizure memo etc.- trial Court had rightly convicted the accused- appeal dismissed. (Para-11 to 22)

Cases referred:

C. Muniappan and others vs. State of Tamil Nadu, (2010)9 SCC 567
Sohrab and another vs. The State of Madhya Pradesh, AIR 1972 SC 2020
State of U.P. vs. M.K. Anthony, AIR 1985 SC 48
Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat, AIR 1983 SC 753
State of Rajasthan vs. Om Parkash, AIR 2007 SC 2257
Prithu alias Prithi Chand and another vs. State of Himachal Pradesh, (2009)11 SCC 588
State of Uttar Pradesh vs. Santosh Kumar and others, (2009)9 SCC 626
Appabhai and another vs. State of Gujarat, AIR 1988 SC 696
Rammi alias Rameshwar vs. State of Madhya Pradesh, AIR 1999 SC 3544
State of H.P. vs. Lekh Raj and another, (2000)1 SCC 247
Laxman Singh vs. Poonam Singh and others, (2004) 10 SCC 94
Kuriya and another vs. State of Rajasthan, (2012)10 SCC 433
Kalma Tumka vs. State of Maharashtra, (1993)8 SCC page 257
Megh Singh vs. State of Punjab, (2003)8 SCC page 666
State of H.P. vs. Pawan Kumar, (2005)4 SCC page 350
State of Punjab vs. Balbir Singh, AIR 1994 SC 1872
Mohinder Kumar vs. State Panji Goa, (1998)8 SCC 655
Bharatbhai Bhagwanjibhai vs. State of Gujarat, AIR 2003 SC 7
State of Punjab vs. Baldev Singh, AIR 1999 SC 2378
Jose vs. State of Kerala, AIR 1973 SC 944
Bipin Kumar Mondal vs. State of West Bengal, AIR 2010 SCW 4470
State of H.P. vs. Om Parkash, Lates HLJ 2003(1) HP 541
Govind Raju alias Govinda vs. State, (2012)4 SCC 722
Tika Ram vs. State of M.P., (2007)15 SCC 760
Girja Prasad (dead) by LRs vs. State of M.P, (2007)7 SCC 625
Tahir vs. State, (1996)3 SCC 338

For the Appellant: Mr. B.B. Vaid, Advocate.
For the Respondent: Mr. M.L. Chauhan Additional Advocate General and Mr.R.K.Sharma Deputy Advocate General

The following judgment of the Court was delivered:

P.S. Rana, Judge

Present appeal is filed against the judgment and sentence dated 13.11.2014 passed by learned Special Judge-I Sirmaur District Nahan in Sessions trial No. 57-ST/7 of

2013/12 title State of H.P. versus Amzad Khan whereby learned Special Judge-I convicted the appellant under Section 22 of the Narcotic Drugs and Psychotropic Substances Act 1985.

Brief facts of the case

2. It is alleged by prosecution that on 15.10.2012 at about 10.20 PM at Balmiki Basti Nahan convict was found in exclusive and conscious possession of 288 capsules of Spasmo Proxyvon and 25 vials of Rexcof cought syrup without any permit/licence. It is alleged by prosecution that convict could not produce any valid permit or licence on demand. It is alleged by prosecution that sample seal Ext.PW4/A was drawn and NCB form Ext.PW3/D was also filled. It is alleged by prosecution that case property was took into possession vide seizure memo Ext.PW4/B. It is alleged by prosecution that ruka Ext.PW3/A was prepared and same was sent to police station for registeration of FIR and FIR Ext.PW3/B was registered. It is alleged by prosecution that spot map Ext.PW5/A was prepared. It is also alleged by prosecution that case property, sample of seal, NCB form and seizure memo were deposited and same sent to FSL through PW7 C. Raj Kumar vide RC Ext.PW1/B. It is alleged by prosecution that special report Ext.PW2/A was prepared and sent to Additional S.P. Sirmaur through PW7 C.Raj Kumar. It is alleged by prosecution that chemical analyst report Ext.PX was received.

3. Charge was framed against the accused on 10.12.2013 by learned Trial Court under Section 22 of NDPS Act. Accused did not plead guilty and claimed trial.

4. Prosecution examined eight witnesses in all and also tendered documentaries evidence.

5. Learned Trial Court convicted the appellant. Feeling aggrieved against the conviction passed by learned Trial Court appellant filed present appeal.

6. Court heard learned Advocate appearing on behalf of the appellant and learned Additional Advocate General appearing on behalf of the State and also perused the entire record carefully.

7. Following points arise for determination in present appeal:-

Point No.1

Whether judgment and sentence passed by learned Trial Court is perverse and is not based upon oral as well as documentaries evidence placed on record as alleged in memorandum of grounds of appeal?

Point No.2

Final Order.

8. Findings upon Point No.1 with reasons

8.1. PW1 MHC Sandeep Negi has stated that he is posted as MHC in P.S. Nahan since April 2012 and he has brought the summoned record. He has stated that on 16.10.2012 at 2.10 AM ASI Mast Ram deposited the parcel sealed with nine seals of 'M' alongwith NCB form and sample of seal. He has stated that he recorded the entry in register at Sr. No. 512/12 and abstract of register is Ext.PW1/A. He has stated that on 18.10.2012 case property along with sample seal, NCB form and other documents sent to FSL Junga through C. Raj Kumar vide RC No. 300/12. He has further stated that case property remained intact in his custody. He has denied suggestion that NCB form was not deposited.

8.2 PW2 HC Ramesh Kumar has stated that he is posted as Reader to Addl. S.P. Sirmaur since 2007 and he has brought the summoned record. He has stated that special report was brought by C. Raj Kumar on 17.10.2012 at 10.15 AM and special report was received by Addl.S.P. Sanjeev Lakhanpal. He has stated that endorsement was also made and he identified the endorsement. He has denied suggestion that special report was not given to him.

8.3 PW3 ASI Mast Ram has stated that he remained posted at P.S. Nahan as I.O. from 2009 to 18.10.2012. He has stated that on 15.10.2012 ruka Ext.PW3/A was brought by C.

Ravinder Kumar No. 495. He has stated that he made the endorsement in red circle and thereafter FIR Ext.PW3/B was registered. He has stated that thereafter case file was handed over to C.Ravinder Kumar with direction to hand over the same to I.O. He has stated that on 16.10.2012 at about 2.10 AM ASI Dalip Kumar produced case property sealed in a cloth parcel with seal 'E' along with sample of seal, NCB form in triplicate and seizure memo. He has stated that NCB form Ext.PW3/D was filled and resealing certificate Ext.PW3/E was given. He has stated that he was officiating SHO. He has statd that parcel Ext.P1 is same. He has denied suggestion that all columns from 1 to 12 were filled by one person.

8.4 PW4 C.Ravinder Kumar has stated that he is posted at P.S. Nahan w.e.f. January 2012 and further stated that on 15.10.2012 he along with C. Dalip Singh ASI Naresh Kumar had gone for patrolling from P.S. Nahan at about 10.20 PM and when they were present near temple of Mata Matangni Devi at Balmiki Basti they noticed accused carrying a bag in his hand and ascending the stairs. He has stated that he identified the accused in Court. He has stated that I.O. directed the accused to stop and thereafter accused turned around and tried to escape but he was over powered by police officials. He has stated that bag carried by accused was searched and 25 bottles of Rexcof cough and two boxes containing 288 capsules of Spasmo Proxyvon were found. He has stated that accused was asked to produce the bill, licence or permit but accused did not produce. He has stated that sample seal Ext.PW4/A was drawn and NCB form in triplicate was filled at the spot. He has stated that seal after use was handed over to him. He has stated that one copy of seizure memo was supplied to accused free of cost and I.O. prepared ruka Ext.PW3/A and same was handed over to him with direction to hand over the ruka at P.S. Nahan and further stated that he produced the ruka before MHC of P.S. Nahan who registered FIR. He has stated that thereafter case file was handed over to him and he delivered the same to I.O. Dalip Singh. He has stated that case property was recovered from accused and spot was adjoining to various residential houses. He has denied suggestion that police party was not present at the spot. He has denied suggestion that accused was not apprehended with any drugs. He has denied suggestion that entire proceedings conducted in police station to falsely implicate the accused. He has denied suggestion that no ruka was delivered by him in police station. He has denied suggestion that seal was not handed over to him. He has denied suggestion that his signatures obtained on documents later on.

8.5 PW5 ASI Dalip Kumar has stated that he remained posted at P.S. Nahan till 23.10.2012. He has stated that on 15.10.2012 he along with C. Ravinder and PSI Naresh Kumar have gone for patrolling at 9.50 PM. He has stated that approximately at about 10.20 PM they were present at Balmiki locality near Mata Matangi temple and a person was noticed on the stairs. He has stated that when accused saw the police officials he turned around. He has stated that accused was directed to stop but accused tried to escape and he was over powered. He has stated that accused present in Court is same person. He has stated that accused was carrying a bag in his right hand and on search of bag 25 bottles of Rexcof cough syrup 100 ml and two boxes of Sapsmo Proxyvon capsules containing 288 capsules found. He has stated that accused could not produce any bill, permit or licence. He has stated that sample seal Ext.PW4/A was drawn and NCB form Ext.PW3/D filled at the spot. He has stated that seal after use was handed over to C. Ravinder Kumar. He has further stated that case property was took into possession vide memo Ext.PW4/B and further stated that signatures of witnesses obtained. He has stated that copy of seizure memo was supplied to accused free of cost and his signatures obtained on memo. He has stated that thereafter he prepared ruka Ext.PW3/A and same was sent through C. Ravinder to P.S. Nahan. He has stated that on the basis of ruka FIR Ext.PW3/A was registered. He has stated that thereafter he prepared site plan Ext.PW5/A. He has stated that statements of witnesses recorded. He has stated that FIR was registered. He has also stated that accused was arrested and information regarding his arrest was given to his wife. He has stated that thereafter they came to police station and case property along with other documents, sample of seal were produced before ASI Mast Ram who was officiating SHO. He has stated that he prepared special report Ext.PW2/A and same was sent to Addl. S.P. Sirmaur through C. Raj Kumar. He has stated that Ext.P2 to Ext.P4 were recovered from accused. He has denied suggestion that all columns of

NCB form written by one person. He has stated that no person crossed from the point at the relevant time. He has stated that it was 10-12 PM night hence all houses were locked from inside and residents were sleeping. He has stated that he prepared spot map and recorded statements of witnesses. He has stated that no vehicle crossed from point during proceedings. He has denied suggestion that no recovery of drugs was effected from accused and also denied suggestion that accused was not apprehended at the spot. He has denied suggestion that accused was in police station in connection with FIR lodged by accused against residents of Balmiki locality. He has denied suggestion that false case registered against the accused.

8.6 PW6 ASI Devi Singh has stated that he is posted at P.S. Nahan and case file was handed over to him for investigation. He has stated that he recorded statements of witnesses on 27.10.2012. He has stated that chemical report Ext.PX was received by him. He has stated that case file was handed over to SHO for preparation of challan and further stated that he recognized signatures of SHO. He has denied suggestion that he did not record statements of witnesses as per their versions.

8.7 PW7 C. Raj Kumar has stated that he is posted as Constable in P.S. Nahan. He has stated that on 17.10.2012 ASI Dalip Singh handed over special report Ext.PW2/A to him and he handed over special report to Additional S.P. Sirmaur. He has stated that on 18.10.2012 MHC Sandeep Negi handed over the parcel resealed with nine seals and NCB form and sample of seal vide RC No. 300 of 2012 with direction to deposit the same in office of SFSL Junga. He has stated that he deposited the parcels in office of SFSL Junga and case property remained intact in his custody. He has denied suggestion that special report was not handed over to him. He has denied suggestion that he has tampered with case property.

8.8 PW8 MHC Madan Dutt has stated that he is posted at P.S. Nahan Sadar since July 2011. He has stated that he has brought the summoned record. He has stated that rapat No. 2 Ext.PW8/A and rapat No. 38 Ext.PW8/B are correct as per original record. He has stated that rapat Nos. 3 and 40 are Ext.PW8/C and Ext.PW8/D. He has denied suggestion that all reports are manipulated at the instance of I.O. to complete the link in story of prosecution.

9. Statement of accused recorded under Section 313 Cr.P.C. Accused did not lead any defence evidence.

10. Following documentaries evidence adduced by the prosecution. (1) Ext.PW1/A is extract of malkhana register. (2) Ext.PW1/B is road certificate. (3) Ext.PW2/A is special report. (4) Ext.PW3/A is ruka sent to SHO P.S. Nahan District Sirmaur for registration of FIR. (5) Ext.PW3/B is FIR No. 202 dated 15.10.2012. (6) Ext.PW3/C is reseal impression 'M'. (7) Ext.PW3/D is NCB form. (8) Ext.PW3/E is resealing certificate. (9) Ext.PW4/A is seal impression 'E'. (10) Ext.PW4/B is seizure memo of 25 bottles of Rexocof Cough syrup and two boxes of Spasmo Proxyvon capsules. (11) Ext.PW5/A is site plan. (12) Ext.PX is SFSL examination report. As per examination report 99.98 mg Dextropropoxyphene Napsylate per capsule of Spasmo Proxyvon was found and 1.981 mg codeine phosphate was found in 100 ml bottle of Rexcof cough syrup. (13) Ext.PW8/A to Ext.PW8/D are daily station diaries.

11. Submission of learned Advocate appearing on behalf of appellant that there is major contradiction in testimonies of prosecution witnesses and on this ground accused be acquitted is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused testimonies of all prosecution witnesses. There is no major contradiction in testimonies of prosecution witnesses which goes to the root of case. In present case 288 capsules of Spasmo Proxyvon and 25 vials of Rexcof cough syrup recovered from exclusive and conscious possession of accused on 15.10.2012 during night period at 10.20 PM at Balmiki Basti Nahan. Testimonies of prosecution witnesses recorded after a gape of sufficient time. Testimonies of PWs 1 to 3 recorded on 3.6.2014, testimony of PW4 and PW5 recorded on 4.6.2014, testimony of PW6 recorded on 16.5.2014, testimonies of PW7 and PW8 recorded on 16.7.2014. It is well settled law that minor contradictions are bound to come when testimonies of prosecution witnesses recorded after a gape of sufficient time. It was held in case reported in ***(2010)9 SCC 567 title C.***

Muniappan and others vs. State of Tamil Nadu that an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the root of the matter and shake the basic version of prosecution's witness. It was held that minor discrepancies are bound to occur in statements of witnesses when testimony of witness is recorded after a gape of time. ***See AIR 1972 SC 2020 title Sohrab and another vs. The State of Madhya Pradesh. See AIR 1985 SC 48 title State of U.P. vs. M.K. Anthony. See AIR 1983 SC 753 title Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat. See AIR 2007 SC 2257 title State of Rajasthan vs. Om Parkash. See (2009)11 SCC 588 title Prithu alias Prithi Chand and another vs. State of Himachal Pradesh. See (2009)9 SCC 626 title State of Uttar Pradesh vs. Santosh Kumar and others. See AIR 1988 SC 696 title Appabhai and another vs. State of Gujarat. See AIR 1999 SC 3544 title Rammi alias Rameshwar vs. State of Madhya Pradesh. See (2000)1 SCC 247 title State of H.P. vs. Lekh Raj and another. See (2004) 10 SCC 94 title Laxman Singh vs. Poonam Singh and others. See (2012)10 SCC 433 title Kuriya and another vs. State of Rajasthan.***

12. Submission of learned Advocate appearing on behalf of the appellant that false FIR was filed against the appellant contrary to facts and on this ground appeal filed by appellant be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Accused did not lead any positive cogent and reliable evidence on record in order to prove that police officials have inimical relation towards the accused at any point of time. It is not expedient in the ends of justice to disbelieve testimonies of police officials in present case.

13. Submission of learned Advocate appearing on behalf of the appellant that provision of Section 50 of NDPS Act not complied in present case and on this ground appeal filed by appellant be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that 288 capsules of Spasmo proxyvon and 25 vials of Rexcof cough syrup found from bag of accused. It is well settled law that when contraband is recovered from bag of accused then compliance of Section 50 of NDPS Act 1985 is not mandatory. ***See (1993)8 SCC page 257 title Kalma Tumka vs. State of Maharashtra. See (2003)8 SCC page 666 title Megh Singh vs. State of Punjab. See (2005)4 SCC page 350 title State of H.P. vs. Pawan Kumar.***

14. Submission of learned Advocate appearing on behalf of the appellant that prosecution did not examine any independent witness and on this ground appeal be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that 288 capsules of Spasmo Proxyvon and 25 vials of Rexcof cough syrup found from exclusive and conscious possession of accused on 15.10.2012 in midnight at 10.20 PM. PW5 ASI Dalip Kumar when appeared in witness box has specifically stated that no person crossed the recovery point and houses were locked and residents of locality were sleeping during night period. It is also proved on record that recovery was effected as a chance recovery. It is well settled law that in chance recovery association of two independent witnesses is not mandatory and it is held that non-association of independent witnesses is not fatal to prosecution case. ***See AIR 1994 SC 1872 title State of Punjab vs. Balbir Singh. See (1998)8 SCC 655 title Mohinder Kumar vs. State Panji Goa. See AIR 2003 SC 7 title Bharatbhai Bhagwanjibhai vs. State of Gujarat. See AIR 1999 SC 2378 title State of Punjab vs. Baldev Singh.***

15. Submission of learned Advocate appearing on behalf of appellant that material incriminating circumstances not put to accused under Section 313 Cr.P.C. and on this ground appeal filed by appellant be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused statement of accused recorded under Section 313 Cr.P.C. It is held that all material incriminating circumstances put to accused when statement of accused was recorded under Section 313 Cr.P.C. by learned Trial Court.

16. Submission of learned Advocate appearing on behalf of appellant that learned Trial Court has failed to appreciate the missing link evidence in present case and on this ground appeal be allowed is rejected being devoid of any force for the reasons hereinafter mentioned.

Court is of the opinion that prosecution has proved the link evidence in present case as required under law. Testimonies of PWs 1 to 3 and 6 to 8 prove the link evidence in accordance with law. Testimonies of PWs 1 to 3 and 6 to 8 are trustworthy reliable and inspire confidence of Court. There is no reason to disbelieve the testimonies of PWs 1 to 3 and 6 to 8 in the present case. There is no evidence on record that PWs 1 to 3 and 6 to 8 have hostile animus against accused at any point of time.

17. Submission of learned Advocate appearing on behalf of apepllant that case property was tampered is rejected being devoid of any force. There is no positive cogent and reliable evidence on record in order to prove that case property was tampered at any point of time. Plea of appellant that case property was tampered is defeated on the concept of *ipse dixit* (Assertion made without proof).

18. Submission of learned Advocate appearing on behalf of appellant that it is not proved on record that dextropropoxyphene Napsylate was found in capsules of Spasmo Proxyvon is also rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused the examination report submitted by SFSL Junga. There is recital in examination report that after various scientific tests such as physical identification, chemical, chromatographic and UV Spectrophotometrix analysis as well as quantitative analysis dextropropoxyphene napsylate was found to the extent of 99.98 mg per capsule.

19. Submission of learned Advocate appearing on behalf of appellant that there is no positive cogent and reliable evidence on record in order to prove that codeine phosphate was found in Rexocof cough syrup is rejected being devoid of any force for the reasons hereinafter mentioned. Chemical Analyst has specifically mentioned in positive manner in examination report that codeine phosphate was found to the extent of 1.981 mg. per/ml in 100 bottle of Rexocof cough syrup. Accused did not file any written application before learned Trial Court for cross examination of public analyst. Report of public analyst is per se admissible in evidence under Section 293 of Code of Criminal Procedure 1973.

20. Submission of learned Advocate appearing on behalf of appellant that accused cannot be convicted on basis of oral as well as documentaries evidence placed on record is rejected being devoid of any force for the reasons hereinafter mentioned. PW4 C. Ravinder Kumar has specifically stated in positive manner that 25 bottles of Rexocof cough syrup containing 100 ml. and two boxes containing 288 capsules of Spasmo Proxyvon recovered from exclusive and conscious possession of accused. Testimony of PW4 is corroborated by PW5 ASI Dalip Kumar. Testimonies of PWs 4 and 5 are tustworthy reliable and inspire confidence of Court. There is no evidence on record that PW4 and PW5 have hostile animus against the accused at any point of time. It is well settled law that conviction in criminal law can be sustained on testimony of single witness if testimony of single witness inspires confidence of Court. It was held in case reported in ***AIR 1973 SC 944 title Jose vs. State of Kerala*** that conviction can be sustained in a criminal case upon the sole testimony of a single witness if testimony of witness is trustworthy, reliable and inspire confidence of Court. ***See AIR 2010 SCW 4470 title Bipin Kumar Mondal vs. State of West Bengal. See Lates HLJ 2003(1) HP 541 title State of H.P. vs. Om Parkash.***

21. Testimonies of oral witnesses are corroborated by documentaries evidence i.e. extract of malkhana register, road certificate, special report, ruka, resealing sample, NCB form, resealing certificate, seal impression, seizure memo, site plan and examination report submitted by chemical analyst and rapats placed on record.

22. Submission of learned Advocate appearing on behalf of appellant that conviction cannot be sustained on testimonies of police officials alone is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that testimonies of police witnesses can be believed if same inspires confidence of Court. ***See (2012)4 SCC 722 title Govind Raju alias Govinda vs. State. See (2007)15 SCC 760 title Tika Ram vs. State of M.P. See (2007)7 SCC 625 title Girja Prasad (dead) by LRs vs. State of M.P. See title Tahir vs. State.*** It is held that business of dextropropoxyphene napsylate and codeine phosphate is spoiling the

career of society at large and Court is of the opinion that no one can be allowed to gain monetary benefit at costs of society at large. Hence it is held that judgment and sentence passed by learned Trial Court is not perverse and same is based on oral as well as documentary evidence placed on record. Point No.1 is answered in negative.

Point No. 2(Final Order)

23. In view of findings upon point No.1 above appeal is dismissed. Judgment and sentence passed by learned Trial Court affirmed. File of learned Trial Court along with certified copy of judgment be sent back forthwith. Criminal appeal No. 413 of 2014 is disposed of. All pending miscellaneous application(s) also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Beena Sharma ……Petitioner.
Versus
State of Himachal Pradesh & others. ……Respondents.

CWP No. 6346 of 2012
Reserved on: 27.06.2016
Decided on: 05.07.2016

Constitution of India, 1950- Article 226- Petitioner and 7 other candidates appeared for the post of Anganwari Worker- respondent No. 6 was appointed- petitioner contended that respondent No. 6 did not fulfill the eligibility criteria as she was living jointly with her father-in-law and had separated on 31.12.2006, whereas, relevant date was 1.1.2004- husband of respondent No. 6 works as Senior Platoon Commander in Himachal Pradesh Home Guards - he owns 10 bighas of land and is enrolled as Contractor in Himachal Pradesh Public Works Department- an appeal was preferred, which was dismissed- aggrieved from the order, present writ petition has been filed- held, that respondent No. 6 is Prabhakar and has taken admission in B.A. 1st year, which means that Prabhakar is higher qualification than matriculation- no evidence was brought on record to show that income certificate issued to respondent No. 6 does not show her actual income- petition dismissed. (Para-10 to 12)

For the petitioner: Mr. Dheeraj K. Verma, Advocate.
For the respondents: Mr. Virender K. Verma, Addl. AG, with Mr. Pushpinder Jaswal, Dy. AG, for respondents No. 1 to 5.
Mr. Tara Singh Chauhan, Advocate, for respondent No. 6.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present writ petition is maintained by the petitioner seeking directions to the respondents for quashing order, dated 10.05.2012, passed by the learned Appellate Authority, whereby the appeal of the petitioner was dismissed. Simultaneously, the petitioner is also seeking direction to the respondents to appoint her as Anganwari Worker, in Aganwari Centre, Sikroha, Tehsil Sadar, District Bilaspur, H.P. by quashing the appointment of respondent No. 6, Smt. Soma Devi.

2. Briefly stating the facts of the case, as per the petitioner, are that the petitioner alongwith seven other candidates appeared in interview for the post of Anganwari Worker in Anganwari Centre, Sikroha, Tehsil Sadar, District Bilaspur, H.P., held on 29.05.2010, and

consequent to the interviews respondent No. 6, Smt. Soma Devi, was appointed. As per the petitioner, respondent No. 6 did not fulfill the eligibility guidelines as laid down for appointment to the post of Anganwari Worker, as she (respondent No. 6) is living jointly with her father-in-law, which is depicted in copy of Pariwar Register (Annexure P-8). Copy of Pariwar Register demonstrates that respondent No. 6 separated on 31.12.2006, however, as per the Policy and the judgment of this Court the relevant date for separation of a family is 01.01.2004. As per the Policy, the date of separation should be depicted in the Pariwar Register and income of the family is to be computed on the basis of separate family. It is also submitted that the husband of respondent No. 6 works as Senior Platoon Commander in Himachal Pradesh Home Guards, owns 10 bighas of land and is enrolled as Contractor in Himachal Pradesh Public Works Department. On the other hand, 22 bighas of land is being owned by father-in-law of respondent No. 6, who also owns a building in Chakkar Shimla, which is rented out. The petitioner further submits that father-in-law of respondent No. 6 also owns Light Goods Vehicle, in which husband of respondent No. 6 works as driver.

3. The petitioner has further submitted that she is Post Graduate in Sanskrit and respondent No. 6 is only Matriculate and Prabhakar and as per her information Prabhakar is equal to 10+2, but the Himachal Pradesh School Education Board has not recognized Prabhakar equivalent to 10+2. As per the petitioner, awarding of additional 3 marks for higher qualification to respondent No. 6 is illegal and wrong. The petitioner has also raised objections on awarding of marks in personal interview by the Selection Committee.

4. At the first instance the appointment of respondent No. 6 was challenged by the petitioner before the Deputy Commissioner-cum-Appelalte Authority under the Anganwari Scheme, 2009, succinctly on the ground of her family income and the grounds cited above. The learned Appellate Authority dismissed the appeal of the petitioner vide order dated 10.05.2012, hence the present petition.

5. Respondents No. 1 to 4 have filed reply to the petition and refuted the stand of the petitioner. Precisely, the stand of respondents No. 1 to 4 is that respondent No. 6 has been rightly awarded 3 marks for higher qualification, as she was having result-cum-detailed mark having B.A. 1st year, which is higher qualification. So the selection of respondent No. 6 is not illegal and wrong. It is also averred that the learned Deputy Commissioner (Appellate Authority) has heard both the parties and also ordered Tehsildar, Sadar, to re-verify the income certificate of respondent No. 6 and on re-verification it was found correct. As per respondents No. 1 to 4, the Selection Committee selected respondent No. 6 relying on the documents placed before it and also on the performance of the candidate in the interview. It is also submitted that rider of family separation on or before 01.01.2014 was removed in the amended guidelines, Notification dated 05.10.2009, and hence this clause has no application in the present case. The family of respondent No. 6 was separated on 01.01.2009. Further it is submitted that Himachal Pradesh University allowed respondent No. 6 to appear in B.A. 1st year's examination solely on the basis of Prabhakar certificate. Therefore, awarding of 3 marks by the Selection Committee for higher qualification to respondent No. 6 was right. It is also averred that the Selection Committee awarded marks on the basis of performance of candidates in the interview and the same were based on merits.

6. Respondent No. 6 has also filed reply to the writ petition, wherein it is submitted that the family of the petitioner was included in BPL on 30.11.2004, whereas the interview was held on 29.05.2010. So, the petitioner was not in BPL family at the time of applying for the said post. Respondent No. 6 has further submitted that 3 marks for higher qualification were rightly awarded to her, as per Notification (Annexure R6-1/A). As per replying respondent, her family is living separately and the cut off date is not 01.01.2004, as the same subsequently stood amended on 12.10.2009 (Annexure R-6/B) and the cut off date stood changed to 1st January of the recruitment year. As respondent No. 6 was appointed in the year 2010 and her family was living separately w.e.f. 31.12.2006, therefore, the petition was alleged to be misleading. It is also

submitted that the replying respondent has separate family and it is denied that her husband works as Driver and enrolled as Contractor with HPPWD.

7. Replying respondent No. 6 has also averred that minimum qualification for the post of Anganwari Worker is 10th standard and in case of higher qualification then 3 marks have to be awarded. So, 3 marks have been rightly awarded to her. It is further submitted that the family of the petitioner was included in BPL on 31.11.2012 and the interview was held on 29.05.2010. So, the family of the petitioner was not in BPL at the time of interview. Replying respondent No. 6 pleaded that the family should have been separated on 1st January of the recruitment year. Interviews were held in the year 2010 and her family was separated on 31.12.2006. It is further submitted that replying respondent possess higher qualification and both petitioner as well as replying respondent were given 3 marks for higher qualification. Prabhakar is equivalent to 10+2 and admission can be sought on the basis of Prabhakar. As per respondent No. 6, there are no allegations of *mala fides* against the interview committee, as the same is a matter of discretion.

8. Rejoinder to the reply filed by respondent No. 6 has also been filed, wherein stand of respondent No. 6 has been refuted and the petitioner reiterated the averments made in the petition.

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

10. Now considering the fact that the marks were awarded to respondent No. 6 for higher qualification and whether *Prabhakar* is a higher qualification or not, this Court finds that the Scheme/Guidelines for the engagement of the Anganwari Workers/Helpers, as enclosed alongwith the reply of respondents No. 1 to 4, provides that the candidate who possesses 10+2 and higher qualification will be awarded 3 additional marks. As per the above policy, the marks shall be given in the following manner:

"(A) Maximum 13 Marks for educational qualification will be given in the following manner:

(i) Percentage of marks in matric divided by 10 subject to the maximum of 10 marks.

(ii) Candidates who possess 10+2 and higher educational qualification will be given 3 additional marks.

11. Considering *Prabhakar* as 10+2, Himachal Pradesh University has given admission to respondent No. 6 in B.A. 1st year, meaning thereby that even the University recognizes *Prabhakar* as a higher qualification than matric, as matric pass candidate never gets admission in B.A. 1st year. This Court finds that selection of respondent No. 6 cannot be said to be arbitrary, against law/rules or is vitiated because of *mala fides.* This Court finds that the order, upholding the appointment of respondent No. 6, passed by the Appellate Authority cannot be said to be arbitrary and against law.

12. The petitioner also tried to assail that Income of respondent No. 6 and averred that income of respondent No. 6 was more than the prescribed limit under the Scheme, but there is no evidence on record to conclude that the Income certificate issued to respondent No. 6 was against her actual income.

13. Consequently, the petition is devoid of merits and requires dismissal. Accordingly, the petition is dismissed. However, in view of peculiar facts and circumstances of the case, there is no order as to costs.

14. The writ petition, as also pending application(s), if any, shall stand(s) disposed of.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

ICICI Lombard General Insurance Company Limited. …Appellant.
Versus
Smt. Soni Devi and others …Respondents.

FAO No.422 of 2010
Reserved on : 30.6.2016
Decided on: 5th July, 2016

Motor Vehicles Act, 1988- Section 149- It was contended that driver did not have a valid driving licence- held, that un-laden weight of the vehicle is 2560 Kgs., and the vehicle falls within definition of Light Motor Vehicle- driving licence authorized driver to drive LMV, therefore, it cannot be said that driving licence was not valid- appeal dismissed. (Para-19 to 21)

Case referred:
National Insurance Co. Ltd. vs. Swaran Singh and others, (2004) 3 Supreme Court Cases 297

For the appellant : Mr. Jagdish Thakur, Advocate.
For the respondents : Mr. Bhupinder Ahuja, Advocate, for respondents No.1 to 5.
Mr. Sanjay Jaswal, Advocate, for respondent No.6.
Mr. Praneet Gupta, Advocate, for respondent No.7.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeal under Section 173 of the Motor Vehicles Act, 1988, is maintained against the award dated 9.7.2010, passed by learned Motor Accident Claims Tribunal-I, Kangra at Dharamshala, in Claim Petition No.36-P/II/2007, filed by respondents/petitioners No.1 to 5 (hereinafter referred to as 'petitioner') against the owner-cum-driver of the Tata 407 LCV (Tempo)/respondent No.6 (hereinafter referred to as 'respondent No.1') and New India Insurance Company, the insurer of the scooter on which the deceased was a pillion rider (hereinafter referred to as 'respondent No.3').

2. The brief facts giving rise to the present appeal are that on 19.5.2007, the deceased alongwith one Ashok Kumar were going on a scooter and the scooter was on the extreme left side of National Highway and the deceased was a pillion ride. The scooter had reached near a place called 61 Miles, then a vehicle TATA 407 LCV (Tempo) applied for, came from Palampur side in such a rash and negligent manner driven by respondent No.1 and struck against the scooter. As a result of which, the deceased and pillion rider fell down on the road. The deceased received multiple injuries on his person, he was taken immediately to Community Health Centre, Nagrota Bagwan, on reaching in the hospital, the deceased was declared dead. The post mortem of the dead body of the deceased was conducted by Medical Officer.

3. Further, case of the petitioner is that the accident occurred due to the rash and negligent driving of the vehicle by respondent No.1. It is pleaded that deceased was 28 years of age and was working as Sepoy in the Indian Army and getting the salary of Rs.9000/- per month. Petitioner No.1 is the widow, petitioner No. 2 and 3 are the parents, petitioner No.4 and 5 are the minor daughters of the deceased and were dependant upon the deceased.

4. Reply was filed by respondent No.1 and denied the accident. It is the case of respondent No.1 that deceased was driving the scooter without having a valid and effective

driving licence to drive the same. It is further pleaded that deceased was never struck by the vehicle of respondent No.1.

5. Respondent No.2 also filed the reply and their case is that driver and owner of the vehicle TATA 407 LCV (Tempo) of respondent No.1, was not having a valid and effective driving licence at the time of alleged accident and the vehicle was being plied in violation of the terms and conditions of the Insurance Policy. Respondent No.3 had also filed reply and denied their case.

6. The learned Court below framed the following issues on 30.6.2008, as under:

1. Whether Sunil Kumar had died on account of rash and negligent driving of vehicle No. HP-14-A-9408 by respondent No.1 ? OPP.

2. If Issue No.1 is proved, to what amount of compensation and from whom the petitioners entitled to ? OPP.

3. Whether the respondent No.1 had not been in possession of valid & effective driving licence ? If so with what effect ? OPR-2.

4. Whether the claim petition is bad for non-joinder and mis-joinder of parties ? OPR-2.

5. Relief.

7. After deciding Issue No.1 in favour of the petitioner, the learned Tribunal held that the petitioners are entitled for an amount of Rs.15,00,000/- (rupees fifteen lacs) to be paid by respondent No.2.

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

9. To prove their case, the petitioner has examined PW-1 HC Kuldeep Singh. He has deposed that an FIR was registered on 19.5.2007, under Sections 279, 337, 338 and 304-A of the Indian Penal Code, against respondent No.1 driver of Tempo bearing No. HP-9408 and challan was presented before the learned Court below. He has further stated that Tempo was not registered at the time of accident, however it was applied for.

10. PW-2 Milap Chand/Photographer, has stated that on 19.5.2007 at about 3:30 pm, he was on his way from Darang to Kangra on scooter. He deposed that Tempo of respondent No.2 over took him in a high speed at a place called as 61 Miles and after travelling a distance of 100 meters ahead it struck with a scooter. The tempo at that time was driven by respondent No.1 and the scooter was being driven by Sunil Kumar while the deceased was a pillion rider. He has stated that tempo struck with the scooter with such a force that scooter was dragged upto a distance of 5-6 meters. He has also deposed that he stopped his scooter and took the injured to hospital where Sunil Kumar succumbed to injuries. He deposed that after the accident Chander Kumar had fled away from the spot. He deposed that deceased had sustained head injuries. The accident was caused due to the rash and negligent driving of tempo driver and there was no fault on the part of scooter driver.

11. PW-3 Smt. Soni Devi, has stated that name of her husband was Sunil Kumar and at the time of accident his age was 28 years. She has stated that her husband was employed as Sepoy in Assam Rifles. She deposed that her husband came home on leave and on 19.5.2007 at 3:30 pm, accident took place near at a place called 61 Miles in which her husband died. She has stated that driver of tempo 407 had hit his tempo with her husband and the accident was caused due to the rash and negligent driving of tempo driver. She has stated that her husband used to draw salary of Rs.9384/- per month, as per salary slip Ex.PW2/A. She has stated that she has two minor daughters and petitioners were dependant upon the deceased. She has stated that she was not present at the time of accident. She has admitted that she used to get family pension. She has denied that the accident was caused due to the fault of her husband.

12. PW-4 Jai Singh, is father of the deceased and stated that his son died on 19.5.2007, due to the rash and negligent driving of vehicle by its driver. He has stated that he had served in Indian Army for 28 years and retired as a Subedar. He has stated that his son was brilliant and had he been alive he would have retired with some good rank. He has stated that accident did not take place in his presence.

13. PW-5 Dr. Vivek Sood, has stated that in the year 2007, he remained posted as Registrar in RPGMC, Tanda. He conducted the post mortem examination on the body of Sunil Kumar. He has stated that injuries mentioned in the post mortem report could be possible in the road side accident.

14. To rebut the evidence of petitioner, RW-1 Chander Kumar has stated that he is owner-cum-driver of TATA-407 and was having valid driving licence to drive the vehicle in question. He has stated that his vehicle was insured vide insurance policy Ex.RW1/A. He has deposed that photocopy of Registration Certificate is Ex.RW2/B. He has deposed that accident did not take place due to his fault, but the same took place due to the fault of scooter driver who had driven the scooter in a rash and negligent manner. He has admitted that when he purchased the vehicle on 18.5.2007, its temporary number was HP-9408. He had admitted that two persons had traveled on the scooter at the time of accident and one of them had died.

15. RW-2 Munshi Ram, Licence Clerk posted in the office of Motor Licensing Authority, Kangra, has stated that driving licence No.11096/SDMK dated 2.5.2001, which was issued for Light Motor Vehicle. As per record this licence was renewed w.e.f. 9.5.2004 to 8.5.2007 and copy of the same is Ex.RW2/A. He has stated that licence was renewed in the name of Chander Kumar for LMV, which is Ex.RW2/B. In cross-examination, he has admitted that licence No.11096 was issued in favour of Chander Kumar for LMV (Transport) and the same was renewed w.e.f. 8.5.2004 to 8.5.2007. He has deposed that driving licence was further renewed on 21.5.2007.

16. RW-3 Jagdish Kumar, Clerk, posted in the office of RTO, Dharamshala, has stated Chander Kumar was not authorized to carry goods in the vehicle in question. He has stated that the said vehicle was passed on 5.6.2007. He has admitted that temporary registration number is valid for one month for plying the vehicle. He has admitted that route permit is issued after the grant of fitness certificate. He has also admitted that owner of the vehicle in question had applied within one month after the purchase of said vehicle for issuance of fitness certificate and route permit thereof.

17. Thus, it is evident from the testimony of PW-3, Soni Devi, is corroborated by PW-2, Milap Singh an eye witness of the alleged accident. PW-2 has specifically stated that deceased had died due to the rash and negligent driving of vehicle bearing Tempo No.HP-9408 and also stated that his statement was also recorded by the police. The testimony of PW-3 is further corroborated by PW-1 HC Kuldeep Singh. He has deposed that FIR was registered against Chander Kumar, owner-cum-driver of vehicle having Tempo bearing No. HP-9408. PW-5 Dr. Vivek Sood, has conducted the post mortem of deceased Sunil Kumar and proved the copy of post mortem report. He has also stated that injuries mentioned in the post mortem report are possible in motor vehicle accident. The testimony of PW-3 is further corroborated by documentary evidence i.e. FIR Ex.PW1/A. There is no reason to disbelieve the testimony of PWs 1 to 5. Respondents No.1 to 3 did not adduce any independent, cogent and reliable evidence in order to prove their case. There is no evidence on record to show that respondent No.1 was not driving the vehicle in a rash and negligent manner.

18. From the above, it is clear that the deceased had died because of the rash and negligent driving of respondent No.1. It has come on record that respondent No.1 was so rash and negligent that after over taking the scooter of PW-2 had struck the scooter, on which the deceased was pillion rider at a place 61 Miles and the same resulted into the death of deceased.

19. Learned counsel for the appellant has argued that the driving licence was not containing endorsement for driving the transport vehicle, as the vehicle was Light Motor Vehicle. So, the driver was having valid and effective driving licence to drive the vehicle in question. This Court finds no force in the submissions made by learned counsel for the appellant.

20. Further, learned counsel for the appellant has argued that the vehicle was Light Motor vehicle, but from the Registration Certificate, it is clear that unladen weight of the vehicle is 2560 Kgs. less than 3000 Kgs., the conclusion is that it was a Light Motor Vehicle. Respondent No.1 was having valid driving licence and the vehicle was Light Motor Vehicle. The learned Court below has rightly held that the accident has taken place because of the rash and negligent driving of respondent No.1 and respondent No.2 is liable to pay the compensation being insurer of the vehicle. Learned counsel for the appellant has also argued that the vehicle was driven without any route permit and registration certificate, but it is clear from the record that the vehicle was new one, it was purchased just a day before. It has also come on record that respondent No.1 has applied for the vehicle registration, the fitness certificate for getting route permit and for the Registration Certificate. In these circumstances, the award passed by the learned Court below holding that the vehicle was being plied as per the terms and conditions of the insurance policy is just reasoned and needs no interference.

21. Hon'ble Supreme Court of India in (2004) 3 Supreme Court Cases 297, titled **National Insurance Co. Ltd.** vs**. Swaran Singh and others**, has held as under :

> **"17. Before we deal with various contentions raised by the parties it is desirable to look into the legislative history of the provisions for their interpretation. The relevant provisions of the Act indisputably are beneficent to the claimant. They are in the nature of a social welfare legislation.**
>
> **18. Chapter XI of the Motor Vehicles Act, 1988, inter alia, provides for compulsory insurance of vehicles in relation to the matters specified therefor. The provision for compulsory insurance indisputably has been made, inter alia, with a view to protect the right of a third party.**
>
> **19. This Court in *Sohan Lal Passi noted (SCC p.28, para 10)***
>
> **"10. The road accidents in India have touched a new height. In majority of cases because of the rash and negligent driving, innocent persons become victims of such accidents because of which their dependants in many cases are virtually on the streets. In this background, the question of payment of compensation in respect of motor accidents has assumed great importance for public as well as for courts. Traditionally, before the Court directed payment of tort compensation, it had to be established by the claimants that the accident was due to the fault of the person causing injury or damage. Now from different judicial pronouncements, it shall appear that even in western countries fault is being read and assumed as someone's negligence or carelessness. The Indian Parliament, being conscious of the magnitude of the plight of the victims of the accidents, has introduced several beneficial provisions to protect the interest of the claimants and to enable them to claim compensation from the owner or the insurance company in connection with the accident."**
>
> **xxxx xxxxx xxxxx**
>
> **110. The summary of our findings to the various issues as raised in these petitions is as follows :**

> **(i) Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of vehicles against third-party risks is a social welfare legislation to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance coverage of all vehicles are with this paramount object and the provisions of the Act have to be so interpreted as to effectuate the said object."**

22. Learned counsel for the appellant has further argued that the deceased was getting salary of Rs.9000/- per month and after giving 1/3rd personal expenses of the deceased, the dependency cannot be more than Rs.6000/-. After applying multiplier of 17 and taking into consideration the age of deceased it was 28 years, the compensation comes much less than Rs.15,00,000/- (rupees fifteen lacs only), the learned Tribunal below has not awarded reasonable compensation.

23. To appreciate the arguments of learned counsel for the appellant, I have gone through the income certificate of the deceased, the salary of the deceased was Rs.9384/-. The deceased was getting increments from time to time throughout his service career. Taking into consideration the future increase in income, 50% increase is required to be given in the current salary of the deceased for calculating the loss on account of dependency. So, the salary of the deceased for calculating the dependency becomes Rs. 15,000/- and 1/3rd becomes Rs.5000/-. After deducting the personal expenses of the deceased i.e. 1/3rd (Rs.5,000/-), this Court finds that the compensation has awarded by the learned Court below i.e. Rs.14,72,000/-, (rupees fourteen lacs and seventy two thousand only) is just and reasoned. So, this Court finds that the amount awarded to the petitioners as compensation is just and reasonable.

24. The net result of the above discussion is that the appeal is devoid of any merit and the same is dismissed. Pending application (s), if any, shall also stands disposed of. No order as to costs.

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

Kishori Lal. ……Petitioner.
Versus
Jammu and Kashmir Bank Limited & anr. ……Respondents.

CMPMO No. 340 of 2015.
Date of decision: July 5, 2016.

Indian Evidence Act, 1872- Section 72- Petitioner is defendant no. 2, who stood guarantor for the re-payment of the loan taken by defendant No. 1- defendant No. 2 had taken a plea that defendant no. 1 is a habitual defaulter- defendant no. 1 had managed to forge his signature on the guarantee deed- application for comparison of signature of defendant No. 1 was filed- held, that defendant No. 2 is not competent to dispute the signatures of the defendant No. 1- defendant No. 1 himself could have disputed the signatures- application was rightly dismissed by the trial Court- petition dismissed. (Para-3 to 5)

Case referred:

Balak Ram Negi versus State of H.P. & its connected matters, Latest HLJ 2013(HP) 402

For the petitioner	:	Mr. Vijay K. Verma, Advocate.
For the respondents	:	Mr. Balwant Kukreja, Advocate, for respondent No. 1. None for respondent No. 2, though served.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. *(Oral)*

Respondent No. 2 is duly served, however, there is no appearance on his behalf. Hence, proceeded against *exparte.*

2. Heard. Order Annexure P-5 is under challenge in this petition. The petitioner is defendant No. 2. He stood guarantor on behalf of respondent No. 2 herein, (defendant No. 1 in the trial Court) to ensure the repayment of the loan, the said defendant had raised from respondent No. 1 (plaintiff in the trial Court).

3. Defendant No. 1 has raised loan from the plaintiff-bank. He executed the loan agreement Ext.PW2/D and also demand promissory notes Ext.PW2/E, Ext.PW2/F and Ext.PW2/G and thereby agreed to repay the outstanding loan amount to the plaintiff. Defendant No. 1, however, has defaulted in the payment of the loan amount. This has led in filing the suit against him and the guarantor, the petitioner-defendant No. 2. The principal borrower, defendant No. 1 was duly served in the suit, however, opted for not putting appearance. Even in this petition also, he allowed himself to be proceeded against exparte.

4. The perusal of the written statement reveals that petitioner-defendant No. 2 has taken a plea that defendant No. 1 is habitual defaulter. According to him, he is in the habit of obtaining loan but not to repay the same. There are many civil and criminal cases including complaints under Section 138 of the Negotiable Instrument Act are stated to be filed against defendant No. 1. Defendant No. 1 has approached him (defendant No. 2) with a request to furnish bank guarantee so that he can raise the loan. The petitioner-defendant No. 2 allegedly refused to do so. Defendant No. 1, however has allegedly managed to forge his signature on the guarantee deed. This is the stand of defendant No. 2 taken in the written statement filed to the suit. It was no where his case that the loan agreement and demand promissory notes not bears the signature of defendant No. 1. Otherwise also, an application filed for comparison of the signature of defendant No. 1 is not maintainable at the instance of petitioner/defendant No. 2 because he cannot say that signature on the loan documents are not that of the said defendant. It was for defendant No. 1, the executant himself to have disputed the execution of these documents. Therefore, learned trial Court has not committed any illegality or irregularity while arriving at a conclusion that the petitioner-defendant No. 2 has no locus standi to ask for the comparison of the signature of defendant No. 1.

5. The ratio of the judgment of a Co-ordinate Bench of This Court in ***Balak Ram Negi*** versus ***State of H.P. & its connected matters, Latest HLJ 2013(HP) 402,*** is distinguishable on facts, hence not applicable. The petition without any merit is accordingly dismissed.

6. Pending application(s), if any, also sands dismissed.

7. Authenticated copy of this judgment be sent to learned trial Court for being taken on record.

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

Mohinder Kumar Walia and Ors. ....Petitioners.

Versus

Prakasho Devi and Ors. ....Respondents.

Civil Revision No. 169 of 2014
Reserved on : 24.6.2016
Date of Decision: 5.7.2016

H.P. Urban Rent Control Act, 1987- Section 14- Landlord sought the eviction of the tenant on the ground of non-payment of rent as well as on the ground that the tenant had failed to occupy the premises- the petition was allowed by the Trial Court on the ground of arrears of rent and that the tenant had ceased to occupy the premises - an appeal was preferred which was partly allowed and the findings that tenant had ceased to occupy premises without any reasonable cause were set-aside - aggrieved from the order of the appellate authority, a revision was preferred – held, that the statements of witnesses show that the tenant had shifted to her village after the death of her husband - she was not residing in the premises for 4-5 years- premises remained closed w.e.f. 26-6-2007 till Oct., 2008- it was also admitted that the original tenant had died in the village which probablises the version of the petitioner/landlord- the Appellate Court had wrongly modified the judgment of the Trial Court- Revision allowed. (Para 15-28)

Cases referred:

Dunlop India Limited versus A.A.Rahna and another; (2011) 5 Supreme Court Cases 778
Amrit Lal Sehgal versus Smt. Ramawati Sahu 2007(1) Shim.L.C.55
Vipin Kumar versus Raj Kumar Latest HLJ 2010(HP) 1201
Sohan Lal Khanna v. Amar Singh, Latest HLJ 2000 (HP) 1008,
Om Parkash v. Subhash Chand, 2003 (2) SLC 217

For the petitioners: Mr. Adarsh K. Vashishta, Advocate.
For the respondents: Mr. T.S. Chauhan, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

Present Civil Revision petition is directed against the order dated 22.11.2013, passed by learned Appellate Authority, Shimla Division in Civil Rent Appeal No.18-S/14 of 2012, partly affirming the order passed by learned Rent Controller-(IV), Shimla, whereby petition filed by the respondent was partly allowed.

2. Briefly stated facts necessary for the adjudication of the present case are that the petitioners filed petition under Section 14(2)(i) and (v) of the H.P. Urban Rent Control Act, 1987 *(for short, Rent Act')* for eviction of original respondent/tenant, who died during the pendency of the petition and was substituted by her legal heirs *(hereinafter referred to as the `respondents'),* from one residential room situated in Kapoor Cottage Ist Floor, Hari Nagar, Boileauganj, Shimla, *(for short `demised premises')* on the ground of arrears of rent as well as the respondents have ceased to occupy the demised premises in question.

3. Learned trial Court, on the basis of material on record, allowed the petition and held that the respondents are in arrears of rent to the tune of Rs.2022.70 as well as they have ceased to occupy the tenanted premises without any reasonable cause preceding 12 months of filling of this petition with costs of Rs.2000/-. However, learned Rent Controller ordered that the respondents shall not be evicted from the tenanted premises on the ground of arrears of rent, if they deposit the same within 30 days from the date of order.

4. Feeling aggrieved and dissatisfied with the aforesaid order passed by learned Rent Controller, respondents-tenants filed an appeal under Section 24 of the Rent Act before the learned Appellate Authority, who modified the order of the learned Rent Controller by partly allowing the petition and held that, "the finding of learned Rent Controller that tenants have not paid rent w.e.f. Ist April, 2008 is affirmed and finding that tenants have ceased to occupy the premises without any reasonable cause continuously for a period of twelve months prior to filing of eviction petition is set aside". The petitioners aggrieved and dissatisfied with the impugned judgment passed by learned Appellate Authority, preferred the instant revision petition.

5. Mr. Adarsh K. Vashishta, learned counsel appearing for the petitioners, vehemently argued that the order/judgment passed by the learned appellate Court below is not sustainable as the same is not based on correct appreciation of evidence available on record. He submitted that learned appellate Court below has not specifically dealt with the pleas and arguments raised by the present petitioners. He also contended that learned appellate Court while deciding the case at hand has miserably failed to appreciate the evidence available on record in its right perspective. He further submitted that the learned appellate Court below has committed an error of law and facts by partly allowing and modifying the order passed by the learned Rent Controller, who had rightly allowed the petition filed by the present petitioners and passed an order of eviction against the tenants on the grounds of arrears of rent as well as ceased to occupy the tenanted premises continuously without reasonable cause. It is also contended on behalf of the petitioner that the learned appellate Court below has wrongly come to the conclusion that the petitioners did not prove on record that the respondents-tenants have ceased to occupy the premises continuously for a period of 12 months prior to the filing of the eviction petition

6. Mr. Vashishta forcefully contended that undue credence has been lent to the statement given by RW-2 Sh. Pyare Lal, posted at District Food and Supply Controller, Shimla, who in his examination-in-chief stated that the ration card was issued in the name of respondents but in his cross-examination he stated that after issuance of ration card to a person, the same is not verified thereafter. He contended that merely issuance of the ration card in favour of the tenant cannot be ground to conclude that he had been staying continuously in the demised premise.

7. During arguments having been made him, he invited attention of this Court to statements given by RW1, who in his cross-examination stated that Rajinder Singh died about two years ago and Smt. Pritmi Devi died about one year ago in her village. He also pointed out that premises were rented out to Pritmi Devi after the death of her husband late Sh. Gopal Singh. Learned counsel contended that learned appellate Court very conveniently ignored the statement of RW3 wherein he in examination-in-chief admitted that his father Rajinder Singh and grandmother died in the premises in question, but in cross examination, he categorically admitted that Smt. Pritmi Devi died in Ludhiana, which clearly suggests that there were material contradictions in the statement given by RW2, which have been heavily relied upon by the learned Appellate Court. Mr. Vashishta, while concluding his arguments specifically invited attention of the Court to the statement of RW3, wherein he specifically admitted that there was less consumption of electricity for the year, 2007-08. RW-3 also admitted that no record of the consumption of the gas during the relevant period has been annexed with the reply to the petition. Mr. Vashishta forcefully contended that the learned Appellate Court miserably failed to appreciate that it stands proved on record that respondents were served on the addresses of the village as mentioned in the memo of appeal, which clearly suggests that they had ceased to occupy the demised premises continuously for the period of 12 months prior to the filing of rent petition. It was also contended on behalf of the petitioners that learned first Appellate Court failed to appreciate the evidence in its right perspective because it ignored the evidence put forth by the petitioners with regard to the consumption of electricity for a period of 12 months. He invited attention of this Court to the statement of PW2 Hans Raj Gupta, Foreman HPSEB, Khalini Sub-Division, to demonstrate that electricity bill of demised premises Ext.PW2/A was in the name of Rajinder Singh and further perusal of which suggests that only one unit of electricity was consumed in two months and consumption for the rest of the period was nil. At last Mr. Vashishta, contended that the petitioners had successfully proved on record the continuous absence of tenant from the premises without any reason and, as such, finding returned by the first appellate Court that petitioners have failed to establish that respondents ceased to occupy the premises, is contrary to material available on record and, as such, judgments passed by the learned First Appellate Court deserve to be quashed and set-aside.

8. On the other hand, Mr. T.S. Chauhan, Advocate, representing the respondents supported the judgment passed by the learned Appellate Court and he vehemently argued that no interference, whatsoever, of this Court is warranted in the present facts and circumstances of the case since the judgment passed by the learned Appellate Court is based upon the correct appreciation of evidence available on record. He contended that landlord had no cause of action, whatsoever, to file the petition since it stands duly proved on record that respondents have been residing in the tenanted premises continuously for thirty five years together. During arguments having been made by him, he invited attention of the Court to the statements given by RW1 Jagarnath and RW2 Pyare Lal to demonstrate that it has come specifically on record that respondents have been residing in the locality for the last 35-36 years. He also referred to that portion of the statement, whereby RW1 stated that two sons of deceased Rajinder Singh were performing business in Shimla and they use to visit residential house of tenants. He also invited attention of this Court to that portion of the statement given by RW2, wherein he stated that ration card for five members was issued on 1.2.2004, to demonstrate that tenanted premise was being regularly used by the respondents. Mr. Chauhan, forcefully contended that by leading cogent and reliable evidence on record, respondents discharged their onus to prove that they have not ceased to occupy the premises but in the present case, no evidence worth the name has been placed on record by the petitioners to suggest otherwise, rather witnesses produced on behalf of respondents have clearly supported the case of the respondents, wherein RW2 admitted that Ration Card was issued in the name of five members. He also submitted that this is not the case, where interference of this Court is warranted while exercising revisionary jurisdiction, especially, when both the courts below have dealt with each and every aspect of the matter very meticulously.

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

10. Pleadings on record suggest that the landlord filed petition for eviction of the present respondent on the ground of non-payment of rent as well as cease to occupy the premises. Record further reveals that respondents tenants took the objection that they had deposited the rent up to 31.3.2008. But both the courts below after appreciating the evidence available on record, in this regard, came to the conclusion that respondents tenants are in arrear of rent. Moreover, aforesaid findings qua the arrears of rent have attained finality since no appeal, whatsoever, qua the same has been filed by the respondents-tenants. Since issue with regard to arrear of rent stands finally decided by the court below, this Court needs not to look into at that issue at this stage. Now question which remains to be determined/decided by this Court is whether findings returned by the first appellate Court to the effect that respondents have not ceased to occupy the tenanted premises, are based upon the correct appreciation of evidence available on record or not?

11. Perusal of the impugned judgment suggests that learned Appellate Court, while accepting the finding of the Rent Controller qua the arrears of rent, has concluded that tenants have not ceased to occupy the premises continuously for a period of 12 months prior to filing of the eviction petition. In the present case, petitioner No.1-Mohinder Kumar, with a view to prove its case that respondents have ceased to occupy the demised premises continuously for a period of twelve months before filing of the petition, examined himself as PW1. Careful perusal of his statement suggests that respondent-Pritmi Devi had shifted to her village Hanuman Badog, Arki, District Solan, H.P. four years back and since then, she had been residing there and tenanted premises were lying locked. He specifically stated that respondent never visited the premises during this period. In support of his contentions, he also placed on record Ext.PW1/A electricity bill, however, in his cross-examination, he admitted the mention of one room in tenancy of the respondent and there is no mention with regard to kitchen. He also admitted that tenant Gopal, was the husband of the Pritmi Devi, who used to reside with his wife and four children. He also admitted that after death of Gopal, respondent was residing continuously.

12. Petitioners also examined Hans Raj Gupta Foreman, HPSEB Khalini Sub Division, as PW2, who stated that Ext.PW-2/A is correct as per their record. He also stated that connection of respondent bearing No. H 1000028 was in the name of Sh. Rajinder Singh and record pertains qua aforesaid matter w.e.f. 26.6.2007 to October, 2008 suggests that only one unit of electricity was been consumed in two months and consumption for rest of period was nil. He also stated in examination-in-chief that one unit can be consumed by indicators also, however, in his cross examination, he stated that he cannot tell as to how many Rajinder Singhs are in the sub division, of which, he had brought the record but he also admitted that address of Rajinder Singh is not mentioned in the record.

13. Respondent Kamal with a view to rebut the evidence of the petitioners, himself appeared as RW2-A and stated that Pritami Devi and Gopal Singh were his grandparents. He also stated that the premises in dispute consisted of one room, kitchen and bath room. Stated that respondent Prakasho Devi is his mother and respondents No.3 and 4 are his brothers. He stated that his brother died in 2008 and grandmother died in 2007. It has also come in his statement that after death of grandmother, they along with father were residing in the tenanted premises. He also stated that he had left school in 2008 and his eldest brother was in the army and second brother was a driver. He also admitted in cross examination that in 2007-08, their electricity consumption was less, however, he self stated that during that period, they were in hospital at Ludhiana and denied the house was lying locked. He also admitted of not filing any record showing any gas connection. It has also come in statement that Pritmi Devi as well as all other respondents were served on the village addresses. Another witness namely Shri Jagarnath produced by respondents, appeared as RW-1 stated that he knew respondent and her husband late Shri Gopal Singh. He stated that respondents used to reside in Kapoor Cottage Hari Nagar, Shimla, which was taken on rent by Gopal Singh. It also came in his statement that Gopal Singh was residing with her wife and along with his family. He also stated that Prakasho Devi and children resided in the tenanted premises. He also deposed that he was neighbor of Gopal Singh and was residing in Hari Nagar for 35-36 years. However, he stated that Rajinder Singh got education in Boileauganj school and used to reside with respondent in tenanted premises during their school days. He stated that tenanted premises never remained locked. In his cross examination, he stated that he is not aware that who is the landlord of the tenanted premises. He also admitted that Pritmi Devi died in village. In his cross-examination, he stated that respondents used to go to school 15-16 years ago. He also admitted of having good relations with the respondents. He also admitted that Kaku S/o Rajinder Singh had asked him to appear as witness.

14. RW2 Pyare Lal, Auditor of District Food and Supply Officer Shimla, deposed that ration card was issued in favour of the Rajinder Singh on 1.2.2004. Later he self stated that it was issued in the name of five members and thereafter, the name of Rajinder Singh was struck off because of his death. However, in cross examination he admitted that when ration card is issued once and, thereafter, it is not verified as to whether they are residing on the given address or not?

15. Conjoint reading of the statements given by PWs1 and 2 clearly suggests that respondent Pritima Devi had shifted to her village Hanuman Badog, Arki, HP, after the death of her husband and respondents have not been residing continuously in the premises for the last 4-5 years. PW2 Hans Raj Gupta specifically stated while proving Ext.PW2/A, that only one unit electricity was consumed in two months and consumption for rest of the period was nil, meaning thereby, respondents tenants were not residing in these premises during the aforesaid period. Since this is not the case of respondents that the electricity meter was out of order or dead, version put forth by the PW2 Hans Raj, who is an independent witness cannot be dis-believed, especially, on the face of Ext.PW2/A, which is electricity bill issued in the name of Rajinder Singh. Since, it is admitted case of the respondents that meter was in the name of Rajidner Singh, it can be safely held that meter No. H 1000028 was in the name of son of original tenant i.e. Rajidner Singh.

16. In the present case, landlord, who appeared as PW1 categorically stated that deceased respondent has ben residing at Arki for the last four years and since then, premises are lying locked and to substantiate his aforesaid assertion, he got examined PW2 Hansraj, official of electricity, who while proving Ext.PW2/A categorically stated that during the period w.e.f. 26.2.2008, only one unit of electricity was consumed within two months ,which clearly suggests that during 26.6.2007 to October, 2008, none of the respondents resided in the tenanted premises. Had anyone of the them resided in the premises during the aforesaid period, they would have consumed considerable units of electricity but in the present case, only one unit has been consumed in two months and consumption for the rest of the period is nil. PW2 also stated that one unit can even be consumed by indicators. In view of the above, this Court sees no reason to dis-believe the version put forth by the official witness produced by the plaintiff in support of his contention with regard to cease to occupy. Moreover, records nowhere suggests that any suggestion with regard to motive to depose falsely against the respondents was ever put to this official witness PW2.

17. Conjoint reading of statements given by PW1 and PW2 proves it beyond reasonable doubt that tenanted premises in question remained closed w.e.f. 26.6.2007 to October, 2008. Respondent tenant who himself appeared in witness box stated that electricity consumed was less since they were in hospital at Ludhiana. In his cross examination, he also admitted that Pritmi Devi died in village and his father died in Ludhiana. Aforesaid submissions/admissions made on behalf of respondent No. 2, itself substantiate the claim of the petitioners that deceased respondent used to reside at Arki for the last 4-5 years and premises were lying locked since then. Though RW 1 whose statement has been heavily relied upon by the learned Appellate Court stated that now Prakasho Devi and her children resides in the tenanted premises but in his cross examination, he admitted that original tenant of premises Pritima Devi died in village. He has also admitted in cross examination that he is not aware when children of Rajinder Singh used to go to School, rather, he has stated that they used to go to school 15-16 years ago.

18. Careful perusal of statement of RW1 though suggests that respondents have been residing in tenanted premises for last few years but no specific statement, whatsoever, has come from him suggestive of the fact that respondents have not ceased to occupy the tenanted premises for the last 12 months preceding to filing of the petition, rather RW1 categorically admitted in cross-examination that children of late Rajinder Singh used to go to school 15-16 years ago. Admittedly, there is nothing in the statement of RW 2 to suggest that in the last 12 months prior to filing of the petitioner, respondents were actually residing in the demised premises. Similarly, RW2 Pyare lal, Auditor of office of District Food and Supply stated that ration card was issued in favour of Rajinder Singh on 1.2.2004 but in his cross-examination, he specifically admitted that once ration card Code No. J-7/383, Sr. No. 797 is issued, thereafter, it is not verified as to whether they were residing on the given address or not? Hence, this court is of the view that statements given by RW1 and RW2 were not sufficient to conclude that respondents have not ceased to occupy the tenanted premises continuously for a period of 12 months preceding to filing of the petition because none of the witness produced by the respondents categorically stated that respondents used to reside continuously for a period of 12 months preceding to filing of the petition in the tenanted premises. Respondents, though, by placing ration card on record attempted to prove that they resided in tenanted premises but no evidence worth the name has been placed on record to suggest that preceding 12 months of filing present petition, respondents actually used this ration card. Respondents have not placed on record any evidence to suggest that during last 12 months preceding to filing of petition, they actually used this ration card. Had respondents placed on record any document suggestive of the fact that they procured some ration on the strength of ration card during the period of 12 months preceding to filing of rent petition, this Court would have presumed that they actually resided in the tenanted premises for the last 12 months preceding filing of the petitioner. Apart from ration card, no evidence worth the name with regard to gas connection, if any, was ever placed on record by the respondent to substantiate their claim with regard to their residing in the tenanted

premises but merely on the basis of issuance of ration card in favour of the respondents, it cannot be concluded that respondents resided in the tenanted premises during the relevant period. On the other hand, in the present case, petitioner, by way of leading cogent and convincing evidence in the shape of electricity bill which clearly suggests that during the relevant time, the consumption of electricity bill was nil, discharged his onus to prove that respondents have actually ceased to occupy the tenanted premises continuously for a period of 12 months preceding to the filing of the petition. Importantly, in the present case, RW1 and RW3 in their cross examination admitted that Pritimi Devi died in the village, whereas Respondent. RW3 also admitted that they were served on their address of the village, which clearly corroborates the statement given by PW1, where he stated that respondents ceased to occupy the rent /tenanted premises and the premises were locked for 4-5 years. Apart from above, in the present case, it also stands proved on record that notices to all the respondents were served on the village addresses, as is given in the memo of parties, which fact/circumstance also indicates that respondents were residing in the tenanted premises at the time of filing of rent petition.

19. Hence, in view of the detailed discussion made hereinabove, this Court has no hesitation to conclude that the judgment passed by the learned appellate Court as envisaged under Rent Control Act, 1987, is contrary to record and same is not based upon the proper appreciation of the evidence available on record, rather careful perusal of the evidence on record, clearly suggests that evidence available on record have not been dealt with in its right perspective by the appellate authority while accepting the appeal of the respondents. The conclusion drawn by the appellate authority that testimony of PW2 is not sufficient to rebut the testimony of RW1 and RW2 is not tenable at all, especially, when it stands proved on record that during the relevant period, consumption of electricity was nil. Learned appellate Court below fell in grave error while holding that statement given by PW2 is not sufficient to rebut the testimonies of RW1 and RW2 because admittedly, PW2 was expected only to state qua the consumption of the electricity during the relevant period, and, as such, his testimony could not be considered to be a rebuttal, if any, to the depositions made by RW1 and RW2 because in their statements, they only stated with regard to the occupancy and staying of respondents in the tenanted premises during the relevant period. Hence, this Court is not in agreement with the finding returned by the appellate authority as far as the consumption of electricity bill during the relevant time, is concerned. Electricity bill placed on record by the petitioner clearly suggests that tenanted premises remained closed during this period, meaning thereby, it stands proved on record that during the relevant time respondents have not been residing in the tenanted premises because admittedly respondents have not placed anything on record to demonstrate that they continued to reside in the premises during the relevant time.

20. Moreover, as has been observed above, respondents have not led on record any cogent and convincing evidence, be it ocular or documentary to suggest that during the relevant period, they were actually residing in tenanted premises. Had respondents resided in the tenanted premises, during the relevant period, they would have definitely led on record, evidence or details with regard to LPG gas connection or ration procured on the strength of ration card, if any, during the relevant period. Hence this Court finds it difficult to accept the findings returned by the appellate authority that petitioners have not been able to prove that respondents tenants have ceased to occupy the premises. In this regard, the Hon'ble Apex Court in ***Dunlop India Limited versus A.A.Rahna and another;*** (2011) 5 Supreme Court Cases 778. The relevant para No. 21 of the judgment reproduced as under:-

> *" The word " occupy" used in Section 11(4)(v) is not synonymous with legal possession in technical sense. It means actual possession of the tenanted building or use thereof for the purpose for which it is let out. If the building is let out for residential purpose and the tenant is shown to be continuously absent from the building for six months, the court may presume that he has ceased to occupy the building or abandoned it. If the building is let out for business or commercial purpose, complete cessation of the business/commercial activity may give rise to a presumption that the tenant has ceased to occupy the premises. In either case,*

legal possession of the building by the tenant will, by itself, be not sufficient for refusing an order of eviction unless the tenant proves that there was a reasonable cause for his having ceased to occupy the building".

21. It clearly emerges from the aforesaid judgment that if the building is let out for the business or residential purpose, complete cessation/absence from the premises may give rise to presumption that the tenant has ceased to occupy the premises. In this case, also there is overwhelming evidence on record, suggestive of the fact that the respondent-tenant had not been residing.

22. Similarly, the Coordinate Bench of this Court in ***Amrit Lal Sehgal versus Smt. Ramawati Sahu*** 2007(1) Shim.L.C.55 held as under:-

> *"6. There is also statement proved by a witness from the electricity office showing the consumption of electricity through the meter installed in the demised premises. As per this statement only 60 units of electricity, 50 units as reflected in the bill for July, 1990 and 10 units as reflected in the bill for September, 1990, were consumed during the relevant period. This statement also shows that tenant-revision petitioner does not reside in the premises and that only occasionally some people visit the place and stay there".*
>
> *"7. As already noticed, even the tenant himself says that his brothers, sisters etc. visit the premises and stay there for sometime, which means that the premises are being used only as a tourist resort by the relatives of tenant- revision petitioner. It is by now well settled that occasional visit to the tenanted premises by the tenant do not amount to the tenant continuing in occupation of the premises. Reference in this behalf may be made to* ***Sohan Lal Khanna V. Amar Singh, 2000(2) Latest HLJ 1008, St. Michaeal's Cathedral Catholic Club v. Smt. Harbans Kaur Nayani, 1997(1) Sim. L.C.237 and Gurbachan Singh V. Ravinder Nath Bhalla and others, Latest HLJ 2006(HP) 177.*** *Therefore, no fault can be found with the finding by the Appellate Authority that the tenant had ceased to occupy the premises for a period of 12 months, before the institution of the petition".*

23. Since in the present case, it stands duly proved that during disputed period consumption of electricity was minimal, presumption can be drawn that during this period no activity, whatsoever, was carried out in the said premises by the respondents-tenants to prove that they continuously resided in the demised premises. Respondents were expected to lead positive evidence that in last 12 months preceding to filing of the rent petition, they actually resided in the premises, mere symbolic possession, if any, of the premises cannot be sufficient to prove that they have not ceased to occupy the demised premises. In this regard, reliance is placed on judgment rendered by Hon'ble High Court of Himachal Pradesh in ***Vipin Kumar versus Raj Kumar*** Latest HLJ 2010(HP) 1201, the relevant para Nos.13 and 16 of the judgment are reproduced as under:-

> *"13. The appeals arise out of proceedings for eviction of the respondents from the premises in question on the ground that they had ceased to occupy the building for a continuous period of more than four months without reasonable cause. The trial Court allowed the applications by orders which were affirmed on appeal by the first appellate Court. The respondents challenged the decree before the High Court by revision applications under Section 15(5) of the Rent Control Act which were allowed by the impugned judgment reversing the decree and dismissing the applications. The High Court has held that the landlord has to prove that the tenant by his conduct has brought the tenancy to an end and with that intention discontinued the occupation of the demised premises, and since this has not been done the application have to be dismissed. The relevant clause of Section 13(2) of the Rent Control Act states that a tenant will be liable to eviction if he ceases to*

occupy the building for a continuous period of four months without reasonable cause. The section does not require the cession of tenancy in question. The only condition which has to be satisfied is the non-user of the building for the requisite period. The principle underlying the provisions is that if a premise is not required by the tenant, it should become available to another person who may be in need thereof. The High Court, therefore, was clearly in error in assuming that unless the cession of the tenancy is proved eviction cannot be ordered."

"16. We are of the view Rent Control Court and Appellate Authority have committed a grave error in taking the view that only if there is abandonment it could be said that there would be cessation of occupation. Rent Control Court and Appellate Authority used words which are not in statute. Statute has not used the word "abandonment". The word "abandon" means to give up, to desert etc. Tenant need not abandon the building so as to attract section 11(4)(v) of the Act. Landlord is also not expected to establish that tenant has abandoned the building so as to attract section 11(4)(v). Once landlord could establish that tenant has ceased to occupy the premises continuously for six months prior to the filing of the petition he is entitled to get order of eviction under that section. The word" occupy" means to cohabit with to hld or have in possession, Tenanted premises must be in the state of being enjoyed and occupied. The word "occupy" used by the statute would show that tenanted premises be put to use. Tenant cannot be heard to contend that he is having physical possession of the premises though not in occupation. So far as this case is concerned, we are of the view landlord has discharged the burden and then the onus has shifted to the tenant and the tenant could not establish that he has not ceased to occupy the premises and even if there is cessation that was with reasonable cause."

24. Under the Rent Control Act, landlord are entitled to get the premises vacated in case tenant cease to occupy the tenanted premises for a period of 12 months before filing the petition without sufficient cause. In the present case, respondents by producing RW1 attempted to prove that they are in continuous possession of the tenanted premises, even after the death of their grandmother and thereafter, their father but this Court is of the view that tenant may be in possession but unless he occupies the premises, the possession is totally meaningless, rather respondent, to dispel the contention put forth on behalf of the petitioner that they cease to occupy the premises, is expected to lead positive evidence suggestive of the fact that they actually enjoyed premises tenanted by the landlord and not by another person. In the present case, as has been observed above, no positive evidence worth the name has been led on record that during that period, they actually resided in the tenanted premises which they could lead by placing on record copy of gas connection and detail of the ration procured on the basis of ration card place on record.

25. In the present case, admittedly, respondents were served and notices were issued by Rent Controller on the addresses of villages which itself suggests that at the time of filing of petition, respondents were residing at their village, as has been claimed by the petitioners in his rent petition. In this regard, reliance is placed on para -17 of the judgment passed by this Court in ***Sohan Lal Khanna v. Amar Singh, Latest HLJ 2000 (HP) 1008***, which reads as follows:

"17. Again, it was specifically admitted by the tenant, which has been recorded in the judgment of the Appellate Authority that the tenant was served with a copy of the petition at his Faridabad address and all communications were served upon him at his Faridabad address. In the light of these circumstances, if a finding is recorded by the authorities that after retirement, the tenant had stayed at Faridabad with his children, it cannot be said that no such finding could have been arrived at and it requires to be interfered by this Court."

26. In the present case, learned counsel representing respondents-tenants had seriously contested the jurisdiction of this Court to interfere in the revision in the present revision petition. In this regard, reliance is placed on judgment rendered by this Court in ***Om Parkash v. Subhash Chand, 2003 (2) SLC 217***, the relevant paras whereof are reproduced as belows:-

> *"11. It is well settled that while exercising revisional jurisdiction under Section 24 of the Act, the High Court should ordinarily not interfere with the findings of facts particularly when such findings are concurrent. However, it is also well settled that in a case where the findings of fact are absurd, unreasonable and contrary to the evidence on record or based on no evidence, the High Court will have to interfere with such findings. It is so because in exercising the supervisory powers which vests in the High Court, it has to ensure that justice is done to the parties and in a case where injustice has been done to a party, it is duty of this Court to undo the same. In the case in hand, the findings of facts recorded by the learned Rent Controller had been reversed by the learned Appellate Authority, therefore, propriety of the findings recorded by the learned Appellate Authority has to be examined on the basis of the material on record."*
>
> *22. The contention of the learned Counsel for the tenant that animus deserendi is not established, therefore, it could not be held that the tenant has ceased to occupy the premises. In G.C. Bhatia's case (supra) relied by the learned Counsel for the tenant to support his contention a learned Single Judge of this Court held as under:*
>
> > *"9. If a tenant uses the rented building occasionally, it may or may not amount to its non-occupation. The nature and extent of the occasional visits, the animus deserendi and the totality of circumstances each case will have to be considered for the purpose of determining whether the tenant has ceased to occupy the building for a continuous period of twelve months without reasonable cause."*
>
> *23. Clause (v) of sub-section (2) of Section 14 of the Act which provides the cessation of the tenant to occupy the rented premises as a ground for eviction reads as under:*
>
> > *"(v) that the tenant has ceased to occupy the building or rented land for a continuous period of twelve months without reasonable cause."*
>
> *24. On a bare reading of the aforesaid provisions, it is clear that to get eviction of the tenant on the aforesaid ground the landlord has to prove that the tenant had ceased to occupy the building for a continuous period of 12 months without reasonable cause and it does not require the landlord to prove further that the tenant has so ceased to occupy the premises with the intention not to occupy them at all at any time in future.*
>
> *25. It may be pointed out that the ground to evict the tenant who has failed to occupy the building continuously for the specified period without any reasonable cause has been enacted by the legislature to ensure that the buildings which are scarce in the numbers especially in towns do not remain unused at the instance of the tenants who do not actually need them. Therefore, animus deserendi cannot be imported to the section and the landlord is not required to prove that the non-occupation of the premises by the tenant for a continuous period of months was pursuant to his intention not to occupy the premises in future.*
>
> *26. In M/s Babu Ram Gopal and others v. Mathra Dass, AIR 1990 SC 879, the Hon'ble Supreme Court held as under:*
>
> > *"3…..The reason of including the clause (v) in Section 13(2) is to ensure that buildings, which are scarce in number specially in the towns, necessitating rent control legislation, do not remain unused at the instance of tenants who do not actually need them. A tenant who is in*

> *possession of a building in the legal sense only cannot be said to be in occupation thereof for the purpose of Section 13(2)(v); otherwise a question of his eviction as envisaged in that section would not arise. The section, by making provisions for his ejectment, assumes that he is in possession, but, still includes cessation of occupation as one of the grounds. The clause, therefore, has to be interpreted in this background and it must take colour from the context. We, therefore, hold that if a tenant stops the business which he is carrying on in a shop and closes the premises continuously for a period of four months without a reasonable cause he will be liable for eviction."*

Therefore, animus deserendi on the part of the tenant is not an essential ingredient to be proved where the eviction of the tenant is sought on the ground of his ceasing to occupy the premises for a continuous period of 12 months.

27. Even in G.C. Bhatia's case (supra), this Court has not held that animus deserendi is essential ingredient to be proved by the landlord seeking eviction of the tenant on the ground of his ceasing to occupy the rented premises but it has been held only to be one of the factors which may weigh with the Court in determining whether the tenant has ceased to occupy the building or not. Moreover, intention of a human being is his mental state regarding which direct evidence can be seldom expected. Therefore, the contention of the learned Counsel for the tenant that animus deserendi in the case is not proved, therefore, order of the learned Appellate Authority calls for no interference is not sustainable.

27. No doubt, while exercising revisionary jurisdiction under Section 24 of the Act, High Court has very limited powers to interfere, especially when the findings are concurrent but it is now well settled that in case court comes to the conclusion that the findings of the court are absurd, unreasonable and contrary to the evidence available on record and same are not based upon proper appreciation of evidence, court has jurisdiction to interfere with such findings. In the present case also, as has been discussed above, learned Appellate Authority has not returned findings with regard to "cease to occupy" on the basis of evidence available on record, rather, same appears to be contrary to the facts as well as law. Hence, this Court with a view to ascertain the genuineness and correctness of the order passed by the learned appellate Authority undertook an exercise to critically examine the evidence available on record to ascertain that judgments passed by the learned appellate Authority is not perverse and same is based upon the proper appreciation of the evidence on record. This Court after perusing the evidence available on record deemed it fit to exercise its revisionary jurisdiction in the present facts and circumstances.

28. Consequently, in view of the detailed discussion made herein above, this Court sees no infirmity and illegality in the finding recorded by the learned Rent Controller that the "respondents-tenants have ceased to occupy the tenanted premises for the relevant time and, therefore, respondents are liable to be evicted from the tenanted premises," is based on the proper appreciation of evidence, whereas the contrary view taken by the Appellate Authority is not sustainable as same appears to be not based upon the correct appreciation of evidence available on record. Accordingly, the present petition is allowed and impugned order passed by the learned Appellate Authority is set-aside and order of Rent Controller directing eviction of tenant from the tenanted premises on the ground that respondents have ceased to occupy the tenanted premises without any reasonable cause preceding filing of this petition with costs of Rs. 2,000/- is restored.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Neeraj and others ....Petitioners.

Versus

Rajinder Kumar and others. ...Respondents.

CMPMO No.111 of 2016.
Reserved on : 28.6.2016
Decided on: 5th July, 2016.

Code of Civil Procedure, 1908- Order 6 Rule 17- Plaintiffs filed a civil suit for seeking injunction- an application for amendment was filed pleading that after filing of the suit defendants had got the window panes of the glaze of second floor towards the house of the plaintiffs and this fact was required to be pleaded- application was opposed by the defendants- held, that application was filed to incorporate the subsequent fact- hence, same is allowed subject to the payment of cost of Rs.6,000/-. (Para-5 to 7)

For the petitioners : Mr. Parveen Chauhan, Advocate.
For the respondents : Mr. Avinash Jaryal, Advocate, for respondents No.5.
Nemo for respondents No.1 to 4.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present petition is maintained by the petitioners under Article 227 of the Constitution of India, for quashing and setting the order dated 10.11.2015, passed by learned Civil Judge (Senior Division), Chamba, District Chamba, H.P, in case titled Neeraj & others vs. Rajinder Kumar and others, in an application filed by the petitioners/applicants under Order 6 Rule 17 of the Code of Civil Procedure, dismissing the application of the petitioner with a prayer to allow the petitioners/plaintiffs to amend the plaint.

2. Brief facts giving rise to the present petition are that the petitioners/plaintiffs (hereinafter referred as 'plaintiffs') maintained the suit for mandatory injunction against the respondents/defendants (hereinafter referred as 'defendants') before the learned Civil Judge (Senior Division), Chamba, with a prayer that respondents No.1 to 4 be restrained from constructing the window panes of the glaze of second floor towards the house of the plaintiffs by issuing a mandatory injunction, but after filing of the suit, the defendants have in fact raised construction of the first floor of the window panes of the glaze, in such a manner that they have encroached upon the open air towards the house of the plaintiffs. So, the suit was required to be amended by including the loss. As per the plaintiffs, defendants No.1 to 4 have got the window panes of the glaze of the second floor towards the house of the plaintiffs during the pendency of the suit. Plaintiffs claimed the relief of mandatory injunction qua the window panes of the glaze of the second storey/floor of the house of the defendants and for that purpose the plaintiffs intend to amend their plaint in the following manner :

> **"I) That the head note "A" and prayer clause "A" of the plaint is to be amended as under :**
>
> **The words "Thereby directing the defendants No.1 to 4 to open the window panes of their glaze laid in newly constructed 1st floor of their house" are to be substituted by the words "Directing the defendants No.1 to 4 to open the window panes of their glazes laid in newly constructed 1st floor and 2nd floor of their house inside their rooms."**
>
> **II) That a new para No.7-A is to be added in the plaint as under :**

> **"That the defendant No.1 to 4 has got the window panes of the second floor of their house fixed with its opening towards the house of plaintiffs during the pendency of the suit which are also required to be removed."**

3. Reply to the application was filed. As per the defendants, plaintiffs have already sought the relief of mandatory injunction in their amended plaint, which was filed by them in the month of April, 2009, when plaintiffs moved an application under Order 6 Rule 17 of the Code of Civil Procedure for amendment of their plaint. Plaintiffs have filed another application under Order 6 Rule 17 of the Code of Civil Procedure, to fill up the lacuna of their case to which they are not entitled.

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

5. At this moment, it is clear from the record that the plaintiffs want to amend the plaint after filing of the suit, defendants have raised the construction and the plaint is required to be amended as the cause of action has accrued after filing of the suit. The plaintiffs were required to be allowed to amend the suit, as plaintiff was having this cause after filing of the plaint, since the construction, as per the plaintiffs, was raised during the pendency of the suit.

6. Earlier also, the plaintiffs had moved a similar application before the learned Court below, but the same was withdrawn. In these circumstances, this Court finds that application of the plaintiffs under Order 6 Rule 17 of the Code of Civil Procedure, is required to be allowed to meet the ends of justice. However, the defendants are required to be compensated with costs assessed to the tune of Rs.6,000/- (rupees six thousand only).

7. In view of the above, the order of learned Court below is set aside and application of the plaintiffs under Order 6 Rule 17 of the Code of Civil Procedure, is allowed, however subject to costs of Rs.6,000/- (rupees six thousand only) to be paid by the plaintiffs to the defendants and only then the amended plaint be taken on record. Parties are directed to appear before the learned Court below on **28th July, 2016.**

8. The petition is accordingly disposed of. Pending applications, if any, shall also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Parbati Hydroelectric Project Stage-II. ……Petitioner.

Versus

H.P.S.E.B. Ltd. & others ……Respondents.

CWP No.4410 of 2014
Reserved on : 28.6.2016
Date of Decision: 05.7.2016

Constitution of India, 1950- Article 226- **Electricity Act, 2003**- Section 127- Petitioner is consumer of the respondent board for consumption of the electricity- petitioner applied for the supply of electricity for load of 216.77 KW- load was enhanced to 3285.39 KW and a contract demand of 1460 KVA was made- officer of the board visited the area of the petitioner and it was found that the connected load was 4843.18 KW against the sanctioned load of 216.77/1085.97 KW- an amount of Rs. 53,03,974/- was demanded- an appeal was preferred, which was dismissed- aggrieved from the order, present writ petition was filed- held, that notice was issued to the parties on 25.10.2013 but there is nothing on record to show that petitioner was served or he had appeared before the Appellate Authority- petition was disposed of without hearing the

petitioner- petition allowed and parties directed to appeal before the Appellate Authority on 22.8.2016. (Para-11 to 16)

For the petitioner : Mr. Chandranarayana Singh, Advocate.
For the respondents : Mr. Satyen Vaidya, Senior Advocate with Mr. Vivek Sharma, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present writ petition is maintained by the petitioner under Section 226 of the Constitution of India for issuance of writ of certiorari, mandamus or any other order quashing the order dated 10.12.2013 (Annexure P-5), passed by the learned Divisional Commissioner, Mandi (exercising the powers of Appellate Authority), in an appeal under Section 127 of the Electricity Act, 2003, whereby the appeal of the appellant has been dismissed without affording opportunity of hearing to the petitioner/appellant and to remand the case back to the Appellate Authority for fresh adjudication after hearing the petitioner/appellant before the Appellate Authority.

2. Briefly stating the facts giving rise to the present petition are that the petitioner is an Undertaking of Government of India and was the consumer of the respondent-Board for the consumption of electricity. The petitioner applied to the respondents for the supply of electricity for the Project and Township, which includes residential, as well as, official colony at Sainj, District Kullu, H.P, initially applied for a load of 216.77 KW in the year, 2004.

3. The respondent-Company called upon the petitioner to deposit Rs.2,17,000/- vide letter dated 26.7.2004, which was deposited in cash by the petitioner on 13.8.2004, alongwith Bank Guarantee to the tune of Rs.1,73,600/-.

4. The petitioner further applied for increase of load from the existing load of 216.77 KW to 1085 KW vide an application in September, 2005. Respondents asked the petitioner to deposit security on account of enhanced load to the tune of Rs.3,47,000/- in cash and a Bank Guarantee of Rs.6,95,200/-. The petitioner deposited the security amount of Rs.3.47,000/- on 21.9.2005 along with Bank Guarantee of Rs.6,95,200/- on 2.12.2005.

5. The petitioner further submitted an application on 24.12.2007 for extension of load to that of 3285.39 KW and a contract demand of 1460 KVA, as it was expected that in the near future, the petitioner would be demanding more load to run its activities and expected occupation of its residential quarters.

6. That respondent No.2, vide communication dated 26.2.2008, directed the appellant to deposit an amount of Rs.23,58,700/-. However, the said amount was on higher side and accordingly respondent No.2 issued a revised demand notice on 20.3.2008 for an amount of Rs.8,06,600/-. The said amount was deposited on 24.3.2008.

7. It has further been averred that on 17.3.2008 and 18.3.2008, officer of the respondent-Company visited petitioner's Sainj Township area and made certain inspections. However, the petitioner received a notice dated 10.6.2008. It was further averred in the notice that upon the inspection, the connected load was found to be 4843.18 KW against the sanctioned load of 216.77/1085.97 KW. It was further intimated that double of the amount of demand charges from March, 2007 to February, 2008 amounting to Rs.25,31,660/- and double the amount of energy charges for the same period to the tune of Rs.27,72,314/- totaling Rs.53,03,974 may be deposited.

8. It has further been averred that on receipt of the notice, the appellant submitted reply and that during the time of inspection, most of the residential premises had fallen vacant

and no electricity connection was provided to those premises. It has also been averred that, in case, there was an increase in load, it would result in increase of the maximum demand, which would have been recorded in Meter Reading Instrument (hereinafter to be referred as **MRI**). It has also been averred that in case, there was an increase in the load during the last one year, the MRI would have immediately recorded the increase in maximum demand exceeded the contract demand which was to be 80% of the connected load (taking 0.9 factor), would have been immediately reflected in the MRI and consequently contract demand violation charge (CDVC) would have been reflected in the monthly electricity bills. It is also averred that no such charges were ever levied by the respondents in monthly electricity bills during the relevant tenure. As the same was demanded without any basis, the order was challenged before the Appellate Authority, i.e. the learned Divisional Commissioner, Mandi under Section 127 of the Electricity Act, who was exercising the powers of the Appellate Authority. The appeal was registered as Appeal No.156 of 2011, which was listed on 6.7.2011 and was adjourned from time to time.

9. On 27.6.2013, the Appellate Authority could not hold the Court and the case was adjourned as per the notice affixed on the Notice Board, The petitioner was not present in the Court on the next date as no notice of the next date had either been given by the Appellate Authority to the petitioner or to the learned counsel for the petitioner. As the petition was heard without any prior notice or intimation of the date either to the appellant or to the learned counsel on 10.12.2013. The same was decided without hearing the petitioner.

10. The respondents contested the writ petition by filing the reply and they had denied the contents of the writ petition and have averred that at the time of inspection, a load of 3285.39 KW was applied vide application in December, 2007, which was under sanctioning process, but the petitioner had connected additional load of 4843.18 KW above the sanctioned load of 216.77 KW un-authorisedly before it was sanctioned by the competent Authority.

11. However, the respondent has admitted that on 27.9.2013, the case was not taken up due to the administrative reasons, as the Presiding Officer could not hold the Court at Mandi, but it is averred by the learned counsel for the petitioner that the case has been adjourned intentionally and deliberately. The learned lower Appellate Court passed the following order:

> **"Mandi**
>
> **27.9.2013.**
>
> **"Due to administrative reasons, Ld. P.O. could not hold Court at Mandi today and as per his directions, this case is fixed on 25.10.2013 for the same purpose for which it was listed for today.**
>
> **Parties have been informed accordingly today by pasting a notice on the notice board of this court room.**
>
> **Sd/-**
> **N.T. (Peshi) to**
> **Divisional Commissioner,**
> **Mandi Division, Mandi."**

12. Rejoinder was filed by the petitioner denying the contents of the reply and reiterated the averments, as made in the writ petition. It is further averred that it is for the respondent to intimate timely with regard to the increase/decrease of the maximum demand, as recorded by the Meter Reader Instrument (MRI) during the relevant period and held that reading be produced on record. It would have been clear that there was no unauthorized consumption of the electricity by the petitioner. It is further averred that the date was never intimated by the Appellate Authority either to the petitioner or to their learned counsel and it was the duty of the Court to communicate next date when the Court did not assemble.

13. Thereafter, on 25.10.2013, the Divisional Commissioner, passed the following order :

> **"<u>Mandi.</u>**

25.10.2013

"Case was called, no one became present on behalf of the appellant. Last opportunity was granted. Now, the case be listed for 12.11.2013.

Divisional Commissioner,
Mandi Division, Mandi."

14. On 12.11.2013, none was present for the petitioner, but the respondent was represented by an Advocate and the case was listed for orders on 10.12.2013 when the appeal was dismissed.

15. To appreciate the arguments adduced by the learned counsel for the parties, I have gone through the entire record of this case.

16. From this, it is clear that the notice was issued to the parties on 25.10.2013, but there is nothing on record to depict that the petitioner was served thereafter or the petitioner, had appeared in the Court on the next date, when the Appellate Authority had ordered the parties to appear in the Court on 25.10.2013, as the case had been adjourned on that day on 27.9.2013, when the Court had not assembled. So, it is clear that the appeal has been disposed of without serving the petitioner/appellant before the Appellate Authority and the same is decided without affording an opportunity of being heard to the petitioner/appellant by the Appellate Authority. Therefore, this is a fit case where the writ petition is required to be allowed directing the Appellate Authority to pass a detailed and speaking order. The order dated 10.12.2013 ***(Annexure-P-5)*** passed in Case No.155/2011, passed by the learned Divisional Commissioner, Mandi Division, Mandi exercising the powers of the Appellate Authority under Electricity Act, 2003, is quashed and set aside.

17. Consequently the present petition is allowed. All pending application(s), if any, shall also stand disposed of accordingly. However, parties are directed to appear before the Appellate Authority, Mandi, H.P. on 22.8.2016. The Appellate Authority shall dispose of the matter within a period of three months from the receipt of the copy of this judgment. Records be also sent forthwith alongwith a copy of this judgment for further compliance.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Parbati Hydroelectric Project Stage-II. ……Petitioner.
Versus
H.P.S.E.B. Ltd. & others …..Respondents.

CWP No.4441 of 2014
Reserved on : 28.6.2016
Date of Decision:5.7.2016

Constitution of India, 1950- Article 226- **Electricity Act, 2003**- Section 127- Petitioner is a consumer of the respondent board for consumption of the electricity- petitioner applied for the supply of electricity for load of 403.82 KW and load was enhanced to 2539.85 KW - officer of the board visited the area of the petitioner and it was found that the connected load was 1118.26 KW against the sanctioned load of 403.82 KW - an amount of Rs. 22,92,844/- was demanded- an appeal was preferred, which was dismissed- aggrieved from the order, present writ petition was filed- held, that notice was issued to the parties on 25.10.2013 but there is nothing on record to show that petitioner was served or he had appeared before the Appellate Authority- petition was disposed of without hearing the petitioner- petition allowed and parties directed to appeal before the Appellate Authority on 22.8.2016. (Para-11 to 17)

For the petitioner : Mr. Chandranarayana Singh, Advocate.
For the respondents : Mr. Satyen Vaidya, Senior Advocate with Mr. Vivek Sharma, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present writ petition is maintained by the petitioner under Section 226 of the Constitution of India for issuance of writ of certiorari, mandamus or any other order quashing the order dated 10.12.2013 (Annexure P-5), passed by the learned Divisional Commissioner, Mandi (exercising the powers of Appellate Authority), in an appeal under Section 127 of the Electricity Act, 2003, whereby the appeal of the appellant has been dismissed without affording opportunity of hearing to the petitioner/appellant and to remand the case back to the Appellate Authority for fresh adjudication after hearing the petitioner/appellant before the Appellate Authority.

2. Briefly stating the facts giving rise to the present petition are that the petitioner is an Undertaking of Government of India and was the consumer of the respondent-Board for the consumption of electricity. The petitioner applied to the respondents for the supply of electricity for the Project and Township, which includes residential as well as official colony at Sainj, District Kullu, H.P, and initially the petitioner applied for a load of 403.82 KW in the year, 2002.

3. The respondent-Company called upon the petitioner to deposit Rs.404025/- as security deposit, which, as per the petitioner, was deposited on 07.3.2002.

4. It has been averred that the petitioner further applied for increase of load from the existing load of 403.82KW to 2539.85 KW vide an application in December, 2007. Respondent No.2 vide communication dated 20.3.2008, directed the appellant to deposit security on account of applied enhanced load to the tune of Rs.5,56,000/- which was also deposited on 24.3.2008. The petitioner received a notice on 10.6.2008 in which it was alleged that on the inspection of Sainj Township area, the connected load was found to be 1118.26 KW against the sanctioned load of 403.82 KW and demanded double amount of the demand charges from March, 2007 to February, 2008 to the tune of Rs.12,56,500/- and double the amount of energy charges for the same period to the tune of Rs.10,36,344/- totaling Rs.22,92,844/- , which was also asked to be deposited.

5. It has further been averred that on receipt of the notice, the appellant submitted a reply and that during the time of inspection, most of the residential premises had fallen vacant and no electricity connection to those premises have been provided. It has also been averred that, in case, there was an increase in load, it would result in increase of the maximum demand, which would have been recorded in Meter Reading Instrument (hereinafter referred to be as ***MRI***). It has also been averred that in case, there was an increase in the load during the last one year, the ***MRI*** would have immediately recorded the increase in maximum demand exceeded the contract demand, which was to be 80% of the connected load (taking 0.9 power factor), would have been immediately reflected in the ***MRI*** and consequently contract demand violation charge (CDVC) would have been reflected in monthly electricity bills. It is also averred that no such charges have ever been levied by the respondents in monthly electricity bills during the relevant tenure. It has been alleged that respondent No.2 vide communication dated 24.6.2008 observed that the alleged violation had already been established during the visit of Addl. Superintending Engineer, Shimla. The electricity bill was communicated along with the said communication directing the appellant to pay an amount of Rs.34,83,265/-. As the same was demanded without any basis, the order was challenged before the Appellate Authority, i.e. the learned Divisional Commissioner, Mandi, under Section 127 of the Electricity Act, which was exercising the powers of the Appellate Authority. The appeal was registered as Appeal No.155 of 2011, which was adjourned from time to time.

6. On 27.6.2013, the Appellate Authority could not hold the Court and the case was adjourned. The appeal was taken up without any prior notice or any intimation to the appellant or its learned counsel, on 10.12.2013 and the learned Court on its own, without affording any reasonable opportunity of hearing to the petitioner, heard and considered the appeal. The petitioner came to know about the order dated 10.12.2013, whereby the appeal had been dismissed by the Appellate Authority. It has further been averred that the petitioner also enquired from his counsel in this regard, who was not at all aware of the order passed by the Appellate Authority.

7. In view of the above stated position, this Court finds that no notice of the next date was either given by the Appellate Authority to the petitioner or to the learned counsel for the petitioner. As the petition was heard on 10.12.2013 without any prior notice or intimation of the date either to the appellant or to the learned counsel, the appeal was decided without hearing the petitioner.

8. The respondents contested the writ petition by filing the reply and had denied the contents of the writ petition and had averred that the petitioner had applied for increasing load from existing load of 403.82 KW to 2539.85 KW vide application in December, 2007, which was under sanctioning process, but the petitioner had connected additional load of 1118 KW above the sanctioned load of 403.82 KW unauthorizedly before it was sanctioned by the competent Authority.

9. However, the respondents have admitted that on 27.9.2013, the case was not taken up due to the administrative reasons, as the Presiding Officer could not hold the Court at Mandi, but it is averred by the learned counsel for the petitioner that the case has been adjourned intentionally and deliberately. The learned lower Appellate Court passed the following order:

> "**Mandi**
> 27.09.2013
> **"Due to administrative reasons, Ld. P.O. could not hold Court at Mandi today and as per his directions, this case is fixed on 25.10.2013 for the same purpose for which it was listed for today.**
> **Parties have been informed accordingly today by pasting a notice on the notice board of this court room."**
>
> N.T. (Peshi) to
> Divisional Commissioner,
> Mandi Division, Mandi."

10. Rejoinder was filed by the petitioner denying the contents of the reply and reiterated the averments as made in the writ petition. It is further averred that it is for the respondent to intimate timely with regard to the increase/decrease of the maximum demand, as recorded by the Meter Reader Instrument (MRI) during the relevant period and held that reading be produced on record. It would have been clear that there was no unauthorized consumption of the electricity by the petitioner. It is further averred that the date was never intimated by the Appellate Authority either to the petitioner or to their learned counsel, it was the duty of the Court to communicate next date when the Court did not assemble.

11. Thereafter, on 25.10.2013, the Divisional Commissioner, passed the following order :

> "**Mandi**
> **25.10.2013**
> **Case was called, no one became present on behalf of the appellant. Last opportunity was granted. Now, the case be listed for 12.11.2013.**
>
> **Divisional Commissioner,**

Mandi Division, Mandi.”

12. On 12.11.2013, none was present for the petitioner, but the respondent was represented by an Advocate and the case was listed for orders on 10.12.2013, when the appeal was dismissed.

13. To appreciate the arguments addressed by the learned counsel for the parties, I have gone through the entire record of this case.

14. From this, it is clear that the notice was issued to the parties, on 25.10.2013 but there is nothing on record to show that the petitioner was served thereafter or the petitioner had appeared in the Court on the next date, when the Appellate Authority had ordered the parties to appear in the Court on 25.10.2013, as the case had been adjourned for that day on 27.9.2013, when the Court has not assembled. So, it is clear that the appeal has been disposed of without serving the petitioner/appellant before the Appellate Authority and so the same is decided without affording an opportunity of being heard to the petitioner/appellant before the Appellate Authority. So, this is a fit case where the writ petition is required to be allowed directing the Appellate Authority to pass a detailed and speaking order. The order dated 10.12.2013 ***(Annexure-P-5)*** passed in Case No.155/2011, passed by the learned Divisional Commissioner, Mandi Division, Mandi exercising the powers of the Appellate Authority under Electricity Act, 2003, is quashed and set aside.

15. Consequently, the present petition is allowed. All pending application(s), if any, shall also stand disposed of accordingly. However, parties are directed to appear before the Appellate Authority, learned Divisional Commissioner, Mandi Division, Mandi, exercising the powers of the Appellate Authority under Electricity Act, 2003,on 22.8.2016. The Appellate Authority shall dispose of the matter within a period of three months from the receipt of the copy of this judgment. Records be also sent forthwith along with a copy of this judgment for further compliance.

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

Raj Kumar …Appellant
Versus
State of Himachal Pradesh …Respondent

Cr. Appeal No. 224/2015
Reserved on: July 4, 2016
Decided on: July 5, 2016

Indian Penal Code, 1860- Section 376 read with Sections 511 and 354(C)- Prosecutrix was taking bath after raising a curtain with a bed sheet- accused came to her and caught hold of her from her leg and then pushed her down on the ground- he tried to rape her - her niece and some other persons reached at the spot- accused ran away on seeing them- prosecutrix sustained injuries on her neck and leg- accused was tried and convicted by the trial Court- held in appeal that version of the prosecurix was duly corroborated by PW-2 and PW-3- Injuries were noticed on her person- accused was rightly convicted by trial Court- appeal dismissed.(Para-16 and 17)

For the Appellant: Mr. Mohit Thakur, Advocate.
For the Respondent: Mr. Parmod Thakur, Additional Advocate General.

The following judgment of the Court was delivered:

<u>Justice Rajiv Sharma, Judge</u>

This appeal has been instituted against Judgment dated 5.5.2015 rendered by the learned Additional Sessions Judge, Hamirpur (H.P.) Circuit Court at Barsar, in Sessions Trial

No. 08 of 2014, whereby the appellant-accused (hereinafter referred to as 'accused' for convenience sake), who was charged with and tried for offences under Section 376 read with Sections 511 and 354(C) IPC, has been convicted and sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs.10,000/-, in default of payment of fine, to further undergo simple imprisonment for three months, for offence under Section 354(C). He has further been sentenced to undergo rigorous imprisonment for four years and to pay a fine of Rs.15,000/-, and in default of payment of fine, to further undergo simple imprisonment for six months, for the commission of offence under Section 376 read with Section 511 IPC. Both the sentences have been ordered to run concurrently.

2. Case of the prosecution, in a nutshell, is that on 11.7.2014, prosecutrix alongwith her sister visited the Police Station, Barsar, and reported to the police vide application Ext. PW-1/A that she was a permanent resident of village Samtana, Tehsil Barsar, District Hamirpur. On 11.7.2014, at about 11.00 AM, she after doing her agriculture work in the fields was taking bath in the courtyard of village after raising a curtain with a bed sheet. While taking bath, accused came there. She, on seeing him, sat down and told the accused not to come there as she was bathing. But accused came to her and caught hold of her from her leg and then pushed her down on the ground. She fell down on her back. Accused removed his pajama and when he was in the process of removing his underwear, she got up and on making a noise, tried to run away but the accused caught hold of her from her leg and then dragged her on the ground. In the meantime, her niece Sangeeta reached there. Other persons namely Satya Devi, Santosh Kumari and Kamla also reached the spot. Accused ran away. She disclosed to them that the accused, on finding her naked and alone, attempted to commit rape on her but could not succeed as they had come in the meantime. She received injuries on her back, neck and leg. On the basis of application, FIR Ext. PW-12/A was registered. Photographs of spot were taken. Slippers of accused left behind at the spot were taken into possession. Statements of witnesses were recorded. Accused made disclosure statement Ext. PW-7/A, in the presence of Constable Ajay and Constable Happy Singh that he could identify the place where he attempted to commit rape upon the prosecutrix. Accused was subjected to medical examination vide MLC Ext. PW-4/C. Medical examination of the prosecutrix was also done on 12.7.2014 vide Ext. PW-4/A. 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 examined under Section 313 of Criminal Procedure Code. He has denied the case of the prosecution. Accused was convicted and sentenced as noticed above. Hence, this appeal.

4. Mr. Mohit Thakur, Advocate has vehemently argued that the prosecution has failed to prove its case against the accused.

5. Mr. Parmod Thakur, Additional Advocate General, has supported Judgment dated 5.5.2015.

6. I have heard the learned counsel for the parties and also gone through the judgment and record carefully.

7. Prosecutrix (PW-1) testified that on 11.7.2014, at about 11 AM, she had gone to her cowshed to keep her cattle. After keeping her cattle in the same, she raised a curtain outside her residence to take bath. When she was taking bath, accused came there and asked whether there was water in the tap. She told that there was no water and he should bring some vessel. She thought that the accused had gone. She continued taking bath. While she was taking batch, accused suddenly appeared there and on seeing him, she sat down and closed her arms. Accused started gazing at her and on her asking as to what he was doing, accused pulled her from her legs. She fell down. Accused took off his pajamas and underwear, upon which she raised alarm and caught the accused in order to stop him from doing wrong act. On hearing her cries, Sangeeta PW-3, Satya (PW-2) and Kamla came to the spot. When Sangeeta was coming, accused

pulled her from her legs, resultantly she fell down. Accused after pulling up his pajama, ran away from the spot. She sustained injuries on her neck, back and legs. Had the aforesaid persons not come on the spot, accused would have committed rape upon her. She visited the house of Pradhan twice but she was not at home. She was alone in her house. She called her sister Kamlesh Kumari and with her went to the Police Station, Barsar to report the matter to the police. She presented application Ext. PW-1/A against accused. Police took her to hospital for medical examination. Police visited the spot. Spot map was prepared by the police. They took photographs and recovered slippers of accused which were left on the spot. In her cross-examination, she has admitted that the accused was her brother-in-law. They were two members in the house, she and her son. House of accused was 200 metres from her house. Her house consisted of two rooms and a separate kitchen. She denied the suggestion that they have two latrines and one bathroom. She admitted that there was a path leading from Samtana to Paniali village in front of cowshed. She also admitted that the path after leading through the front of her cowshed further leads through its backside. She admitted that the path had been made pakka by the Panchayat. She admitted that there were 35-40 houses in the village Paniali. She admitted that land of the accused measuring 5-6 Kanal was adjoining to her house. She denied the suggestion that there was no land adjoining to her house. She denied the suggestion that she used to cultivate the land of accused. She also denied the suggestion that sometimes back, fields had been taken back. She denied the suggestion that dispute took place due to lopping of *Biul* trees. She had raised curtain with the help of one big bed sheet. Curtain had been raised with the help of drum and wooden sticks. She admitted that the bed sheet was not transparent. Accused caught hold of her from both the legs. She received injuries on her back and head struck against stone. Application Ext. PW-1/A was got written from Pradhan Roma Devi at Ukhali on the same day. She admitted that her brother was serving as HHC in the Police Department at Police Station, Barsar. She admitted that her village fell in Police Station Bijhari. Accused while committing said act remained at the spot for 30-35 minutes.

8. Satya Devi (PW-2) corroborated the statement of PW-1. She testified that on 11.7.2014, she was working in her fields and complainant was grazing her goats near her fields. She asked her to move to the house but she told that she would come after tying her goats in the cowshed. She waited for her but when she did not come for sometime, she returned to her house and started taking bath. When she was taking bath, she heard the prosecutrix shouting and calling her daughter's name, on which she asked her daughter to go and see what was happening. After sending her daughter, she also rushed towards the complainant's cowshed. When she reached there accused had already left and complainant told her that while she was taking bath, near her cowshed after raising curtain, accused came there and tried to rape her. She also told her that accused ran away towards the jungle when Sangeeta reached there. When she reached there, prosecutrix was undressed. On the next day, police visited the spot, prepared spot map, took photographs and took into possession a pair of slippers of accused which were lying at the spot. In her cross-examination, she has admitted that the complainant was her real sister-in-law. They had good relations with the complainant. Their houses were adjacent. She denied the suggestion that the bathroom was jointly used by them and complainant. She admitted that land of accused was adjoining to their houses. She denied the suggestion that the land of accused used to be cultivated by the complainant. She denied the suggestion that the complainant was asking accused to give land for constructing a house. She denied the suggestion that accused and complainant had a quarrel regarding lopping of *Biul* trees as well as cutting of grass. Curtain was raised with the help of bed sheet

9. Sangeeta (PW-3) deposed that the complainant was her aunt (Chachi). She was a student of BA 1st year at Bhota. On 11.7.2014, at about 11.30 AM, her mother, while she was taking bath, called her and asked her to go and see as to why complainant was shouting. On this, she rushed towards the cowshed of prosecutrix. On reaching there, she saw that her aunt was naked and accused was also coming from that side. She picked a Danda for beating the accused, but he on seeing her, ran towards jungle. Soon thereafter, her mother and Kamla Devi also reached the spot. In her cross-examination, she deposed that the path existing in front of

cowshed was used to reach village Paniali. She denied the suggestion that there was a quarrel between the complainant and accused regarding cutting of grass. Curtain was raised with the help of drum and bed sheet.

10. Dr. Sapna (PW-5) is the Medical Officer. She examined the prosecutrix and observed following injuries

1. **Complain of pain on left shoulder**
2. **Scratch over nape of neck left side.**
3. **Bruise measuring 2 x 3 cm over left ankle.**

11. All the injuries were simple in nature. She issued MLC Ext. PW-4/A. She also examined the accused and issued MLC Ext. PW-4/B.

12. Roma Kumari (PW-5) deposed that on 11.7.2014, prosecutrix met her at Ukhali and disclosed that accused had attempted to commit rape upon her while she was taking bath by raising curtain. She wrote application Ext PW-1/A to SHO Police Station Badsar. On the next day, police visited the spot at 7-7.30 AM on the identification by prosecutrix, prepared spot map and took photographs. Police also recovered a pair of slippers lying on the spot and which, as per the prosecutrix were of the accused.

13. Constable Happy Singh (PW-7) testified that on 25.7.2014, accused made a disclosure statement in his presence and in the presence of Constable Ajay Kumar that he could lead the police party to the place where he attempted to commit rape on the complainant. Statement was reduced into writing vide Ext. PW-7/A.

14. ASI Parkash (PW-10) testified that on 12.7.2014, Inspector /SHO Shashi Pal visited the spot and handed over investigation of the case to him. At about 7-7.30 AM, he visited the spot which was identified by the prosecutrix. Photographs of the spot were taken. Spot map Ext. PW-10/A was prepared. A pair of plastic slippers lying on the spot was recovered. He recorded the statements of the witnesses Satya Devi, prosecutrix, Roma Devi under Section 161 CrPC. He also recorded statements of Sangeeta, Kamla and Santosh Kumari. Accused was arrested on 23.7.2014. In his cross-examination, he has admitted that the path shown in Ext. PW-10/A was *Kachha* and leads to village Paniali. He denied the suggestion that investigation was undertaken on the dictates of Karam Chand.

15. SI Amar Singh (PW-11) deposed that on 25.7.2014, case file was handed over to him for investigation by Inspector Shashi Pal. Accused made a disclosure statement. It was reduced into writing vide Ext. PW-7/A. Accused led the police to the spot where he had attempted to commit rape upon the prosecutrix. Map Ext. PW-11/A was prepared.

16. It is evident from the statements of the witnesses analyzed hereinabove that the accused has arrived at the spot at a time when prosecutrix was taking bath. He asked for water. Prosecutrix told him that there was no water and he should bring a vessel. However, accused pulled her from her legs. She fell down. Accused thereafter took off his pajamas. She raised alarm. Satya Devi (PW-2) and Sangeeta (PW-3) came on the spot. Accused again pulled her from legs. She fell down. Accused pulled up his pajama and ran away. She received injury on her neck, back and legs. Matter was reported to the police. Statement of PW-1 (prosecutrix) is duly supported by PW-2 Satya Devi, about the manner in which prosecutrix shouted for help and she sent her daughter to the spot. PW-2 Satya Devi noticed that the prosecutrix was undressed when she reached the spot. She has denied the suggestion that there was any quarrel. Similarly, PW-1 (prosecutrix) has also denied that there was any enmity between the parties about the fields or lopping of *Biul* trees. PW-3 Sangeeta has also deposed that her mother was taking bath. She told her to go and find out why the prosecutrix was shouting. She reached the spot. She found her Aunt in naked condition. Accused was also going that side. She picked a *Danda* however, accused managed to escape. Soon thereafter, her mother Kamla and Aunt also came on the spot. PW-4 Dr. Sapna has noticed simple injuries on the left side of her (prosecutrix) neck and bruises

measuring 2 x 3 cm were found on her left ankle. She proved MLC Ext. PW-4/A. Slippers of the accused were taken into possession by the police. Police visited the spot after disclosure statement was made by the accused.

17. Mr. Mohit Thakur, Advocate has vehemently argued that the accused has been falsely implicated due to the dispute between the parties. However, fact of the matter is that, as noticed above, there was no enmity between the parties. No woman would risk her honour by leveling false allegations that too against her brother-in-law. He also argued that it is not believable that the prosecutrix was taking bath in a temporary bathroom raised near a busy thoroughfare. It has come in the statement of the prosecutrix (PW-1) that she has constructed a bathroom with the help of drums and wooden sticks. The Court can take judicial notice of the fact that in the villages, there are no permanent bathrooms in most of the houses and temporary bathrooms are constructed/raised. Accused was seen coming from the spot by PW-3 Sangeeta. Accused has pulled down prosecutrix from her legs twice, resulting into injuries. She raised alarm and even after raising alarm, accused pulled the prosecutrix down. Delay in filing the FIR has been duly explained since PW-1 prosecutrix has twice visited the house of Pradhan for reporting the matter. Statement of PW-1 prosecutrix is duly corroborated by PW-2 Satya Devi, PW-3 Sangeeta and PW-5 Roma Kumari. Accused has made an attempt to commit rape upon the prosecutrix by reaching the spot and removing curtain. He had the intention to commit the offence of rape upon the prosecutrix. Thus, the prosecution has duly proved the case against the accused under Sections 376 read with Sections 511 and 354 © IPC. There is no occasion for this Court to interfere with the well reasoned judgment of the learned trial Court.

18. Accordingly, there is no merit in the present appeal and the same is dismissed, so also the pending applications, if any

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

Rajan Sharma	….Appellant
Versus	
Chaudhary & Others	….Respondents

RSA No.83 of 2007
Judgment Reserved on: 24.06.2016
Date of decision: 05.07.2016

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit for declaration pleading that suit property is Hindu ancestral property- plaintiff, being grandson of defendant No. 2, had right in it by birth- defendant No. 2 had wrongly entered into an agreement to sell the same- defendant No. 1 had wrongly obtained ex-parte decree for specific performance - suit was dismissed by trial Court- an appeal was preferred, which was also dismissed- held, in second appeal that defendant No. 2 had got some land as Nautor- there was no proof that he had sold the ancestral land- sale deed cannot be said to be invalid- onus was upon plaintiff to prove nature of the property, which was not discharged- appeal dismissed. (Para-18 to 25)

Cases referred:

Union of India vs. Ibrahim Uddin and Another, (2012)8 SCC 148
Wadi vs. Amilal and Others, (2015)1 SCC 677
Laxmidevamma and Others vs. Ranganath and Others, (2015)4 SCC 264

For the Appellant:	Mr.G.R. Palsra, Advocate,
For Respondent No.1:	Mr.Atul Jhingan, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

This appeal has been filed by the appellant-plaintiff against the judgment and decree dated 1.12.2006, passed by the learned District Judge, Mandi, District Mandi, H.P., affirming the judgment and decree dated 26.8.2003, passed by the learned Sub Judge Ist Class, Court No.2, Mandi, H.P., whereby the suit filed by the appellant-plaintiff has been dismissed.

2. The brief facts of the case are that the plaintiff- appellant *(herein after referred to as the `plaintiff'),* filed a suit for declaration with consequential relief of injunction wherein he averred that the land comprised in Khata No.127 Khatauni No.134, Khasra No.943 (old) and new Khasra No.913/1, measuring 0-5-1 bigha and the land comprised in Khewat No.127/134 min, Khatauni No.913 min (old), 935/1 (new), measuring 0-4-17 bighas, situated in Mauja Ledo, District Mandi, H.P., *(hereinafter referred as the "suit land"),* is recorded in the ownership and possession of defendant No.2 Durga. It is alleged that the aforesaid suit property is joint Hindu coparcenary and ancestral property and plaintiff, being grandson of defendant No.2, has got right in the said property by birth. It is further alleged that on 12.12.1991, defendant No.2 has wrongly and illegally entered into an agreement to sell with defendant No.1 for the sale of the suit land, measuring 0-5-0 bigha from each of Khasra numbers for a consideration of Rs.4,000/-. The plaintiff further alleged that defendant No.1 has also obtained ex-parte decree against defendant No.2 for specific performance of contract and injunction as consequential relief with regard to the suit land vide judgment and decree dated 28.8.1998 passed in Civil Suit No.151/96(95), which is collusive, wrong, illegal and not binding on the rights of the plaintiff. It is further alleged by the plaintiff that the defendants were asked time and again to get the said agreement cancelled as well as judgment of trial Court set aside but all in vain, hence the present suit.

3. Defendant No.1, by way of written statement, raised preliminary objections on the ground of maintainability, the present suit being collusive between the plaintiff and defendant No.2 and plaintiff having no locus standi to challenge the decree dated 28.8.1998. On merits, the defendant denied the averments made in para-1 of the plaint and alleged that defendant No.2 is not owner in possession of the suit land. However, defendant No.1 admitted the factum of agreement to sell between him and defendant No.2. It was also denied that the suit land is joint Hindu Coparcenary property and plaintiff is grandson of defendant No.2. Vide averments made in para-3 of the written statement, defendant No.1 has referred to the previous judgment passed on the basis of agreement to sell between him and defendant No.2 and also made reference to the execution of sale deed by way of appointment of Commissioner on 3.7.2000, on the basis of which now he has become owner in possession of the suit property and the said decree is denied to be collusive. Rather, the present suit is alleged to be collusive. It was averred that defendant No.2 has also sold some land out of the suit land to different persons. All the other averments have been denied by defendant No.1 and prayed that the suit be dismissed.

4. Defendant No.2, as per record of the trial Court, has not filed any written statement as he was proceeded ex-parte.

5. The plaintiff also filed replication to the written statement filed by defendant No.1 and reiterated the allegations made in the plaint and denied those of written statement.

6. The learned trial Court, on the basis of pleadings of the parties, settled inasmuch as 7 issues and decided four issues against the plaintiff and three issues against defendant No.1 and accordingly dismissed the suit of the plaintiff. An appeal preferred before the learned Appellate Court was also dismissed.

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

(1) Whether both the ld.courts below have misread, misconstrued and misinterpreted the oral as well as documentary evidence especially Ex.PX,

Ex.RX and Ex.RY, which has materially prejudiced the case of the appellant?

(2) ***Whether the judgment dated 28.8.1998 in previous suit has been obtained in collusion with defendant Durga?***

8. Shri G.R. Palsra, learned counsel representing the appellant-plaintiff, vehemently argued that the judgment and decree passed by both the Courts below are against law and facts on record and as such the same deserve to be quashed and set aside being unsustainable in the eye of law. He also submitted that, while dismissing the suit filed by the plaintiff, both the Courts bellow misread, misconstrued and misinterpreted oral as well as documentary evidence made available on record, especially Ex.PX, Ex.RX and Ex.RY. He contended that both the Courts below, in order to prove the relationship of the plaintiff with Durga, have failed to appreciate ample oral evidence led by the plaintiff coupled with the document Ex.PX, hence, any finding returned by the Courts below that the plaintiff failed to prove the relationship, if any, with Durga is contrary to the record and same deserves to be quashed and set aside. He forcefully contended that the finding returned by the learned Courts below that the suit land is self acquired property of deceased Durga is contrary to record and cannot be allowed to sustain, especially in view of the documentary evidence available on record. During arguments having been made by him, he also invited the attention of this Court to the oral as well as documentary evidence led on record to demonstrate that the plaintiff had led the cogent and convincing evidence on record to prove relationship between the parties. He also made this Court to peruse the statements rendered by the defendant and argued that bare perusal of deposition made by defendant suggests that it is untrustworthy and does not inspire confidence and has been wrongly relied by the Courts below. He also contended that findings returned by the both the Courts below that ex-parte decree, dated 28.8.1998, obtained by defendant No.1, is not collusive, rather the same is based upon the agreement to sell, allegedly entered into by Shri Durga with defendant No.1 is not based on correct appreciation of record. He strenuously argued that the rights of the plaintiff, who was admittedly minor, were required to be protected by the Court. But, in the present case, both the Courts below, solely relying upon the statement given by the defendant, dismissed the suit of the plaintiff ignoring the revenue record, wherein it stands clearly established that Durga inherited the suit property from his forefathers and as such plaintiff, being grandson of Durga, had right over the ancestral property. He also invited the attention of this Court to ***CMP No.115 of 2007*** filed in this appeal under Order 41 Rule 27 of the Code of Civil Procedure *(for short `CPC')* for permission to lead additional evidence. However, perusal of order dated 27.2.2009, when the present appeal was admitted, suggests that aforesaid application was ordered to be considered at the time of final hearing of the main appeal.

9. Shri Atul Jhingan, learned counsel, representing the respondents, supported the judgments passed both the Courts below. He vehemently argued that no interference, whatsoever, of this Court is called for in the present case, where concurrent findings have been returned by the Courts below that too after appreciating material evidence available on record. During submissions having been made by him, he made this Court to travel through oral as well as documentary evidence available on record by respective parties to demonstrate that how miserably the plaintiff has failed to prove that the suit land was joint, co-parcenary and ancestral property and he being the member of joint Hindu co-parcenary and ancestral property, (being the grandson of defendant No.2), has right in the suit property by birth. He forcefully contended that there is no document on record suggestive of the fact that the plaintiff, being grandson of defendant No.2, has right in the suit property by birth. He also invited the attention of this Court to the statement made by PW-1 Keshav Ram, father of the plaintiff, wherein he deposed that Durga, apart from ancestral property, had some self-acquired property. He also argued that there is nothing in the statement of PW-1 to suggest that which part of land was sold by Durga to defendant No.1. He also opposed the prayer made on behalf of the plaintiff for setting aside the ex-parte decree dated 28.8.1998 obtained by defendant No.1 on the ground that no evidence worth the name has been led on record to demonstrate/suggest that agreement to sell dated

12.12.1991, entered between defendant No.1 and Durga, is a result of fraud or collusion. He also opposed the aforesaid application bearing CMP No.115 of 2007 filed on behalf of the plaintiff for leading additional evidence, at this stage, by stating that the plaintiff had ample opportunity to place on record additional documents, if any, at the trial stage of suit and thereafter during the pendency of first appeal. He invited the attention of this Court to the application and argued that no reasons, whatsoever have been spelt out in the application for non-placing of these documents at the time of filing of the suit, when admittedly these were available with the plaintiff. At last he prayed for the dismissal of the appeal.

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

11. Before proceeding to answer the substantial questions of law formulated by this Court, at the time of admission, it would be appropriate and in the interest of justice to deal with the application being CMP No.115/2014 filed on behalf of the plaintiff under Order 41 Rule 27 CPC for placing on record additional evidence at first instance.

12. Appellant in his application moved under Order 41 Rule 27 CPC has sought permission to lead additional evidence during the pendency of the present appeal. It would be apt to reproduce paras 2 and 3 of the application which are reproduced hereinbelow.

> ***"2. That the applicant/appellant due to inadvertence could not file the material documents, which are very necessary and bone of contention between the parties because most of the record is in Urdu and the applicant is minor, whose interest has not been protected and watched in proper manner by the guardian who is also simpleton/illiterate lady. Now, the applicant wants to file by way of additional evidence the following documents:-***
>
> ***(i) Copy of Sajra Naxb (Pedigre table)***
>
> ***(ii) Copy of jamabandi for the year 1939-40***
>
> ***(iii) Copy of mutation No.334 dated 15.6.1951 alongwith jamabandi for the year 1950-51***
>
> ***(iv) Copy of pariwar register***
>
> ***(v) Copy of jamabandi for the year 1997-98.***
>
> ***(vi) Copy of consolidation for the year 1991-92.***
>
> ***(vii) Copy Misalhaquiat Bandobast Jadid.***
>
> ***3. That if the aforesaid documents are not allowed to be produced and exhibited in this case, then the case of the applicant/appellant will be adversely affected because these documents prove the nature of the suit land and the relationship of the plaintiff with the deceased Durga."***

13. Bare perusal of averments contained in the paras reproduced above, suggests that applicant-appellant, due to inadvertence, failed to file these documents at the time of filing of the suit. Interestingly, applicant-appellant, mother of the minor Rajan Sharma, has moved this application for placing on record the aforementioned documents by way of additional evidence. Only reason, which has been given for not furnishing these documents at the time of suit, is that same could not be filed due to inadvertence since the applicant is minor, his interest has not been protected and watched in proper manner by his mother, who is a simpleton illiterate lady. But careful perusal of this application, which is duly supported by affidavit of Smt.Dhanwanti Devi widow of Shri Keshav Ram, who had actually filed a suit on behalf of Rajan Sharma, minor plaintiff, being natural guardian. It is not understood that how a simpleton illiterate lady, who failed to protect and watch the interest of the minor in proper manner, could file the instant application at this stage for leading additional evidence by placing some documents on record. Since this application on behalf of minor plaintiff has been moved by the same lady, who

allegedly, as per averments contained in para-2, failed to protect and watch interest of minor in proper manner, it cannot be accepted that due to inadvertence documents proposed to file at this stage could not be filed at the time of filing the suit. Rather, while perusing the judgments passed by both the Courts below, it transpired that applicant-appellant had moved one application for leading additional evidence before the first appellate Court, wherein copy of Parivar Register was sought to be placed on record to prove that minor plaintiff Rajan Sharma grandson of Durga had share in the joint co-parcenary property. At this stage, plaintiff-appellant owes explanation that why these documents, if any, available with them, were not filed at the time of moving application before the first appellate Court. Perusal of the documents proposed to be placed on record at this stage, as find mention in paragraph-2 of the application, itself suggests that all these documents were available at the time of filing the suit and no plausible explanation worth the name has been rendered by the applicant-appellant in the application that why despite due diligence he could not lay his hand to these documents at the time of filing of the suit and as such this Court sees no reasons, whatsoever, to accept the contention put forth by the applicant-appellant at this stage regarding inadvertence. Rather, Court has reasons to believe that after passing of the judgments by both the Courts below better sense prevailed upon the appellant and they after taking hint from the observations made by the Courts below, moved instant application under Order 41 Rule 27 CPC at this stage, which cannot be permitted at this belated stage. No doubt, documents, proposed to be led in additional evidence, are prepared by the government servants in discharge of their duties and same are perse admissible, but fact remains that it was duty of the applicant-plaintiff to place the same on record at the time of filing of the suit and in case these documents were not available to the plaintiff at that time, he could always move an application at the time of filing first appeal. If the application filed by the applicant-appellant is read in its entirety, no plausible explanation worth the name has been rendered for not placing these documents on record at the time of filing of the suit and thereafter at the time of filing the first appeal. There is no whisper that what prevented the applicant-plaintiff to place these documents on record earlier. As has been observed above, only explanation rendered by the applicants, that interest of minor was not protected and watched in proper manner by his guardian, who is simpleton illiterate lady, is also falsified on the face of it because admittedly present application has also been filed by the same lady, who, as per paragraph-2 of the application, failed to protect and watch the interest of minor being guardian and mother of the minor. Hence, this Court sees no reason, whatsoever, to allow this application at this belated stage because allowing the application, at this stage, would be detrimental to the interest of the defendants, who, admittedly, after contesting the suit for almost 13 years, have finally succeeded by leading cogent and convincing evidence on record to establish their right over the suit land. Apart from this, this Court has no hesitation to conclude that no sufficient cause has been rendered by the applicant-appellant in the application for non production of these documents, hence application deserves to be rejected.

14. In this regard reliance is placed on ***Union of India vs. Ibrahim Uddin and Another, (2012)8 SCC 148,*** wherein the Hon'ble Supreme Court held:-

> ***"Order 41 Rule 27 CPC***
>
> ***36. The general principle is that the Appellate Court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order 41 Rule 27 CPC enables the Appellate Court to take additional evidence in exceptional circumstances. The Appellate Court may permit additional evidence only and only if the conditions laid down in this rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, provision does not apply, when on the basis of evidence on record, the Appellate Court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the rule itself. (Vide: K. Venkataramiah v. A. Seetharama***

Reddy, AIR 1963 SC 1526; The Municipal Corp. of Greater Bombay v. Lala Pancham, AIR 1965 SC 1008; Soonda Ram v. Rameshwarlal, AIR 1975 SC 479; and Syed Abdul Khader v. Rami Reddy, AIR 1979 SC 553).

37. The Appellate Court should not, ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the Court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment. (Vide Haji Mohammed Ishaq v. Mohd. Iqbal and Mohd. Ali and Co., AIR 1978 SC 798).

38. Under Order 41 Rule 27 CPC, the appellate Court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate Court is empowered to admit additional evidence. (Vide Lala Pancham).

39. It is not the business of the Appellate Court to supplement the evidence adduced by one party or the other in the lower Court. Hence, in the absence of satisfactory reasons for the non- production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal. (Vide State of U.P. v. Manbodhan Lal Srivastava, AIR 1957 SC 912 and S. Rajagopal v. C.M. Armugam, AIR 1969 SC 101).

40. The inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realise the importance of a document does not constitute a "substantial cause" within the meaning of this rule. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal.

41. The words "for any other substantial cause" must be read with the word "requires" in the beginning of sentence, so that it is only where, for any other substantial cause, the Appellate Court requires additional evidence, that this Rule will apply, e.g., when evidence has been taken by the lower Court so imperfectly that the Appellate Court cannot pass a satisfactory judgment."(pp.167-169)

15. ***In Wadi vs. Amilal and Others, (2015)1 SCC 677,*** the Hon'ble Supreme Court held:

"4. It cannot be disputed that the correct date of death of Rupa Ram would clinch the issue and enable the court to pronounce a satisfactory judgment in the suit. A perusal of mutation No. 49, if proved, would throw considerable light on the issue. On the question of admission of that document by the appellate court, it would be necessary to notice the relevant provision of Order 41 Rule 27 of the Code of Civil Procedure:

"27. Production of additional evidence in appellate court. (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the appellate court, but if -

(a)-(aa) * * *

(b) the appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the appellate court may allow such evidence or document to be produced or witness to be examined."

5. Now it is clear that Rule 27 deals with production of additional evidence in the appellate court. The general principle incorporated in Sub-rule (1) is that the parties to an appeal are not entitled to produce additional evidence (oral or documentary) in the appellate court to cure a lacuna or fill up a gap in a case. The exceptions to that principle are enumerated thereunder in Clauses (a), (aa) and (b). We are concerned here with Clause (b) which is an enabling provision. It says that if the appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, it may allow such document to be produced or witness to be examined. The requirement or need is that of the appellate court bearing in mind that the interest of justice is paramount. If it feels that pronouncing a judgment in the absence of such evidence would result in a defective decision and to pronounce an effective judgment admission of such evidence is necessary, Clause (b) enables it to adopt that course. Invocation of Clause (b) does not depend upon the vigilance or negligence of the parties for it is not meant for them. It is for the appellant to resort to it when on a consideration of material on record it feels that admission of additional evidence is necessary to pronounce a satisfactory judgment in the case."(pp.678-679)

16. In the present case, applicant-plaintiff nowhere pleaded on record that despite due diligence, he could not produce these documents before the learned first appellate Court, rather very strange stand has been taken in para-2 of the application which is reproduced hereinbelow:

"2. That the applicant/appellant due to inadvertence could not file the material documents, which are very necessary and bone of contention between the parties because most of the record is in Urdu and the applicant is minor, whose interest has not been protected and watched in proper manner by his guardian who is also simpleton/illiterate lady."

17. But, as has been observed above, present application has also been moved by the same lady who has been termed as `simpleton/illiterate lady'. There is no averment worth the name to suggest that it was beyond their control to place these documents in evidence at the time of filing suit and thereafter in appeal. Appellant-applicant could have definitely produced these documents, if he had shown due diligence during the course of the trial but as emerges from the record, suit in question has been filed half heartedly by the father of the minor plaintiff namely; Rajan Sharma, who admittedly was the son of late Durga i.e. grandfather of plaintiff. It is not understood when a suit for declaration with consequential relief of injunction against the defendant was filed by stating that the suit property is joint Hindu co-parcenary and ancestral property and plaintiff, being grandson of defendant No.2, has right to said property by birth, why the documents, which are now being sought to be placed on record, were not filed, which were admittedly crucial of determining the dispute in question. This Court, while deciding this application, constrained to take into consideration the stand taken by the defendants in the suit where specific objection with regard to collusion of present plaintiff and defendant No.2 has been taken. In totality of the facts and circumstances narrated hereinabove, this Court has plausible reasons to conclude that the present application has been filed solely with a view to fill up the

lacune as indicated by both the Courts below and as such application moved at this belated stage cannot be allowed by this Court, accordingly the same is dismissed.

18. To answer substantial question of law No.1, as formulated above, this Court traveled through the evidence led on record by the respective parties as well as documentary evidence especially Exs.PX, RX, and RY.

19. After traversing through record of this Case, it appears that plaintiff Rajan Sharma, being grandson of Durga, filed a suit on the ground that he being the member of joint Hindu co-parcenary and ancestral property has a right in the property by birth. He filed suit for declaration with consequential relief of injunction, wherein, he averred that land, description whereof has been given above, is recorded in the ownership and possession of the defendant No.2- deceased (LRs of whom stand proceeded ex-parte). Plaintiff specifically alleged that property is a joint Hindu co-parcenary and ancestral property and he, being grandson of defendant No.2, has right in the property by birth since, as per plaintiff, defendant No.1 wrongly and illegally entered into agreement to sell on 12.12.1991 with defendant No.2 for the sale of 0-10 bighas of land i.e. 0-5-0 bigha each from two Khasra Numbers, for a consideration of very petty amount i.e. Rs.4,000/-. The plaintiff has further alleged that defendant No.1 has also obtained ex-parte decree against defendant No.2 for specific performance of contract and injunction as consequential relief with regard to the suit land vide judgment and decree dated 28.8.1998 passed in Civil Suit No.151/96(95). Plaintiff by way of suit also sought declaration that aforesaid decree being collusive, wrong, illegal and not binding on the rights of the plaintiff may also be declared nonest and set aside. Defendant contested the suit and specifically denied that defendant No.2 is owner in possession of the suit land. Defendant No.1 in written statement admitted that he had entered into an agreement to sell with defendant No.2 and after obtaining decree from the Civil Court he got the sale deed executed qua the suit land. Assertion of the plaintiff that the suit land is a joint Hindu co-parcenary property and he is grandson of defendant No.2 has also specifically been denied by the defendant. Defendant also denied that the decree obtained by him is collusive, rather he alleged that suit is collusive.

20. Keshav Ram, father of plaintiff Rajan Sharma, appeared as PW-1 and reiterated the submissions contained in the plaint. He specifically stated that defendant No.2 Durga was his father and suit property is ancestral in nature as the same was inherited by Durga from his ancestors. In his statement he also deposed with regard to the agreement allegedly executed between defendants No.1 and 2, but stated the same to be result of fraud. However, in his cross-examination he stated that the name of his grandfather is Gopal and that of his great-grandfather is Mahajan. In his cross-examination he also admitted that the entire land in the name of his father was not by way of Natature but some land was his self-acquired and some was ancestral. However, in his cross-examination, he could not explain that how much land was inherited by his father from his forefathers. After perusing the deposition made by aforesaid plaintiff witness, one thing clearly emerges that deceased Durga was the owner of the suit land. But, since, as per statement of this witness Durga had acquired some land in Nautore apart from the ancestral property which he inherited from his forefathers, onus was definitely upon PW-1 to prove that land, if any, sold to defendant No.1 was ancestral. In the present case, careful perusal of deposition made by PW-1 nowhere suggests that he was able to distinguish the land owned and possessed by defendant No.2. Admittedly, in the present case, no evidence worth the name has been led on record by the plaintiff to suggest that defendant No.2 sold that portion of the land to defendant No.1 which he had inherited from his forefathers being ancestral property. PW-1 also tendered in evidence Ex.PW-1/A, Jamabandi for the year 1991-92, wherein land in Khasra Nos.913 and 935, kitta 2, measuring 3-14-11 bighas is recorded in the name of Durga son of Gokal. There is another document Ex.PW-1/B on record which suggests that defendant No.2 Durga had agreed to sell land in Khasra No.943, measuring 0-5-0 bigha and Khasra No.913/2, measuring 0-5-0 bighas for a sale consideration of Rs.4,000/- in favour of defendant No.1 Chaudhary.

21. Similarly, Khem Chand, PW-2, stated that Keshav Ram is father of the plaintiff and Durga is father of Keshav Ram and that the suit property is ancestral property of the parties which is in possession of Keshav Ram and Smt.Indira. However, in his cross-examination he admitted that suit land has been sold by Durga to defendant No.1 Chaudhary in terms of agreement. He also failed to depose that how much land was ancestral land inherited by Durga from his ancestors.

22. Conjoint reading of statements made by PW-1 and PW-2, however, suggests that defendant No.2 Durga had sold certain portion of land, description whereof has been given in Ex.PW-1/B, but, as has been observed, it remains un-explained that out of which property Durga had sold this property to defendant No.1. It has specifically come in the statement of aforesaid plaintiff witnesses that defendant No.1 Dugra, apart from having ancestral property, had acquired some land in Nautore but specifically in the absence of specific proof that Durga had sold some portion of the land which he actually acquired as an ancestral property, version put forth by the plaintiff that action of defendant No.2 for selling the ancestral property was not in accordance with law, cannot be lent much credence. Since plaintiff has miserably failed to lead any evidence on record to suggest that defendant No.2 Durga sold ancestral property acquired by him from his forefathers, Courts below rightly relying upon the evidence available on record concluded that plaintiff miserably failed to prove that nature of the property sold by defendant No.2 Durga was ancestral.

23. Factum with regard to the sale deed executed by defendant No.2 in favour of defendant No.1 in terms of judgment dated 28.8.1998 also stands proved on record because it is an admitted case of the parties that on the basis of agreement to sell entered into between defendant No.1 and defendant No.2, decree was passed in favour of the defendant No.1 and as a result whereof Commissioner was appointed by the Court for execution of the sale deed, which fact stands duly proved vide Ex.DW-1/D i.e. order dated 23.5.2000. This Court, while traversing through evidence made available on record, could not lay its hand to any evidence, be it ocular or documentary, which could be sufficient to prove that there was fraud, if any, played by defendant No.1 upon defendant No.2 to execute the sale deed in question. But fact remains that defendant No.2, who had allegedly entered into sale agreement with defendant No.1 on the basis of which sale deed was executed after passing of the decree by the trial Court, never assailed the sale deed on the basis of fraud, undue influence or coercion etc. Moreover, fact remains that the judgment passed by the trial Court in Civil Suit No.151/96(95) has attained finality and at this stage parties cannot be allowed to rake-up that issue by alleging that previous judgment is vitiated by fraud. This Court, after careful perusal of the evidence available on record, is of the view that both the Courts below have rightly passed the judgments and no fault, if any, can be found with the same. Rather, both the Courts below have very meticulously dealt with each and every aspect of the matter and it cannot be said that Courts below mis-read and mis-construed the evidence available on record. It is well settled law that co-parcernary or ancestral property cannot be alienated by sale, gift or in any other manner by co-parcernar except for legal necessity, discharge of debt or better management of ancestral property. But, as per law, coparcener has no right to restrain the Karta of the Hindu Joint Family from discharging his duties as Karta in accordance with law. It is also well settled law that there cannot be any injunction by a Court restraining the Karta from making alienation when the same is being managed by Karta of the family.

24. In the present case, where plaintiff being grandson of defendant No.2 challenged that action of the defendant No.2 in selling the property to defendant No.1 on the ground that the property was co-parcenary or ancestral in nature and as such it could not be sold by the defendant No.2 to the detriment of plaintiff. But in such like case onus was upon the plaintiff to prove that nature of the property, which has been sold by defendant No.2. Plaintiff has nowhere led any evidence from where it could be inferred that land sold by Durga (defendant No.2) was actually ancestral and same was inherited by Durga i.e. grandfather from his forefathers. Moreover, in the present case no evidence worth the name has been led on record by the plaintiff to suggest that he is the grandson of Durga and thereafter no evidence worth the name has been

led to suggest that the property in question sold by defendant No.2 to defendant No.1 was ancestral in nature. Hence in the absence of specific evidence led on record by the plaintiff to prove that the property in question was ancestral and he being the grandson of defendant No.2 had any right in the ancestral property, the suit filed by the plaintiff has been rightly rejected by the trial court below. The fact remains that the plaintiff has not led any evidence on record, as has been observed by the Courts below, in the shape of pedigree table to establish that he is the grandson of Durga, defendant No.2. Though by leading the additional evidence, during the pendency of appeal, document Ex.PX was placed on record i.e. extract of Pariwar Register to demonstrate that Rajan Sharma is recorded as son of Keshav Ram, but defendant placed on record another documentary evidence i.e. extract of Pariwar Register Ex.RX, pertaining to year 1995, wherein name of father of Keshav Ram is recorded as Durga. In Ex.RY there is no mention of the name of plaintiff Rajan Sharma. Both the aforesaid certificates have been issued by Secretary, Gram Panchayat, Biarkot to plaintiff and defendant No.2. After perusing Ex.RY, it can be concluded that if Rajan Sharma was grandson of defendant No.2, his name should have been mentioned in Pariwar Registrar of the year 1995 and subsequent thereto. Learned first appellate Court has rightly concluded that entry, if any, made in the Pariwar register Exs.PX and RX, is infact on the basis of some certificate produced by the plaintiff from Municipal Council, Shimla, whereas in that eventuality plaintiff should have examined the officers of the Municipal Council, Shimla to prove the same, but admittedly no official of Municipal Council, Shimla was ever examined.

25. Consequently, in view of the discussion made hereinabove, this Court is of the view that there is no mis-reading and mis-appreciation of oral as well as documentary evidence i.e. Exs.PX, RX and RY as alleged by the plaintiff and the judgments passed by both the Courts below are based upon proper appreciation of evidence available on record and as such substantial question No.1 is answered accordingly.

26. So far substantial question No.2 is concerned, since no specific evidence has been led on record by the plaintiff to prove that the judgment dated 28.8.1998 in previous suit has been obtained in collusion, both the Courts below have rightly held that the judgment and decree dated 28.8.1998 passed by the learned Court in previous Civil Suit No.151/96(95), by Sub Judge, Court No.2, Mandi has attained finality and it is binding upon the parties. There is no evidence worth the name led by the plaintiff on record to prove that the aforesaid decree was result of fraud exercised by defendant No.2 upon defendant No.1 and as has been observed above that best person to assail aforesaid sale deed on the basis of fraud, undue influence was defendant No.2, who never during his life time chosen to assail the same and as such findings returned by the both the Courts below deserve to be upheld and substantial question of law No.2 is answered accordingly.

27. Consequently, in view of detailed discussion made hereinabove, this Court has no hesitation to conclude that judgments passed by both the Courts below are based upon the correct appreciation of record/evidence available on record. To answer the substantial question, reproduced hereinabove, this Court traveled through entire evidence led on record by the parties to the lis and it can be safely concluded that both the Courts below have rightly returned the concurrent findings of facts as well as law after dealing with the evidence on record meticulously. There is no doubt that defendant, by leading cogent and convincing evidence, has established that he purchased the suit land from defendant No.2 in terms of sale agreement, whereas plaintiff miserably failed to prove that he, being the grandson, has right in the ancestral property. Hence this Court is of the view that this is not a fit case where in exercise of powers/jurisdiction under Section 100 CPC concurrent findings returned by both the Courts below cannot be upset, especially when the plaintiff has failed to prove that judgments are perverse.

28. Reliance is placed in ***Laxmidevamma and Others vs. Ranganath and Others,* (2015)4 SCC 264,** wherein the Hon'ble Apex Court held:

> ***"16. Based on oral and documentary evidence, both the courts below have recorded concurrent findings of fact that the plaintiffs have established their right in A schedule property. In the light of the concurrent findings of fact, no substantial questions of law arose in the High Court and there was no substantial ground for reappreciation of evidence. While so, the High Court proceeded to observe that the first plaintiff has earmarked the A schedule property for road and that she could not have full-fledged right and on that premise proceeded to hold that declaration to the plaintiffs' right cannot be granted. In exercise of jurisdiction under Section 100 CPC, concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. In our considered view, the High Court did not keep in view that the concurrent findings recorded by the courts below, are based on oral and documentary evidence and the judgment of the High Court cannot be sustained." (p.269)***

29. Hence, in view of the aforesaid discussion, this Court is compelled to conclude that the impugned judgments passed by both the Courts below are based on proper appreciation of the evidence, be it ocular or documentary on the record and, as such, substantial questions of law, framed above, are answered accordingly. Hence, present appeal fails and the same is, accordingly dismissed.

30. Interim direction, if any, is vacated. All miscellaneous applications are disposed of.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

State of Himachal Pradesh. ……Appellant.
Versus
Virender Singh. ……Respondent.

Cr. Appeal No. 353 of 2011
Reserved on : 27.5.2016.
Decided on: July 5, 2016.

N.D.P.S. Act, 1985- Section 20- Accused was found coming through forest path holding a bag on his right shoulder- he became nervous on seeing the police party- he was apprehended – his search was conducted during which 3.5 kgs charas was recovered- accused was tried and acquitted by the trial Court due to non-joining of independent witnesses, contradictions in the testimonies of the prosecution witnesses - aggrieved from the judgment, present appeal was filed - held in appeal, that accused was found at a lonely place- no independent witness was available, therefore, non-association of independent witness is not fatal to the prosecution version- conviction can be based on the testimonies of official witnesses, if they inspire confidence- police officials had consistently stated that accused had tried to run away on seeing the police- he was apprehended and his search was conducted during which 3.5 kgs. Charas was recovered- they consistently deposed about taking of sample- non-production of seal will not make the prosecution version doubtful – contradictions in the testimonies of official witnesses are not significant and are bound to come with the passage of time - they should not be used to discard the prosecution version- link evidence was complete- seals were intact when the case property was produced before the Court- prosecution version was proved beyond reasonable doubt- trial Court had wrongly acquitted the accused- appeal allowed- accused convicted of the commission of offence punishable under Section 20 of N.D.P.S. Act. (Para-13 to 42)

Cases referred:
Girja Prasad Versus State of M.P., (2007) 7 Supreme Court Cases 625
Makhan Singh Versus State of Haryana, (2015) 12 Supreme Court Cases 247
State of Haryana Versus Asha Devi and Another, (2015) 8 Supreme Court Cases 39
Makhan Singh Versus State of Haryana, (2015) 12 Supreme Court Cases 247
State of Himachal Pradesh Vs. Sunder Singh, Latest HLJ 2014 (HP) 1293
Dalel Singh Vs. State of Haryana, 2010(1) SCC 149
State of Punjab Vs. Lakhvinder Singh and another, (2010) 4 SCC 402
State of Rajasthan Versus Parmanand and Another, (2014) 5 Supreme Court Cases 345.
Dhyan Singh Versus State of Himachal Pradesh, 2015 (3) Shim. LC 1222
State of Himachal Pradesh Versus Gurpreet Singh & Connected matter, 2014(3) Him. L.R. (DB) 1897
Lal Kishore Vs. State of H.P. & Anil Kumar Vs. State of H.P., Latest HLJ 2014 (HP) 962
Ashok Kumar Versus State of H.P., Latest HLJ 2009 (HP) 557
Noor Aga Versus State of Punjab, (2008) 16 SCC 417

For the appellant: Mr. D.S. Nainta and Mr. Virender Verma, Additional AGs.
For the respondent: Mr. Ajay Kochhar and Mr. Vivek Sharma, Advocates.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J.

The State of Himachal Pradesh aggrieved by the judgment dated 20.5.2011 passed by learned Special Judge (II), Kinnaur at Rampur has preferred the present appeal with a prayer that the impugned judgment be quashed and the respondent (hereinafter referred as the 'accused') be convicted of the charge under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred in short as "NDPS Act').

2. The prosecution case in a nut shell is that on 12.1.2009 PW9 SI Dulo Ram accompanied by PW2 Moti Ram and Constable Chand Misra of Police Station, Nirmand left towards Bagipul, Darar Nallah and Urtu side in official vehicle No. HP-34-0085 being driven by Constable-driver Tikkam Singh PW1 for patrolling and detection of cases under the Excise and NDPS Act. A rapat was entered in the *Rojnamcha* in this regard, copy whereof is Ext.PW3/A. Around 1:00 P.M. the police party reached at Parjanda nallah. The vehicle was parked there. PW9 accompanied by the other police officials then proceeded towards Darar nallah and village Kalah on foot. When the police party reached at Darar nallah, the accused was spotted coming down through forest path. He was holding a bag on his right shoulder. On seeing the police party, he became nervous. On suspicion, PW9 over powered him with the help of other police officials. It was an isolated place. No one, therefore, could be associated as independent witness. The I.O. PW9 has, therefore, associated Constable Chand Misra and PW2 Constable Moti Ram as independent witnesses. On inquiry, the accused disclosed his name as *Virender Singh* and father's name *Hawa Singh* whereas the address as *village and post office Budsham, Tehsil Samalkha, District Panipat (Haryana)*. Since the I.O. suspected that the accused must be carrying some narcotic substance or drugs with him or in the bag he was holding on his shoulder, an option that he has a legal right of being searched in the presence of a Magistrate or a Gazetted Officer was given to him orally as well as in writing vide memo Ext.PW1/A. The accused as per the endorsement made on Ext.PW1/A in his own hand has opted for being searched by the police i.e. PW9 himself. Consequently, the PW9 has first offered his personal search to the accused which he conducted vide memo Ext.PW1/B.

3. PW9 has thereafter conducted the search of the black coloured bag having written 'PUMA' thereon with metal and found one polythene bag half black and half red in colour having 'Lintaaz Premium Shirts' printed thereon. The said polythene bag when searched further

was found containing black coloured substance in the shape of rounds which on checking was found *charas.* Immediately thereafter, PW9 has informed the then Deputy Superintendent of Police, Anni on his Cell No. 93180-11419 from his personal Cell No. 94182-97457 regarding the recovery of *charas* from the accused. The information so given to the DSP was reduced into writing. The recovered *charas* was taken out from the bag and it was weighed with the weights and scale the I.O. PW9 having in his kit. The recovered *charas* when weighed was found 3 Kgs 500 grams. Out of the same, 25-25 grams was separated for the purpose of samples. The remaining bulk 3Kgs 450 grams was sealed in a cloth parcel Ext.P3 with three seals of impression 'T'. The sample parcels Ext.P1 and Ext.P2 were also sealed separately with 3-3 impressions of the same seal of impression 'T'. Ext.PW1/C was separately obtained on a piece of cloth. It is thereafter NCB-I form Ext.PW9/A was filled-in in triplicate by PW9. The *charas* recovered from the accused was thereafter taken by him in possession vide seizure memo Ext.PW1/D in the presence of PW1 Tikkam Singh and Constable Chand Misra. It is thereafter Rukka Ext.PW2/A was reduced into writing and sent to police Station Nirmand through PW2 Constable Moti Ram. The I.O. has thereafter prepared the spot map Ext.PW9/B. On the basis of *Rukka* Ext.PW2/A, FIR Ext.PW2/B was registered in Police Station, Nirmand by PW7 MHC Lal Chand. PW7 has handed over the case file to PW2 Constable Moti Ram for being taken to the I.O. PW9 on the spot. The accused was apprised about the grounds of arrest vide memo Ext.PW1/E. He was arrested and intimation of his arrest given to his father Hawa Singh over Cell Phone No. 09050861977 vide memo Ext.PW1/F. The I.O. has recorded the statements of witnesses under Section 161 Cr.P.C. The case file was handed over to him by PW2 Constable Moti Ram at Nirmand bus stand. The statement of Constable Moti Ram was recorded at bus stand. The I.O. PW9 arrived at the Police Station along with the accused and case property at 8:15 P.M. He made entries of his arrival in the police station vide rapat No. 28, Ext.PW3/B. PW9 has deposited the case property along with NCB-I form in triplicate and specimen of seal with PW7 MHC Lal Chand in the Malkhana of Police Station. PW7 has made entries Ext.PW7/A in this regard in the Malkhana register. The I.O. prepared the special report Ext.PW5/B and it was sent to Sub Divisional Police Officer, Anni through PW6 HHC Shyam Lal. PW6 has delivered the same on the same day to PW5 ASI Sohan Lal, the then Reader to SDPO Anni. PW5 has entered the special report in the prescribed register vide entries Ext.PW5/A. The special report was produced before the then DSP Anni Bhajan Singh Negi who on perusal thereof returned the same to PW5 for being retained in the record. One of the sample parcels was sent for analysis to Forensic Science Laboratory, Junga, District Shimla on 14.1.2009 vide RC Ext.PW7/B along with NCB-I form in triplicate and a docket through Constable Nanak Chand. Subsequently, the entire bulk was also sent to Forensic Science Laboratory, Junga vide RC No. 37/2010 Ext.PW7/C through Constable Shyam Lal. It is so stated by the MHC PW7 while in the witness box. Later on, PW8 Constable Shyam Dass was deputed to Forensic Science Laboratory, Junga to collect the case property and also the report of Chemical Examiner. PW8 has brought the case property and also the Chemical Examiner's report Ext.PW8/A and handed over the same to PW7 for being retained in the Malkhana.

4. On completion of the investigation, PW9 has prepared the report under Section 173 of the Code of Criminal Procedure and it was filed in the Court.

5. Learned trial Court after having gone through the report and also documents annexed therewith arrived at a conclusion that prima-facie the commission of offence punishable under Section 20 of the NDPS Act has been made out against the accused, hence charge was framed against him accordingly. The accused, however, not pleaded guilty to the charge and claimed trial. The prosecution was therefore, called upon to produce evidence in order to sustain charge against the accused.

6. The prosecution in turn has examined PW1 Constable Tikkam Singh who has witnessed the manner in which search and seizure has taken place on the spot and also PW2 Constable Moti Ram who was also present at the time when the search of the bag, the accused was carrying on his shoulder, was conduced and the contraband allegedly *charas* recovered from

him. The another material prosecution witness is the I.O. PW9 who was posted as Station House Officer in Police Station, Nirmand at the relevant time.

7. The remaining prosecution witnesses are LC Rima, who has entered *rapat rojnamcha* Ext.PW3/A and Ext/PW3/B in the *rojnamcha* of the Police Station, PW4, who has taken one of the sample parcels vide RC No. 6/09 to Forensic Science Laboratory, Junga, PW5, who was posted at the relevant time as reader to Dy.S.P. Anni. It is he who received the special report Ext.PW5/B and made the entries Ext.PW5/A in this regard in the relevant register. It is he who even has produced the same before the Dy.S.P. for perusal. PW6 HHC Shyam Lal has taken the special report Ext.PW5/B to the office of Dy. S.P. Anni and handed over the same to PW5. PW7 HC Lal Chand was posted at the relevant time as Moharar Head Constable in Police Station, Nirmand. He received Rukka Ext. PW2/A from Constable Moti Ram and registered the case on the basis thereof vide FIR Ext.PW2/B. He made endorsement Ext.PW2/C on the Rukka and handed over the file for being taken to the I.O. on the spot. The case property and also the sample parcels along with NCB form and sample of seal were deposited by PW9 with him in the Malkhana. He made the entries Ext.PW7/A in the Malkhana register in this regard. It is he who initially sent sample parcel for analysis vide RC No. 6/09 Ext.PW7/B and thereafter the entire bulk vide RC No. 37/10 Ext.PW7/C to Forensic Science Laboratory, Junga, Shimla for analysis. He made the entries in Malkhana register Ext.PW7/D and also proved the receipts on RC Ext.PW7/B and Ext.PW7/C. PW8 Constable Shyam Dass has collected the case property from the Forensic Science Laboratory and also the report of Chemical Examiner Ext.PW8/A and handed over the same to MHC in the Malkhana. PW9 is the Station House Officer, Police Station, Nirmand and also the Investigating Officer of this case.

8. On the other hand, the accused in his statement recorded under Section 313 of the Code of Criminal Procedure has denied the incriminating circumstances appearing against him in the prosecution evidence being wrong and also for want of knowledge. In his defence while answering question No. 27, it is stated that he is a patient of polio since his childhood, hence not able to walk in a hilly area. He was not at the alleged place of occurrence. He, however, was arrested from a bus namely Kumkum Bus Service at Nirmand near the office of Tehsildar when the police party found an abandoned bag behind driver's seat and as on inquiry he told that he is from Haryana, hence was made to alight from the bus and taken to the Police Station situated nearby. All the documents were prepared by the police in the Police Station. In his defence, he has also examined one Satish Kumar DW1, a taxi driver.

9. Learned trial Judge on appreciation of the prosecution evidence and also the evidence produce by the accused in his defence has arrived at a conclusion that the evidence as has come on record by way of the testimony of the prosecution witnesses is contradictory in nature, hence inspires no confidence. Therefore, it was not deemed appropriate to place reliance on the evidence as has come on record by way of the testimony of official witnesses as in view of the findings recorded by learned trial Court the same was not reliable. Therefore, benefit of doubt is given to the accused and consequently, he has been acquitted of the charge.

10. The State has assailed the impugned judgment on the grounds, inter-alia, that the prosecution evidence has been appreciated by learned trial Court in a slip-shod and perfunctory manner. The trial Court has allegedly set unrealistic standards to evaluate the cogent and reliable evidence produced by the prosecution. The testimony of the prosecution witnesses has been discarded for untenable reasons in the absence of any proof of their enmity with the accused. The findings recorded by the Court below are stated to be based upon conjectures and surmises. The impugned judgment, as such, has been sought to be quashed and set aside with further prayer that since the prosecution has proved its case against the accused beyond all reasonable doubt, therefore, he be convicted for the offence he committed.

11. Learned Additional Advocate General has vehemently argued that the testimony of police officials is as much good as that of any other person. Also that, PW1, PW2 and PW9 while in the witness box have made consistent statements qua all material aspects of the case.

Learned trial Court has illegally brushed aside the same while giving undue weightage to the facts such as non-joining of independent witnesses, contradictions minor in nature, qua the place of occurrence, on the point of traffic checking, filling of NCB form etc.-etc. Learned Additional Advocate General has thus urged that the evidence available on record is sufficient to establish the involvement of the accused in the commission of the offence. He, therefore, has been sought to be convicted for the offence, he committed.

12. On the other hand, Mr. Vivek Sharma, Advocate, learned defence Counsel has pointed out from the record the contradictions in the statements of the prosecution witnesses and taken note of by learned trial Judge and has contended that on the basis of the evidence contradictory in nature having come on record by way of testimony of official witnesses the findings of conviction could have not been recorded. It is further argued that the search and seizure has not taken place in the manner as claimed by the prosecution and rather the recovery of contraband allegedly *charas* has been fastened upon the accused only because of he happens to be from the State of Haryana and was traveling in Kumkum bus service at Nirmand when the police failed to apprehend the real culprit.

13. The only point needs adjudication in this case is as to whether irrespective of prosecution having proved its case against the accused beyond all reasonable doubt he has been erroneously acquitted of the charge framed against him.

14. In order to decide the fate of this case, the reappraisal of the evidence produced by the prosecution and the accused in his defence is required. However, before that it is desirable to note that an offence under the Act is not only heinous but serious in nature. An offence under the Act is not against an individual but against the Society as a whole because the illicit trafficking of drugs not only affects a particular individual but the public at large and in particular our young generation. The NDPS Act is a piece of social legislation enacted with the sole idea to curb illicit trafficking of drugs. A case registered under the Act, therefore, needs consideration keeping in mind the above factors. At the same time keeping in view there being provision of deterrent punishment against an offender if ultimately held guilty, the provisions contained under the act to safeguard an offender from conviction and sentence also need to be looked into thoroughly so that any innocent person may not be convicted and sentenced.

15. The statute casts a duty upon the prosecution not only to prove beyond all doubts the commission of an offence by an offender but additionally the compliance of various provisions mandatory in nature enshrined there under. Thus, law casts a duty on the Courts seized of the case registered under the Act to deal with it with all circumspect and caution and before recording the findings of conviction against an offender to satisfy itself about the compliance of procedural requirements and also the availability of cogent and reliable evidence connecting the accused with the commission of the offence.

16. The perusal of the judgment under challenge reveals that learned trial Judge on being influenced with the factum of non-joining of independent witnesses, the so called contradictions in the statements of material prosecution witnesses PW1, PW2 and PW9 qua the exact location of the place of occurrence, place of parking of police vehicle, the manner of filling the columns of NCB-I form, the police party on its way to Bagipul and to the place of the recovery, whether conducted traffic checking or interrogated other persons and distance of the spot where search and seizure took place has concluded that the prosecution case is doubtful. The accused was, therefore, given the benefit of doubt and consequently acquitted of the charge framed against him.

17. The present is a case of recovery of *charas* weighing 3Kgs 500 Grams from the bag, the accused was carrying on his right shoulder. Learned trial Judge has not recorded any findings as to whether the contraband has been recovered from the accused or not and rather discarded the prosecution story on being influenced by the fact that the prosecution witnesses are police officials and that there are contradictions in their statements.

18. The recovery of the contraband from the exclusive and physical possession of the accused is sine qua non to infer the commission of offence by him. This aspect needs evidence cogent and reliable for its proof. The joining of independent person in such a case to witness the search and seizure is in the interest of fair trial. However, it is again well settled that the evidence having come on record by way of the testimony of official witnesses is as much as good as that of an independent person. The same, however, is required to be examined with all circumspection and cautiously. If such evidence inspires confidence should be relied upon. It is held so by the Apex Court in ***Girja Prasad Versus State of M.P., (2007) 7 Supreme Court Cases 625.***

19. Similar is the ratio of the judgment of the Apex Court in ***Makhan Singh*** *Versus* ***State of Haryana, (2015) 12 Supreme Court Cases 247.*** As per the ratio of this judgment the conviction of an offender booked under the Act can be based on the testimony of official witnesses, however, if the same inspires confidence.

20. In the light of the legal and factual aspect of the matter discussed hereinabove, it is to be seen that the statements of PWs 1, 2 and 9 are worthy of credence or the so called contradictions noticed by the learned trial Court goes to the very root of the prosecution case and render the same doubtful.

21. PWs 1, 2 and 9 are categoric and specific in stating that they were away to Bagipul area in connection with patrolling and detection of cases under the Excise and NDPS Act on that day. According to PW1 and PW9 from Bagipul they went to Parjanda "nallah" and parked the official vehicle HP-34-0085 there on road side. Then they proceeded towards village Darar and Kalah on foot. The accused was spotted coming down through forest path when the police party was at point 'X' in the map Ext.PW9/B. The statements of all the three prosecution witnesses to this extent are consistent.

22. As per their further version the accused got scared the moment he noticed the presence of the police party there. He was over powered. The map Ext.PW9/B amply demonstrates that the spot is an isolated place having no inhabitation. Although a village is there in the hill side as has come in the cross-examination of these witnesses. Yet nothing suggestive has come on record qua its distance from that place. The plea raised by learned defence Counsel that someone should have been associated from that village as an independent witness is without any merit for the reason that the I.O. PW9 while in the witness box has stated that the place of recovery was isolated and as such, no one could be associated as independent witness. Similar is the version of PW1 Tikkam Singh and PW2 C. Moti Ram. The suggestion given to them that a village is situated in hill side of the spot no doubt has been admitted by them, however, as already said for want of any evidence qua the distance of that village, the plea in defence so raised by the accused is hardly of any help to his case. In hilly area one can see a village or place in the hill side even from a distance of 10 KM-15 KM and even 20 KM also and in that situation, it is not always possible to depute someone to the village and call someone there from to witness the search and seizure. The present is, therefore, not a case where it can be said that the action of the I.O. in not associating the independent witness was intentional or deliberate.

23. The Apex Court in ***State of Haryana*** *Versus* ***Asha Devi and Another, (2015) 8 Supreme Court Cases 39*** a case with more or less similar facts has held that when the official witnesses were consistent that the efforts to join the independent witnesses were made however, none from public agreed to witness the occurrence, non-joining of the independent witnesses is not fatal to the prosecution case. The relevant extract of this judgment reads as follows:-

> *"……We find that both DSP Maharaj Singh as well as IO Ramphal have deposed that public persons were available when the contraband was seized; however, none of the public persons acceded to their request of joining the investigation as an independent witness. The court below have found it unbelievable but no reason for the same is rendered. In our opinion, the consistent*

statement of both DSP as well as IO rather enhances the veracity of the circumstances as put forth by them...."

24. It is well settled at this stage that some time independent witnesses are not available to witness the search and seizure and some time afraid to come and depose in favour of the prosecution. Also that the conviction can be based solely on the testimony of the official witnesses if inspires confidence. We are drawing support in this regard from the judgment again that of the Apex Court in ***Makhan Singh*** *Versus* ***State of Haryana, (2015) 12 Supreme Court Cases 247.*** The relevant extract of this judgment reads as follows:-

> "......In peculiar circumstances of the case, it may not be possible to find out independent witnesses at all places at all times. Independent witnesses who live in the same village or nearby villages of the accused are at times afraid to come and depose in favour of the prosecution. Though it is well settled that a conviction can be based solely on the testimony of official witnesses, condition precedent is that the evidence of such official witnesses must inspire confidence. In the present case, it is not as if independent witnesses were not available....."

25. In view of the above, the findings that the failure on the part of the prosecution to join the independent witnesses has rendered the prosecution story doubtful as recorded by learned trial Court are neither legally nor factually sustainable.

26. If coming to further version of PW1, PW2 and PW9, they are again categoric and specific while stating that on seeing the police party the accused got scared and tried to flee away. He, however, was over powered and on inquiry he has disclosed his name and also the parentage as well as his complete address. In view of he having become nervous and tried to flee away has obviously created doubt in the mind of the police officials that he must be carrying some narcotic substance with him, the I.O. was left with only option to associate the police officials itself as witnesses and to proceed with the search of the accused and the bag he was carrying on his right shoulder. However, before that an option as required under Section 50 of the Act was given to the accused who, however, opted for being searched by the police itself. This aspect of the prosecution case finds corroboration from the consent memo Ext.PW1/A. PW1 and PW2 have stated in one voice that it is the bag of the accused which was firstly searched and the '*charas'* weighing 3 KGs 500 Grams recovered therefrom. No doubt, PW2 has deposed while in the witness box that it is the personal search of the accused was first conducted. This contradiction, however, is not of such a nature so as to have gone to the very root of the prosecution case because all of them have stated in one voice that the *charas* was recovered from the polythene bag, which was taken out from the bag the accused was carrying on his shoulder.

27. The prosecution witnesses are also unanimous so far as the sampling and sealing process is concerned. As per their version out of the recovered *charas* 25-25 grams was separated for the purpose of samples and sealed with impression of seal 'T'. They have also stated in one voice that the remaining *charas* weighing 3KGs 450 Grams was put into the same plastic envelope and then in the same bag which the accused was carrying on his right shoulder and then it was sealed with the impression of seal 'T'. As per the version of the I.O. PW9, the seal after its use was handed over to Constable Chand Misra. No doubt, the seal has not been produced nor Constable Chand Misra is examined during the course of trial. However, the version of the I.O. that the seal was handed over to Constable Chand Misra remained unshattered for the reason that no

suggestion that the seal was not handed over to said Shri Chand Misra was given to PW9 the I.O. in his cross examination. Therefore, the plea that for want of non-production of the seal the trial has vitiated is neither legally nor factually sustainable. The judgment of a Co-ordinate Bench of this Court in ***State of Himachal Pradesh*** *Vs*. ***Sunder Singh, Latest HLJ 2014 (HP) 1293*** being distinguishable on facts is not applicable in this case.

28. Now, if coming to NCB-I form Ext.PW9/A as per the evidence available on record the I.O. has filled-in all columns i.e. 1 to 8 thereof on the sot. As a matter of fact, it is column Nos. 1 to 7 needs to be filled-in by the I.O., so far as column No. 8 is concerned, against the same only facsimile of the seal used is required to be given. According to PW1 and PW2 column Nos. 1 to 8 were filled-in by the I.O. on the spot. The I.O., however, has stated that it is the entries in column Nos. 1 to 7 were filled-in by him on the spot. As a matter of fact, it is the entries only in these columns are required to be filled-in whereas against column No. 8 only facsimile of seal is required to be placed. Even if it is a contradiction, the same again is of not such a nature so as to render the prosecution case as well as the recovery of the contraband weighing 3 KGs 500 Grams from the accused doubtful. Therefore, it is satisfactorily established on record that NCB-I form was filled-in by the I.O. on the spot.

29. Much has been said about the place where the official vehicle was parked by the police. PW1 and PW9 have stated in one voice that the same was parked at Parjanda nallah. However, PW 2 has stated that the vehicle was parked at Darar nallah. As a matter of fact, this witness has clarified that the vehicle was parked at a place in between Parjanda nallah and the place of recovery. The statements of PW1 and PW9 can also be interpreted in the similar manner because as per their version also the vehicle was at a place at Parjanda nallah in between the nallah and the place of recovery. In our opinion, undue weightage should have not been given to this aspect of the matter when *charas* in huge quantity i.e. 3 KGs 500 Grams has been recovered from the accused and the recovery thereof from him cannot be believed to have been planted on him.

30. The findings that the presence of the police party could have been noticed by the accused from the path through which he was coming down are again hypothetical and based upon conjectures and surmises. It is not even the defence of the accused also that the place mark 'X' in the site plan was visible from the path on which he was walking down. Otherwise as per the site plan Ext.PW9/B there is growth of Cheel trees at that place. Therefore, the presence of the police party on the spot may have escaped the notice of the accused while coming down cannot be ruled out. The trees as per the map Ext.PW9/B are Cheel trees. PW1 and PW9 have also stated so while in the witness box. True it is, that PW2 has stated that it is the Cheel tress and Kail trees which were in existence at the spot. His statement that Kail trees were also in existence there should have not been given undue weightage by the trial Court particularly when the map Ext.PW9/B discloses the existence of Cheel trees alone and similar is the statements of PW1 and PW9. Above all with the passage of time memory also fades and PW2 seems to have stated qua existing of kail trees due to this reason.

31. The contradictions in the statements of prosecution witnesses as pointed out that according to PW1 and PW9 the place of recovery was situated at a distance of 2 K.M. from Parjanda nallah whereas as per PW2 at a distance of 500 meters from the place where they had parked the vehicle should have also not been taken so seriously because with the passage of time such type of contradictions are bound to occur. Above all parrot like version is not possible to be given by a witness that too after a period over two years because the date of occurrence was 12.1.2009 whereas the statements of the witnesses were recorded on 4.11.2011. In this view of the matter, the contradictions in the statements of the prosecution witnesses qua conducting of traffic checking and interrogation of other persons while on the way to the place of occurrence should have also not been viewed so seriously that too when PW1 and PW9 have stated that they have conducted traffic checking on the way while going to the place of occurrence. No doubt, PW2 has stated that they went straight to Bagipul and there from to Darar nallah and did not

stop at any place on the way. However, as already observed, this aspect was also not required to be viewed so seriously so as to discard the recovery of huge quantity of *charas* from the accused.

33. As per the ratio of the judgment of Hon'ble Supreme Court in ***Dalel Singh*** Vs. ***State of Haryana, 2010(1) SCC 149*** and in ***State of Punjab Vs. Lakhvinder Singh and another, (2010) 4 SCC 402,*** minor contradictions and discrepancies in the statements of the witnesses are bound to occur due to fading of memories of the witnesses, hence should not be viewed so seriously to render the prosecution case doubtful, if the same otherwise found to have been proved beyond all reasonable doubt with the help of cogent and reliable evidence.

33. The present is also not a case where it can be said that the link evidence is missing for the reason that resealing of the parcels containing the case property was not involved in this case because the SHO was the I.O. himself. He has handed over the parcels containing the case property and the sample parcels sealed with eight seals of impression 'T' along with NCB-I from in triplicate. PW7 Head Constable Lal Chand is the Moharar Head Constable. The entries in Malkhana register Ext.PW7/A substantiate this aspect of the matter. The findings that there is no mention of handing over NCB-I form to PW7 are therefore contrary to the evidence available on record.

34. Now, if coming to the RC Ext.PW7/B, one of the sample parcels along with seizure memo and NCB-I form in triplicate was sent to Forensic Science Laboratory, Junga through a docket for analysis. The case property was taken to the Laboratory by PW4 Constable Nanak Chand. There is no reason to disbelieve his testimony that till the deposit of the case property in the Laboratory the same remained in his safe custody. The report Ext.PW9/C reveals that the sample sent for analysis was the mixture of cannabis and the sample of *charas*. Subsequently the entire recovered bulk sealed in a parcel was sent to Forensic Science Laboratory vide RC No. 37/10 Ext.PW7/C along with sample of seal, copy of FIR, NCB form in triplicate through Constable Shyam Lal PW8. The parcel containing the *charas* was also deposited in the Laboratory in same condition and not allowed to be tampered with as has come on record by way of the testimony of PW Shyam Lal. The report Ext.PW8/A reveals that the recovered contraband was extract of cannabis and as such sample of *charas*.

35. Learned trial Court has, therefore, erroneously concluded that the link evidence is missing for the reasons that the Malkhana register finds the entries Ext.PW7/A which reveals that besides the sample parcels and the parcel containing the recovered *charas,* NCB-I form was also handed over to PW7 in triplicate. The finding that photocopy of NCB-I form was sent when the entire bulk forwarded to the Forensic Science Laboratory for analysis also appears to be not correct for the reasons that the repot Ext.PW8/A reveals that along with the parcel the specimen of seal and NCB-I form were also sent to the Laboratory which were kept in safe custody till analyzed and the report arrived and dispatched. The photocopy as referred to by the trial Court does not form the part of the record and seems to have come on record by way of mistake because there is no need to tag the NCB-I form with the report of the Chemical Examiner. Otherwise also, the photocopy of the NCB-I form is neither marked nor an exhibited document. Therefore, the findings recorded by learned trial Court are contrary to the factual position.

36. On behalf of the accused, reliance has been placed on the judgment of the Hon'ble Supreme Court in ***State of Rajasthan*** *Versus* ***Parmanand and Another, (2014) 5 Supreme Court Cases 345***. This judgment deals with the admissibility of joint communication made to two accused under Section 50 of the Act. The Apex Court has not held the same as legally admissible. It is not known as to how this judgment is applicable in this case because the consent memo Ext.PW1/A makes it crystal clear that thereby the sole accused has been apprised about his legal right of giving his search either in the presence of a Gazetted Officer or a nearby Magistrate.

37. The ratio of the judgment delivered by a Single Bench of this Court in ***Dhyan Singh*** *Versus* ***State of Himachal Pradesh, 2015 (3) Shim. LC 1222*** is also not applicable in this case for the reason that the case property in duly sealed condition was produced in the Court

by the Public Prosecutor in the presence of the accused and learned Counsel representing him. The seals were intact. The defence has not doubted the production of the case property in safe custody in the Court. No doubt, there is no evidence as to when the case property was taken out from the Malkhana and who has brought the same to the Court. The fact, however, remains that the same was produced by learned Public Prosecutor in parcels which were duly sealed. The parcels containing the case property after recording the evidence are ordered to be resealed with the seal of Court. In this case the trial Judge has not passed any order on 4.1.2011 and 5.1.2011 when statements of PWs 1, 2 and 3 were recorded. Therefore, the trial Court itself is at fault. Anyhow, it is not the case of the accused that the case property was not sealed with seal of the Court and returned to the Malkhana. Therefore, the ratio of the judgment supra is not applicable in this case.

38. The ratio of the judgment of this Court in ***State of Himachal Pradesh*** *Versus* ***Gurpreet Singh & Connected matter, 2014(3) Him. L.R. (DB) 1897*** and ***Lal Kishore*** *Vs.* ***State of H.P.*** & ***Anil Kumar*** *Vs.* ***State of H.P., Latest HLJ 2014 (HP) 962*** is also distinguishable on facts, hence not applicable in this case. The consent memo Ext.PW1/A amply demonstrates that an option was given to the accused to opt for his search in the presence of a nearest Gazetted Officer or Magistrate. Therefore, the judgment of a Co-ordinate Bench of this Court in ***Ashok Kumar*** *Versus* ***State of H.P., Latest HLJ 2009 (HP) 557*** is also not applicable.

39. On reappraisal of the evidence available on record and also the given facts and circumstances as well as law cited at the Bar, in our considered opinion, the present is not a case where it can be said that the prosecution has failed to prove its case against the accused beyond all reasonable doubt. No doubt, the witnesses are police officials as the spot being an isolated place it was not possible to associate the independent witnesses. The evidence as has come on record by way of the testimony of official witnesses is however consistent, categoric and also supports the prosecution case on all material aspects. The prosecution has, therefore, discharged the onus on it satisfactorily. We find the present a fit case where the presumption as envisaged under Section 35 and 54 of the Act can be raised against the accused because onus to prove otherwise that he was neither apprehended nor *charas* recovered from him stood shifted on him.

40. The accused a resident of Haryana has, however, failed to explain as to what he was doing at Darar nallah, a remote area. Even if it is believed that he was traveling in Kumkum Bus Service and apprehended at Nirmand he failed to explain as to what was the purpose of his visit to that area and from where he had boarded Kumkum Bus Service and where he was going. DW1 Satish Kumar he examined also belongs to Punjab. No doubt, he claims himself to be the driver of Indica Car HP-01A-1989 being plied as taxi and had gone with passengers on that day to Bagipul. However, there is no supporting evidence that some mechanical defect developed in the vehicle and he boarded Kumkum Bus Service for Rampur to bring a mechanic. He failed to produce any ticket and also the bill of repair of the vehicle. Therefore, to our mind, he is a liar and has deposed falsely to help the accused may be for some extraneous consideration. The accused, therefore, has failed to discharge the onus upon him and as such, the presumption as envisaged under Sections 35 and 54 of the Act can be raised against him. In similar circumstances, the Apex Court in ***Noor Aga*** *Versus* ***State of Punjab, (2008) 16 SCC 417*** has held as under:

> *"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."

41. Be it stated that as per the ratio of the judgment *supra* it is the prosecution which has first to prove the foundational facts i.e. proof qua the recovery of the contraband from the exclusive and conscious possession of the accused beyond all reasonable doubt to attract the rigors of Section 35 of the Act and it is only thereafter the burden to prove otherwise that the contraband has not been recovered from his exclusive and conscious possession would shift upon the accused. Also that, the standard of proof to discharge the onus upon the accused to prove his innocence is not so high as compared to that upon the prosecution and the accused can discharge such onus upon him merely on preponderance of probability. However, we are of the firm view that cogent and consistent eye witness count given by PWs 1 and 2 and supported by the testimony of the I.O. PW9 leaves no manner of doubt that the *'charas'* has been recovered from the physical and conscious possession of the accused. As noticed supra, he however, failed to discharge the onus upon him even by preponderance of probability also. The factors such as he is a resident of Haryana, the purpose of his presence in a remote area where he has been apprehended and if he had not come there to carry '*charas'* what was the purpose of his visit in that area which remained unexplained lead to the only conclusion that the '*charas'* has been recovered from his physical and conscious possession.

42. In view of what has been said hereinabove, the only inescapable conclusion would be that the prosecution has been able to prove its case against the accused beyond all reasonable doubt. We, therefore, set aside the impugned judgment and convict the accused for the commission of the offence punishable under Section 20 of the NDPS Act.

43. The accused is now to be heard on the quantum of sentence. Let him appear for the purpose on 15.7.2016.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J

Anju Rais …..Petitioner.

Vs.

Chief Executive Officer, Khadi and Village Industrial Board and another. …..Respondents.

CWP No.: 3544 of 2009
Reserved on: 22.6.2016
Date of Decision: 7.7.2016

Constitution of India, 1950- Article 226- Petitioner applied for loan to start tailoring and stitching factory for readymade garments - project report submitted by the petitioner was proved and the case was sent for financing the project- project was sponsored under the margin money scheme of the Khadi and Village Industries Commission (KVIC) – a sum of Rs. 90,000/- was to be kept as subsidy in a fixed deposit- contribution of the petitioner was to be 10% in case of general category and 5% in case of weaker section- loan of Rs. 3 lacs was sanctioned out of which equity of the petitioner was Rs. 0.15 lac- case of the petitioner was sent for releasing Rs. 90,000/-- respondent no. 1 instead of releasing the amount, issued a notice asking the respondent No. 2 to refund Rs. 90,000/- as margin money and interest thereon to respondent no. 1 - aggrieved from the letter, writ petition was filed- respondent no. 1 stated that project of the petitioner was not a new project- petitioner had started the project prior to the sanction of the loan- petitioner was not eligible and was wrongly sanctioned the loan- held, that loan was approved on 3.7.2003- bills were issued in favour of the petitioner prior to the date of sanction for purchase of the machinery – this shows that unit of the petitioner was already in existence before the sanction of the loan- petitioner had shifted the unit from Shimla to Manali- petitioner had withheld the material facts from the Court and had not come to the Court with clean hands- petition dismissed with cost of Rs. 10,000/-. (Para-11 to 22)

For the petitioner: Mr. B.N. Mehta, Advocate.
For the respondents: Ms. Ritta Goswami, Advocate, for respondent No.1.
None for respondent No.2.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.

The case of the petitioner is that with a view to earn livelihood, she applied for a loan with respondent No.1 to start tailoring and stitching factory for readymade garments at Ghora Chowki, Shimla. The project report was accordingly prepared and submitted to respondent No.1. The said respondent approved the project report of the petitioner for an amount of Rs.3 lac and forwarded the case for the purpose of financing the project to respondent No.2. On 31.3.2003, respondent No.1 addressed a sanction letter (Annexure P-1) to respondent No.2, copy of which was forwarded to the petitioner. The project was sponsored under the margin money scheme of the Khadi and Village Industries Commission (hereinafter referred to as "KVIC"). In the said project, a subsidy of Rs.90,000/- was to be kept with respondent No.2 in a fixed deposit. It was further the case of the petitioner that as per the policy scheme of respondent No.1, firstly the beneficiary was to contribute upto 50% of the total cost of the project, which was subsequently amended vide circular dated 11.3.2003 (Annexure P-2) as per which, it was decided that the maximum own contribution of the beneficiaries in the project cost would be 10% in case of general category and 5% in case of weaker section. The said decision was to be effective from 1.4.2003.

2. Respondent No.2 vide communication dated 3.7.2003 (Annexure P-3) informed respondent No.1 that the project of the petitioner had been sanctioned. As per said sanction letter, the expenditure loan was Rs.1 lac, working capital loan was Rs. 2 lac and thus, the total project cost was Rs. 3 lac, out of which the promoter's equity was Rs.0.15 lac. According to the petitioner, thereafter respondent No.2 sent the case of the petitioner to respondent No.1 for releasing the subsidy/margin money of Rs.90,000/-, which was lying in the shape of an FDR with respondent No.2 vide communication dated 7.7.2003 (Annexure P-4). On 27.6.2004 (Annexure P-5), the petitioner requested respondent No.2 to allow her to shift the said unit to Hotel Angel Inn, Village Aleo, Tehsil Manali, District Kullu and the requisite permission was granted in her favour vide communication dated 3.7.2004 (Annexure P-6).

3. In the meanwhile, respondent No.1 also directed its Assistant Development Officer to inspect the unit of the petitioner to find out as to whether the same was functioning or

not, who submitted his inspection report dated 17.8.2005 (Annexure P-7), which demonstrated that the petitioner had set up her readymade garments unit in Hotel Angel Inn Complex.

4. The grievance of the petitioner is that respondent No.1 rather than releasing the subsidy of Rs.90,000/- in her favour issued impugned communication dated 27.12.2005 (Annexure P-8) instructing respondent No.2 to refund an amount of Rs.90,000/- as margin money and interest thereon to respondent No.1 immediately for being refunded to KVIC in view of the fact that the petitioner had not set up a new unit as per the norms of the scheme. According to the petitioner, the said impugned communication is not sustainable in the eyes of law because there was no occasion for respondent No.1 to have had issued the same and in fact, she was entitled for the release of the subsidy amount of Rs.90,000/-. Accordingly, in these circumstances, the petitioner has filed the writ petition.

5. Respondent No.1 in its reply contested the case of the petitioner and submitted that KVIC through H.P. Khadi and Village Industries Board under REGP (margin money scheme) sanctioned the margin money in favour of the petitioner for setting up a new unit vide communication dated 31.3.2003 (Annexure P-1). However, there is a condition precedent that the credit facility should be provided for a new proposed unit and no funds should be sanctioned for any expansion or against an existing unit as is evident from communication dated 31.3.2003. The stand of respondent No.1 is that the project of the petitioner was in fact not a new project, as per the norms of the Scheme. Therefore, keeping in view this fact and condition No.4 of the communication dated 31.3.2003, when it came to the notice of respondent No.1 that the petitioner had already set up a unit before the project was sanctioned in her favour by the authorities concerned, margin money of Rs.90,000/- was rightly ordered to be refunded back as granting the same in favour of the petitioner would have been against the norms of the scheme.

6. Respondent No.1 has placed on record along with reply purchase bills of the material including machines dated 21.4.2003, 25.4.2003 and 5.5.2003 (Annexures R-1/A to R-1/C), which were prior to the date the petitioner's project was sanctioned. Therefore, it was pleaded that since the petitioner was not eligible and entitled to be granted margin money, respondent No.1 rightly directed respondent No.2 to refund back the amount of Rs.90,000/-, which was lying with the said respondent in the shape of an FDR.

7. It was further case of respondent No.1 that it had received communication from respondent No.2 dated 10.8.2005 (Annexure R-2), in which it was mentioned that the petitioner had informed respondent No.2 on 3.7.2003 that she was not interested in term loan and she would establish the unit from her own sources. As per respondent No.1, this fact was withheld by respondent No.2 and petitioner from respondent No.1, which was also clear violation of terms and conditions of the REGP (margin money scheme) because as per the guidelines of KVIC, the project cost must consist of own contribution, capital expenditure loan and working capital loan/C.C. and in the absence of any of the components, the project is ineligible.

8. Respondent No.2 has also filed its reply stating therein that no relief has been claimed against it and the petitioner is not having any cause of action against respondent No.2. According to the respondent No.2, in fact it is only a disbursing agent and it has nothing to do with the sanctioning of the scheme or payment of margin money etc.

9. Rejoinder has been filed by the petitioner to the reply filed by respondent No.1, in which the petitioner has reiterated her case as put forth in the petition and denied the contentions raised in the reply.

10. I have heard learned counsel for the parties and have also gone through the records carefully.

11. During the course of the arguments, this court called upon learned counsel for the petitioner to place on record copy of the project report, which was initially submitted by the petitioner to respondent No.1. Learned counsel for the petitioner stated that this was the

responsibility of the respondent No.1 and not the petitioner. Faced with this situation, this Court in the interest of justice, called upon respondent No.1 to provide the records of the case of the petitioner and the said records were made available to the court. The suggestion of the Court to sit across the table and discuss the matter with respondent No.1 was also not accepted by the petitioner and it was urged that the case be decided on merits by this Court.

12. It is apparent from the records produced by respondent No.1 that the case of the petitioner, for loan of Rs. 3 lac for setting up textile unit under REGP scheme i.e. Rural Employment General Programme of KVIC through the H.P. State Khadi and Village Industries Board, was forwarded by the Assistant Development Officer of respondent No.1 to its Chief Executive Officer vide communication dated 31.3.2003. The application form submitted by the petitioner also contained an affidavit dated 29.3.2003 having been sworn in by her, in which it was categorically admitted that she intends to take financial help under margin money scheme of KVIC and undertakes to set up a new unit from the financial assistance involved in margin money scheme of KVIC and that the funds including subsidy availed under this scheme will be purely utilized for the new proposed activity and not for the existing activity/unit.

13. The project report appended with the said application of the petitioner also expressly contained that she proposed to start a readymade garments manufacturing unit under REGP scheme and the proposed unit was to have provision for manufacturing all kinds of gents, ladies and children wears, jackets and other related products.

14. Thus, it is crystal clear from the perusal of the application and project report submitted by the petitioner that she had applied for loan of Rs.3 lac to respondent No.1 for setting up a new textile unit.

15. The Chief Executive Officer sent the case of the petitioner to respondent No.2 for the appraisal of the report on 31.3.2003 (Annexure P-1). The factum of the loan having been sanctioned in favour of the petitioner was conveyed by respondent No.2 to respondent No.1 vide communication dated 3.7.2003 (Annexure P-3). This was followed by communication dated 7.7.2003 (Annexure P-4) addressed to respondent No.1 in the shape of an application form-cum-receipt for claiming margin money from respondent No.1, which was duly signed on behalf of the petitioner. Vide this communication, respondent No.1 was intimated that a village industry project has been sanctioned in favour of the petitioner under the margin money scheme of KVIC and it was requested to advise respondent No.2 to disburse an amount of Rs.90,000/- being margin money sanctioned by the commission.

16. Thus, the fact of the matter is that the project of the petitioner was in fact sanctioned by respondent No.2 only on 3.7.2003 (Annexure P-3). In other words, there was no sanction of the project of the petitioner before 3.7.2003. There is no material placed on record from, where it can be inferred that the petitioner was 100% sure that her project would be approved and cleared by respondent No.2 or before grant of actual sanction by respondent No.2 in favour of the petitioner, there was some "in principal sanction" by respondent No.2 to the petitioner. However, it is a matter of record that even before the project of the petitioner was sanctioned by respondent No.2, there were bills issued in favour of the petitioner qua the purchase of the machinery, which were submitted by her to respondent No.2 and these bills are dated 21.4.2003, 25.4.2003 and 5.5.2003. These bills have been duly appended with the reply by respondent No.1. In the rejoinder to the reply filed by respondent No.1, the explanation given by the petitioner to these bills is that though the sanction was conveyed on 3.7.2003, but respondent No.1 had issued sponsoring of project letter to respondent No.2 on 31.3.2003 (Annexure P-1) which was in reference to consent letter issued by respondent No.2 dated 8.3.2003 and it was only thereafter the she as per terms and conditions contained in Annexure P-1 went ahead to comply with the same and the purchase of the machinery was done as per the petitioner's obligation.

17. In my considered view, the said explanation which has been given by the petitioner is incorrect because there is no mention in communication dated 31.3.2003 that the

petitioner had to immediately purchase machinery. On the contrary, it is apparent from the perusal of the said communication that respondent No.1 had only forwarded the case of the petitioner to respondent No.2 for the purpose of grant of sanction and this sanction admittedly was granted to her on 3.7.2003. Therefore, it is amply clear from the material on record that the petitioner had submitted bills to respondent No.2 with regard to purchase of machinery pertaining to the months of April and May 2003, though the fact of the matter is that the said project was sanctioned by respondent No.2 only on 3.7.2003. Therefore, the only inference which can be drawn from the said facts is that the unit of the petitioner was already in existence before the project of the petitioner was actually sanctioned by respondent No.2. Had that not been the case, then it is not understood as to why the petitioner had purchased machinery worth almost Rs.1 lac even before her project was sanctioned by respondent No.2. In my considered view, the machinery could have been purchased for setting up a new project only after project had been sanctioned by respondent No.2 and loan in lieu of that had been released in favour of the petitioner.

18. Therefore, it is clear that the petitioner was already having an existing unit before the project was in fact sanctioned by respondent No.2 and in this view of the matter, there is no infirmity with the impugned communication dated 27.12.2005 (Annexure P-8) issued by respondent No.1 vide which it had directed respondent No.2 to refund the subsidy/margin money.

19. Further, communication dated 27.12.2015 is also addressed to the petitioner. This communication refers to earlier communications dated 7.6.2005 and 6.9.2005 on the same subject. As per records, vide communication dated 7.6.2005, respondent No.1 had called upon respondent No.2 to refund an amount of Rs.90,000/- along with interest, which was margin money pertaining to the unit of the petitioner on the ground that she had not set up readymade garments unit as was reported by the Assistant Development Officer of the Board at Shimla and Kullu. A copy of this communication was also addressed to the petitioner. It is evident from the records that the petitioner shifted the proposed unit from Ghaura Chowki, Shimla to Hotel Angel's Inn, Village Aleo, Manali, District Kullu, without intimation/permission of the respondent No.1. There is letter on record of Assistant Development Officer of the Board dated 18.6.2004, in which it is stated that the said Officer went to inspect the unit of the petitioner and found that there was no unit being run by the petitioner at Ghaura Chowki Shimla and in fact, 10 years' rent agreement with the landlord had been cancelled about four months back. Copy of this letter was also addressed to the petitioner. This letter was followed by another letter dated 27.7.2004 vide which respondent No.1 asked the petitioner to have her unit inspected, otherwise the margin money shall be recalled. In response to this, there is a letter dated 7.8.2004 written by the petitioner to respondent No.1 intimating therein that she had shifted her unit from Ghaura Chowki, Shimla to Hotel Angel's Inn, Village Aleo, Phatti Vashisht, Manali, District Kullu and she had purchased her own land for this purpose. It was also mentioned that she had utilized the funds as per project report and she was not aware that permission was required from the Khadi Board to shift the unit. It was further mentioned that she was planning to shift to Manali completely as her business had already been shifted to that place.

20. Incidentally, vide communication dated 7.6.2005, it is clearly mentioned that as per the report of the Assistant Development Officer of the Board, the petitioner had mis-utilized the funds as she had not set up any readymade garments unit as per terms of Scheme. In response, there is a communication dated 20.6.2005, in which it is mentioned that she was already running readymade garments unit at Hotel Angel's Inn, Village Aleo, Manali, District Kullu. Similarly, vide communication dated 6.9.2005, respondent No.1 had also requested respondent No.1 to refund back the margin money of Rs.90,000/- pertaining to the unit of the petitioner on the ground that she had not set up new unit as per norms of the scheme. Copy of this communication was also addressed to the petitioner. Incidentally, there is another communication dated 20.8.2005 addressed by the petitioner to respondent No.1, contents of which are reproduced here-in-below:

"I want to bring this to your kind notice that my unit for the readymade garments was sanctioned by your department in the year 2002-03 for Rs.3 lac only. At that time promoter's own contribution was permitted to the extent of 50% of the total cost of the project. Copy of the circular enclosed. As I was in a hurry to establish my unit I invested my money for the machinery and fixtures and availed the working capital from the bank. Bank has visited my unit on 10.7.2003 and found working and got satisfied.

You are therefore requested to direct the bank to retain the margin money with them only. Please do the needful at the earliest.

Thanking you."

21. None of these documents have been placed on record by the petitioner and in my considered view there is material concealment of facts by the petitioner and she has not approached this Court with clean hands. The petitioner cannot be permitted to say that she was not aware of the documents which have been referred to by me from the records because all these documents are addressed to the petitioner.

22. Learned counsel for the petitioner during the course of arguments could not satisfy this Court as to why the petitioner purchased machinery in the months of April and May 2003 even before her project was sanctioned by respondent No.2. Further, learned counsel for the petitioner could not satisfy this Court as to why the factum of shifting of unit by the petitioner from Ghaura Chowki, Shimla to Hotel Angel's Inn, Village Aleo, Manali, District Kullu was not brought to the notice of respondent No.1. Learned counsel for the petitioner could not inform this Court as to on which date and where the said unit of the petitioner was registered with any statutory authority. Not only this, it is apparent and evident from what I have discussed above that the earlier communications dated 7.6.2005 and 6.9.2005 issued by respondent No.1, copies of which were duly sent to the petitioner on the subject of the refund of the margin money, have been withheld by the petitioner from the Court. Therefore, the petitioner has not approached this Court with clean hands. It is, thus, apparent that no new unit has been set up by the petitioner as per the norms of the KVIC and the steps taken by respondent No.1 for the refund of the margin money along with interest cannot be termed as illegal.

Therefore, in view of what has been discussed above, I do not find any merit in the present petition and the same is accordingly dismissed with costs assessed at Rs.10,000/-. Pending application(s), if any, also stands disposed of. Records produced by respondent No.1 be returned back to the said respondent.

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BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J

Bhag Chand Soni ……Appellant.
Versus
State of H.P. …….Respondent.

Cr. Appeal No. 04 of 2011.
Reserved on: July 05, 2016.
Decided on: July 07, 2016.

Indian Penal Code, 1860- Section 409 and 420- **Prevention of Corruption Act, 1988-** Section 13(2)- PW-3 had obtained a loan of Rs. 50,000/- for running a karyana shop from H.P. Minorities Finance and Development Corporation- he defaulted - notice was issued to him - accused visited the house of PW-3 and received a sum of Rs.21,000/-- PW-3 informed the corporation regarding the payment made to the accused- notice was issued to the accused and the accused admitted receipt of money- he also deposited a sum of Rs.21,000/- in the account- an FIR was registered

against the accused- he was tried and convicted by the trial Court- held, in appeal that accused had admitted receipt of money- he had also admitted deposit of Rs. 21,000/-- a receipt was also issued by the accused- prosecution case was duly proved- accused was rightly convicted by the trial Court. (Para-13 to 17)

For the appellant: Mr. Peeyush Verma, 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 dated 31.12.2010, rendered by the learned Special Judge (Forest), Shimla, H.P., in Corruption Case No. 9-S/7 of 2009, whereby the appellant-accused (hereinafter referred to as the accused), who was charged with and tried for offences punishable under Sections 409 and 420 IPC and Section 13(2) of the Prevention of Corruption Act, 1988 (hereinafter referred to as "the P.C. Act" for convenience sake) was convicted and sentenced to suffer imprisonment for three years and to pay a fine of Rs. 10,000/- and in default of payment of fine to further undergo imprisonment for three months under Section 409 IPC. He was also sentenced to suffer imprisonment for three years and to pay a fine of Rs. 10,000/- and in default of payment of fine to further undergo imprisonment for three months under Section 420 IPC. He was further sentenced to undergo imprisonment for three years and to pay a fine of Rs. 10,000/- and in default of payment of fine to undergo imprisonment for three months under Section 13(2) of the P.C. Act. The sentences were ordered to run concurrently.

2. The case of the prosecution, in a nut shell, is that PW-3 Chet Ram obtained a loan of Rs. 50,000/- for running a karyana shop from H.P. Minorities Finance and Development Corporation, Shimla. He committed default. A notice was served upon him on 5.12.2007 asking him to deposit the amount in question. On 25.12.2007 accused Bhag Chand Jr. Assistant of the Corporation visited Chet Ram at his house and received a sum of Rs. 21,000/- and issued receipt thereof. On 6.11.2008, Chet Ram informed the Corporation that he has made payment to accused Bhag Chand. Pursuant to this complaint, the Dy. General Manager was assigned the job of inquiry. Notice was issued to accused Bhag Chand on 17.11.2008. Accused Bhag Chand through communication dated 26.11.2008 admitted to have received the money through his son and regretted the lapse. He also deposited Rs. 21,000/- in the Corporation's account in the Axis Bank. The Dy. General Manager sent letter dated 22.11.2008 for registration of a case and FIR was registered at Police Station SV & ACB, Shimla. Various documents were taken into possession by the police. 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. He admitted that he was charge-sheeted and departmental inquiry was conducted. He also admitted that he was responsible for stock and stores, furniture and fixtures, diary dispatch etc. He claimed that when he was deputed for election duty, he had handed over the charge to Sh. C.L.Sharma. He specifically denied to have received Rs. 21,000/- from Chet Ram and issuance of receipt to him. He submitted his reply on 26.11.2008 admitting his guilt. However, no defence evidence was led by the accused. The learned trial Court convicted and sentenced the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. Peeyush Verma, 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 has supported the judgment of the learned trial Court dated 31.12.2010.

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 Anil Kumar Sharma, testified that he issued memo to accused Bhag Chand. The copy of memo is Ext. PW-1/A. Reply was submitted by accused Bhag Chand vide Ext. PW-2/B. He submitted the matter to the Managing Director. The Managing Director ordered suspension of the delinquent official and for investigation into the matter. Accused also filed letter dated 26.11.2008 vide Ext. PW-1/B. He sent letter dated 22.11.2008 for registration of case vide Ext. PW-1/C. In his cross-examination, he admitted that the accused remained on Vidhan Sabha duty from 6.11.2007 to 9.1.2008 and he was at Shimla. They had sent communication to Chet Ram on 5.12.2007 for default in his loan. The loan was to be re-paid in monthly installments. He denied the suggestion that accused deposited money with the department. He admitted that during election duty, the charge of the official is handed over to another official.

7. PW-2 Farid Khan testified that he was working as Clerk in the office of H.P. Minorities Finance and Development Corporation, Shimla. Accused Bhag Chand had handed over to him the receipt-book bearing No. 0003901 to 0004000 vide Ext. P-1. Page No. 1 of the receipt No. 0003903 was missing. He handed over this receipt book to Atma Ram Bhardwaj, Sr. Assistant. Bhardwaj had kept this in his custody. The police had seized the documents mentioned in memo Ext. PW-2/A during investigation. In his cross-examination, he deposed that the accused was the custodian of the record and the receipt book remained with him. When accused was suspended, then this receipt book Ext. P-1 was handed over to him. He had received Ext. P-1 at the order of the Managing Director. He made endorsement Ext. PW-2/B. Similarly, on one copy of receipt No. 0003903, he also made endorsement Ext. PW-2/C on 20.11.2008.

8. PW-3 Chet Ram deposed that the loan was obtained by him in the year 2003, amounting to Rs. 50,000/-. It was to be returned in quarterly installments. A sum of Rs. 30,800/- was outstanding for repayment. Accused had visited his house imploring him to make the payment otherwise there would be a case against him. He had paid him Rs. 21,000/-. The accused issued receipt on 25.12.2007 vide Ext. PW-3/A. He handed over the receipt Ext. PW-3/A to the police vide memo Ext. PW-3/B. He made complaint to the Managing Director regarding deposit of Rs. 21,000/-. Since the proceedings were initiated against him through Collector, he received notice dated 5.12.2007. In his cross-examination, he deposed that the department had obtained cheques from him. The department used to present cheque issued by him and the amount used to be realized from his account. Many cheques bounced. He has deposited the amount after receipt of the notice. After issuance of notice, cheques were not presented. Accused had come to his house on 25.12.2007.

9. PW-5 A.K.Gupta, deposed that he was posted as Managing Director of H.P. Minorities Finance and Development Corporation, Shimla since September, 2009. He had accorded prosecution sanction under Section 19 of the P.C. Act, for prosecuting accused Bhag Chand. He had gone through the inquiry report conducted by State Vigilance and thereafter he consulted the record available in his office. The sanction letter is Ext. PW-5/A.

10. PW-6 Atma Ram deposed that the Corporation advances loan and finances to minority and disabled persons for setting up of their units. On 1.8.2002, a sum of Rs. 50,000/- was advanced as loan to Chet Ram. On receipt of complaint, the matter was dealt in the office. As per record, only photo copy of complaint dated 6.12.2008 was received and it was dealt with by DGM. A sum of Rs. 21,000/- was deposited after a lapse of 11 months. The amount was deposited by accused Bhag Chand in the Axis Bank. The copy of counter foil of pay-in-slip dated 26.11.2008 is Ext. PW-6/A. The entry of deposit of Rs. 21,000/- paid in cash is at page 148 vide Ext. PW-6/B. Accused had given in writing a letter dated 26.11.2008 vide Ext. PW-1/B. The department had also initiated departmental inquiry against the accused vide Ext. PW-6/D-1. The order of inquiry is Ext. PW-6/D-2 to Ext. PW-6/D-4. The order of suspension is Ext. PW-6/D-5. He admitted in his cross-examination that from counter foil Ext. PW-6/A, it cannot be inferred that the amount in question was deposited by accused Bhag Chand. Volunteered that from the

writing it appears that it has been deposited by him. He denied the suggestion that he could not say that during Vidhan Sabha accused remained at Shimla throughout.

11. PW-9 Insp. Karam Chand deposed that he conducted the investigation in the case. He had seized on 20.5.2009, the documents as per memo Ext. PW-2/A. He also seized the original receipt in possession of Chet Ram through memo Ext. PW-3/B on 21.7.2009 at Banjar. The receipt is Ext. PW-3/A. Specimen signatures of accused were obtained before the Judicial Magistrate vide Ext. PW-6/D-13 to PW-6/D-42. The documents were sent to FSL and report Ext. PW-9/A was obtained.

12. It is evident from Ext. PW-1/B written by the accused to the Managing Director on 26.11.2008 that he has admitted that money was paid by the loanee to his son. His son did not tell this fact to him because of fear. He was informed of this fact on 23.11.2008 by his son who was called by him to Shimla. Since he was the custodian of receipt books and receipt No. 003903 dated 22.12.2007 was written by him in good faith and on assurance that the money will be paid soon. He has regretted the lapse and has admitted the deposit of Rs. 21,000/- in Corporation's account No. 2776 on 26.11.2008 with Axis Bank. He has also enclosed the receipt. He has prayed that lenient view be taken.

13. The accused has also sent communication to the Managing Director on 26.11.2008 vide Ext. PW-2/B. He has admitted that the complainant has taken receipt through his son. It is not the case of the accused that PW-3 Chet Ram has taken away receipt Ext. PW-3/A forcibly from accused Bhag Chand. Even, according to the contents of Exts. PW-1/B and PW-2/B the son of accused had received the money on behalf of the accused and receipt Ext. PW-3/A was issued by the accused. It has also come on record that only receipt Ext. PW-3/A was found missing from the entire receipt book.

14. According to the contents of Forensic Science Report Ext. PW-9/A, the writings marked Q-1 were written by one and the same person whose specimen handwritings were marked as S-1 to S-10 and A-1 to A-4. The specimen handwritings of accused Bhag Chand marked as S-1 to S-10 and A-1 to A-4 are Ext. PW-6/D-13 to D-22. It is duly proved by the prosecution that the receipt Ext. PW-3/A was written by accused in his own hand writing. It has come in report Ext. PW-9/A that receipt Ext. PW-3/A was from receipt book Ext. P-1. In case the accused had remained on election duty between 6.11.2007 to 9.1.2008, there is no possibility of the receipt book with him. His son has received the payment and the accused has issued the receipt. He has admitted in Ext. PW-1/B that his son has received the money. Ext. PW-1/B and Ext. PW-2/B were in the handwriting of the accused. These documents were sent by the accused pursuant to notice issued to him by the Management. He has also admitted that he has deposited Rs. 21,000/- in the Corporation's Account in the Axis Bank. The official witnesses were well conversant with the handwriting of the accused, he being their colleague. The fact of the matter is that the author of Ext. PW-3/A was none else than the accused.

15. PW-3 Chet Ram has categorically deposed that the accused had visited his house and received Rs. 21,000/- and issued receipt Ext. PW-3/A. The accused has not led any evidence to prove that on the relevant date he was at Shimla. Rather accused Bhag Chand has admitted in Ext. PW-1/B that he has written the receipt. This fact is duly corroborated by report Ext. PW-9/A. PW-2 Farid Khan has obtained receipt book Ext. P-1 on the basis of orders passed by the Managing Director.

16. Mr. Peeyush Verma, Advocate, for the accused has vehemently argued that there is delay in lodging the FIR. However, the fact of the matter is that the complaint was received on 6.11.2008 and the misappropriation came to the notice of the Department. Thereafter, prompt action was taken against the accused. It is reiterated that the accused has admitted his guilt and has also paid a sum of Rs. 21,000/- to the Corporation through Bank. This amount was tendered by the accused himself.

17. PW-6 Atma Ram has deposed that the writing Ext. PW-6/A was of the accused. The accused has also admitted, as noticed hereinabove, that as per the contents of Ext. PW-1/B, he has deposited the amount in question. Once he has received the amount from Chet Ram on 25.12.2007, he was supposed to deposit the same in the Corporation. However, the default was detected in November, 2008 and accused deposited the amount in question only on 26.11.2008. Thus, the prosecution has proved the case against accused Bhag Chand under Sections 409, 420 IPC and Section 13(2) of the Prevention of Corruption Act, 1988. There is no occasion for this Court to interfere with the well reasoned judgment of the learned trial Court dated 31.12.2010.

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

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

Chhinda Ram alias Shinda Ram ....Appellant

Versus

State of H.P. ...Respondent.

Cr.A No. : 498 of 2015
Reserved on: 5.7.2016
Decided on: 7.7. 2016

N.D.P.S. Act, 1985- Section 20- Accused tried to run away on seeing the police- he was apprehended- he was apprised of his right to be searched in the presence of Gazetted Officer or Magistrate- accused consented to be searched by the police- 250 grams charas was recovered during search of the accused- accused was tried and convicted by the trial Court- held, in appeal that accused was apprehended and was apprised of his right to be searched in the presence of Gazetted Officer or Magistrate- all the codal formalities were completed at the spot- testimonies of police officials inspire confidence- minor contradictions are bound to come with the passage of time and cannot be used to discard the prosecution version- accused was rightly convicted by the trial Court- appeal dismissed. (Para-13 to 15)

Case referred:

Ram Swaroop versus State (Government of NCT of Delhi) (2013) 14 SCC 235

For the appellant: Mr. Rajesh Kumar, Advocate.
For the Respondent: Mr. Parmod Thakur, Addl. A.G.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This appeal is instituted against the judgment dated 8.4.2015 rendered by the Special Judge, Mandi, District Mandi in sessions trial No. 15 of 2011 whereby the appellant-accused (hereinafter referred to as the "accused"), who was charged with and tried for offence punishable under section 20 of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as the 'Act' for brevity sake), has been convicted and sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs. 20,000/- and in default of payment of fine he was further ordered to undergo simple imprisonment for six months under section 20 of the Act.

2. Case of the prosecution, in a nutshell, is that PW-9 ASI Surender Singh with other police officials had gone for patrolling on 9.2.2011 after lodging rapat Ex.PW-4/A. The police party had laid a Nakka at Kainchi Mod. At about 2.00 P.M. accused came from Kullu side.

On seeing the police party, turned around and tried to escape. The accused was apprehended. The place was desolate and no independent witness was available. Police made request to various persons, however, no one was ready to be witness in the case. Constables Lalit Kumar and Dhameshar were associated as witnesses. Accused was apprised of his right to be searched either in presence of a Gazetted Officer or a Magistrate vide memo Ex.PW-3/B. Accused consented to be searched by the police. During search, one sky blue coloured handkerchief containing some material was found in his left sock. On opening of handkerchief, 250 grams charas Ex.P-2 was found. The charas was resealed in the same manner and was kept in a cloth, which was sealed with six seal impressions 'Y'. Sample seal Ex.PW-3/D was drawn and facsimile of seal was drawn on NCB-1 form filled in triplicate on the spot. The seal after use was handed over to PW-3 Lalit Kumar. The case property alongwith documents was seized vide memo Ex.PW-3/C. Rukka Ex.PW-6/A was prepared and sent to Police Station through constable Dhameshwar. Spot map was prepared. Parcel Ex.P-1 containing charas Ex.P-2, handkerchief Ex.P-3 was produced before PW-7 Surender Pal alongwith NCB form, sample seals etc. He resealed the same with four seal impressions of seal 'T'. Case property was deposited with MHC PW-8 Thakur Singh. He made entry in the Malkhana register. Case property was sent to FSL, Junga vide RC Ex.PW-8/B through constable Gulab Singh. 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 nine witnesses in all to prove its case against the accused. Statement of accused under Section 313 Cr.P.C. was recorded. The defence of the accused is of simplicitor denial. Trial court convicted and sentenced the accused, as noticed hereinabove. Hence, the present appeal.

4. Mr. Rajesh Kumar, learned counsel for the accused, has vehemently argued that the prosecution has failed to prove its case against the accused.

5. Mr. Parmod Thakur, learned Additional Advocate General, has supported the judgment dated 8.4.2015.

6. I have heard the learned counsel for the parties and have gone through the judgment and record meticulously.

7. PW-2 Gulab Singh has testified that on 11.2.2011, HHC Thakur Dass handed over to him a parcel, which was sealed with seal impression 'Y' at four places alongwith sample seals and NCB form in triplicate vide RC Ex.PW-2/A. He took the same to FSL, Junga. No one tampered with the case property till it remained in his custody.

8. PW-3 Lalit Kumar has deposed that on 9.2.2011, he alongwith HC Surinder Singh, constable Parma Nand, Constable Narender, Constable Kashmir Singh and Constable Dhameshwar Singh was present at place Kainchi Mod on Nakkabandi. Accused was seen coming from Hanogi towards Pandoh. On seeing the police party, accused tried to escape. He was apprehended. The I.O. tried to associate independent witness in search party and stopped the vehicles passing thereby; however, none was ready to join the search party. Consent of the accused was obtained for his search vide memo Ex.PW-3/B. Accused consented to be searched by the police. Personal search of the accused was conducted and cannabis in the shape of sticks was recovered from the sock of the left foot, which was wrapped in a handkerchief. It weighed 250 grams. All the codal formalities were completed on the spot. In his cross-examination, he has deposed that they left police post at 12.10 P.M. in a private vehicle. Kainchi Mod is at a distance of 2½ KMs and Pandoh Dam is at a distance of 2 KMs from the Police Post. He denied the suggestion that there was one shop at Kainchi Mod. He has also denied that there was a tea stall at the spot, though admitted that employees generally remain at Pandoh Dam.

9. PW-5 Sachan Kumar has deposed that he was directed by the SHO, Police Station Sadar to bring the report and case property of the case from FSL, Junga. He brought the report Ex.PW-5/A, NCB form and other relevant documents.

10. PW-7 Surender Pal has deposed that on 9.2.2011, HC Surender Singh handed over to him one cloth parcel sealed with seal Y at six places alongwith NCB form in triplicate and sample seal for resealing purposes. The seals were found intact on the parcel. The cloth parcel containing cannabis was resealed by him with seal impression 'T' at four places. Sample seal 'T' was embossed on the NCB form Ex.PW-7/A. He filled in column Nos. 9 to 11 of NCB form in triplicate. Sample seal T was separately taken on a cloth piece Ex.PW-7/B. Thereafter, case property was deposited in Malkhana. He also prepared resealing certificate Ex.PW-7/C.

11. PW-8 HHC Thakur Singh has testified that on 9.2.2011, Inspector/SHO Surender Pal handed over to him one cloth parcel sealed with seal 'Y' at six places and resealed with seal impression 'T' at four places containing 250 grams cannabis alongwith NCB form in triplicate etc. He entered the case property in Malkhana register at Sr. No. 1135. He sent the case property alongwith documents to FSL, Junga vide RC No.275/2010.

12. PW-9 Surender Singh has deposed the manner in which the accused was arrested. Accused was apprised about his legal right to be searched either in presence of a Gazetted Officer or a Magistrate vide memo Ex.PW-3/B. Accused consented to be searched by the police. His personal search was conducted. Charas weighing 250 grams was recovered. Case property was taken into possession. The charas was sealed with 6 seal impressions of Y. He prepared Rukka Ex.PW-6/A. It was sent to the Police Station through constable Dhameshwar. He denied the suggestion in his cross-examination that many labourers were present in the mines. He admitted that the spot falls on National Highway. He admitted that number of vehicles cross on the National Highway. He has denied that a tea stall and workshop were situated near the spot. They checked 10 to 20 vehicles after 2.00 P.M. He has denied the suggestion that no attempt was made to join independent witnesses.

13. Accused was apprehended at Kainchi Mod in the afternoon on 9.2.2011. He was apprised of his legal right to be searched in presence of either a Gazetted Officer or a Magistrate vide memo Ex.PW-3/B. He consented to be searched by the police. Charas was recovered from his person. It weighed 250 grams. All the codal formalities were completed on the spot. Rukka Ex.PW-6/A was prepared, on the basis of which FIR was registered. Case property was resealed in accordance with law. It was sent to FSL, Junga for analysis. It was found to be charas. PW-3 HC Lalit Kumar has categorically deposed that the I.O. tried to associate independent witnesses; however, no one was ready to be witness. It is in these circumstances, he was associated in the search party. He has denied that there was one tea stall at Kainchi Mod. Kainchi Mod was at a distance of 2 ½ KMs from Police Post and 2 KMs from Pandoh Dam. Similarly, PW-9 Surender Singh has denied the suggestion that the police has not made any efforts to join independent witnesses. Statements of police officials inspire confidence and are trustworthy. These cannot be discarded.

14. Their Lordships of the Hon'ble Supreme Court in ***Ram Swaroop*** versus ***State (Government of NCT of Delhi)*** (2013) 14 SCC 235 has held that there is no absolute rule that police officers cannot be cited as witnesses and their depositions should be treated with suspicion since generally public at large are reluctant to come forward to depose before court and, therefore, prosecution case cannot be doubted for non-examining independent witnesses. Their Lordships have held as under:

> **[7] To appreciate the first limb of submission, we have carefully scrutinized the evidence brought on record and perused the judgment of the High Court and that of the trial Court. It is noticeable that the evidence of PW-7, namely, Ritesh Kumar, has been supported by Balwant Singh, PW-5, as well as other witnesses. It has come in the evidence of Ritesh Kumar that he had asked the passerby to be witnesses but none of them agreed and left without disclosing their names and addresses. On a careful perusal of their version we do not notice anything by which their evidence can be treated to be untrustworthy. On the contrary it is absolutely unimpeachable. We may note here with profit there is no absolute rule that police officers cannot be**

cited as witnesses and their depositions should be treated with suspect. In this context we may refer with profit to the dictum in State of U.P. v. Anil Singh, 1988 Supp1 SCC 686 wherein this Court took note of the fact that generally the public at large are reluctant to come forward to depose before the court and, therefore, the prosecution case cannot be doubted for non-examining the independent witnesses.

[10] Keeping in view the aforesaid authorities, it can safely be stated that in the case at hand there is no reason to hold that non- examination of the independent witnesses affect the prosecution case and, hence, we unhesitatingly repel the submission advanced by the learned counsel for the appellant."

15. There is no violation of section 50 of the Act, as argued by Mr. Rajesh Kumar, learned counsel for the accused. Minor contradictions pointed out by Mr. Rajesh Kumar in the statements of PW-6 Dharam Singh and PW-9 Surender Singh have not prejudiced the case of the accused. Fact of the matter is that Rukka Ex.PW-6/A was sent to Police Station on the basis of which FIR was registered. PW-3 Lalit Kumar has testified that Rukka was sent through constable Parma Nand. However, PW-9 Surender Pal has deposed that Rukka was sent through constable Dhameshwar. However, PW-6 Dharam Singh has deposed that Rukka was received by him through Constable Parma Nand. It was minor contradiction, which is bound to happen with the passage of time.

16. Consequently, in view of analysis and discussion made hereinabove, the prosecution has proved its case against the accused to the hilt.

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

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

Joga Singh ....Appellant

Versus

State of Himachal Pradesh ......Respondent.

Cr. Appeal No. 3 of 2013
Reserved on : 23.05.2016
Decided on: 7th July, 2016

N.D.P.S. Ac, 1985- Section 20- Accused was found walking ahead of the police party- he was signaled to stop but he tried to run away- he was apprehended and his search was conducted after giving option under Section 50 to him- 1.3 kg charas was found tied to his legs with cello tape – accused was tried and convicted by the trial Court- aggrieved from the order, present appeal has been preferred- held, that drivers of the vehicles had not stopped their vehicles despite the signal of the police- therefore, non-association of independent witness will not be material in the present case- testimonies of police officials inspire confidence- police officials supported the prosecution version regarding the recovery and weighing- minor contradictions are bound to come due to fading of the memory of the witnesses- prosecution version was proved beyond reasonable doubt- link evidence is complete- seals were intact on the parcel –appeal dismissed- directions issued to the courts to put their seals after opening case property in the court. (Para-10 to 26)

Cases referred:

Girja Prasad v. State of M.P., (2007) 7 SCC 625
Makhan Singh v. State of Haryana, (2015) 12 SCC 247
Dalel Singh V. State of Haryana (2010) 1 SCC 149

State of Punjab V. Lakhvinder Singh and another (2010) 4 SCC 402
Noor Aga Versus State of Punjab, (2008) 16 SCC 417
Bal Raj Singh v. State of HP, Latest HLJ 2014(HP) 1120
Tarun Sharma v. State of HP, Latest HLJ 2015(HP) 519
Rajinder Singh and another v. State of Himachal Pradesh, Latest HLJ 2015(HP) 1532

For the appellant: Mr. N.K. Thakur, Senior Advocate with Mr. Ramesh Sharma, Advocate.
For the respondent: Mr. D.S. Nainta and Mr. Virender Verma, Addl. Advocates General.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge

Accused Joga Singh, in a case registered under Section 20-61-85 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the 'Act' in short) vide FIR No. 11/2012 in Police Station, State CID, Bharari (Shimla) aggrieved by his conviction and sentence by learned Sessions Judge, Shimla vide judgment dated 29.10.2012, is in appeal before this Court.

2. The complaint is that learned trial Court has recorded the findings of conviction against the accused on surmises and conjectures. The contraband allegedly charas, if was tied by him with transparent tape on his both legs, it was necessarily required for the Investigating Officer to have conducted his search either in presence of a Gazetted officer or Magistrate. He never opted for being searched by the police. The consent memo Ext. PW-1/B is stated to be false. There is no compliance of the provisions contained under Section 50 of the Act. There being no evidence as to how much was the quantity of charas tied by him in his each leg, no findings of conviction could have been recorded. The search was conducted at 3.30 p.m. in broad day light and that too on a national highway, therefore, non-joining of independent witnesses has rendered the entire prosecution story highly improbable. The material contradictions in the statements of the official witnesses have been erroneously ignored and brushed aside. The judgment has, therefore, been sought to be quashed and set aside.

3. In a nut-shell, the prosecution case as disclosed from the record shortly stated is that PW-6 Sub Inspector Krishan Chand was posted as Investigating Officer in State CID Police Station, Bharari, Shimla in the year 2012. On 16.05.2012, around 11.30 p.m. he along with Head Constable Pradeep Kumar (PW-1) and Constable Joginder Singh (PW-2), proceeded towards Tara Devi and Shoghi side for patrolling and in connection with detection of crimes. Rapat Ext. PW-1/A to this effect was entered in the rojnamcha. Around 3.30 p.m. when the police party reached at a place one kilometer ahead of bifurcation of road to P.W.D rest house Tara Devi, one person walking ahead of them was spotted. PW-6 asked him to stop. On inquiry, the said person has disclosed his name Joga Singh. Also that he was going on foot from Tara Devi to Shoghi Side. On asking as to why he was going to Shoghi walking on foot and that too at an isolated place, he failed to answer satisfactorily and rather became nervous. He tried to flee away from the spot, however, apprehended by the police. On further inquiry, he disclosed his parentage and also the place of his residence at Patiala in Punjab. PW-6 suspected that the accused is in possession of some narcotic substance or drug. The efforts were made to try independent witnesses, however, the place being isolated, no person could be associated as independent witness. PW-6 even tried to stop few vehicles, but of no avail because the persons on wheel of such vehicles did not stop the same. Therefore, the Investigating Officer has associated Head Constable Pradeep Kumar (PW-1) and HHG Narinder Kumar (PW-2) as witnesses and proceeded further in the matter. The accused was informed orally as well as in writing about his right of being searched either in presence of a Gazetted officer or a Magistrate. The memo Ext. PW-1/B was prepared in this regard. The accused, however, agreed for his search by the police itself. Therefore, after obtaining the consent of the accused, PW-6 offered his own search to the accused

first vide memo Ext. PW-1/C. Nothing incriminating was found during the search of PW-6 conducted by the accused. Thereafter, the personal search of the accused was conducted. He was found to have wrapped some substance brown in colour with plastic tape on his both legs below knee level. The Investigating Officer got the plastic tape cut and noticed that two transparent plastic poly bags containing black coloured substance in the shape of balls and sticks were tied with both legs. On checking and smelling the same and on his personal experience, the Investigating Officer found the same to be charas. When weighed with electronic scale, the Investigating Officer having with him, it was found to be 1.300grams. The recovered charas along with plastic bag and tape was packed in a parcel of cloth and it was sealed with 10 seals of impression 'K'. Samples of seal Ext. PW-1/D were drawn and the seal after its use handed over to Head Constable Pradeep Kumar. The recovered charas was taken into possession vide memo Ext. PW-1/E. All the documents were prepared in the presence of witnesses and also the accused, which were also signed by them. The Investigating Officer thereafter filled in the NCB forms Ext. PW-4/D in triplicate. He prepared the rukka Ext. PW-6/A and it was forwarded through Constable Joginder Singh along with parcels containing charas, seizure memo, NCB forms and sample of seal to Police Station State CID Bharari for registration of a case. On the basis of rukka, FIR No. 11/12, Ext. PW-4/A was registered by PW-4 Head Constable Parkash, the then MHC, Police Station, State CID, Bharari. Spot map Ext. PW-6/B was prepared. Since the accused was found to be in possession of charas weighing 1.300grams, therefore, he was arrested after the grounds of arrest disclosed to him vide memo Ext. PW-6/C. The statements of witnesses were recorded. Memo Ext. PW-3/A qua the articles recovered during the personal search of the accused was prepared. Special report Ext. PW-1/F was prepared and it was sent to Deputy Superintendent of Police, Crime Bharari, Shimla. The certificate CIPA (Common Integrated Police Application) was also prepared. The case property was re-sealed by PW-5 Inspector Tenzin Shasni, the then Station House Officer with six seals of impression 'R'. The sample of seal Ext. PW-5/A was separately drawn on a piece of cloth. PW-5 has also filled in relevant columns of NCB forms vide memo Ext. PW-4/D. He thereafter deposited the case property with the MHC in the Malkhana. PW-4 received the parcels containing recovered charas duly sealed along with NCB forms in triplicate, seizure memo, re-sealing certificate and retained the same in Malkhana. Entries Ext. PW-4/B were made in the Malkhana register. On 17.05.2012, PW-4 has handed over the parcels containing the recovered charas, sample of seals 'K' and 'R', NCB forms in triplicate, copy of seizure memo and reseal certificate and copy of FIR vide RC No. 39/12 Ext. PW-4/C to Constable Joginder Singh for being deposited in the Forensic Science Laboratory. The said Constable has deposited the case property in Forensic Science Laboratory and produced the receipt on it before PW-4.

4. On receipt of the chemical examiner's report Ext. P-X and completion of the investigation of the case, report under Section 173 of the Code of Criminal Procedure was prepared by PW-5 and filed in the Court.

5. Learned trial Judge on appreciation of the investigation conducted by the police and the documents annexed to the report filed under Section 173 of the Code of Criminal Procedure has prima-facie found the involvement of the accused in the commission of the offence punishable under Section 20-61-85 of the N.D.P.S. Act. Therefore, charge against him was framed accordingly. He, however, pleaded not guilty to the charge, therefore, the prosecution was called upon to produce the evidence in order to sustain the charge so framed against the accused.

6. The prosecution, in turn, has examined six witnesses in all. The material prosecution witnesses are PW-1 HC Pradeep Kumar, PW-2 HHG Narinder Kumar, PW-3 Constable Joginder Singh and PW-6 Sub-Inspector Krishan Chand, the Investigating Officer, who has apprehended the accused, conducted his search and recovered charas weighing 1.300grams from his possession. The remaining witnesses PW-4 and PW-5 are formal being the Moharer Head Constable and the Station House Officer, Police Station, State CID Bharari and the evidence as has come on record by way of their testimony can be considered and taken as link evidence.

7. Learned trial Court on appreciation of the evidence has concluded that in view of the cogent and reliable evidence produced by the prosecution during the course of trial, the charas weighing 1.300 Grams has been recovered from the physical and conscious possession of the accused and as such, he was convicted and sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.1,00,000/-. It is this judgment, which is under challenge in the present appeal.

8. Mr. Ramesh Sharma, learned counsel representing the convict has argued with all vehemence that learned trial Court has erred legally and factually in placing reliance on the testimony of official witnesses. According to him, there is no consistency in the statements made by these witnesses and they rather have contradicted each other on material aspects. The option of the accused qua his search either before the Gazetted Officer or a Magistrate is not at all obtained in accordance with law and as such, the entire proceedings in the trial have vitiated. The alleged place of recovery, a national highway, the independent witnesses could have easily been associated. Therefore, it is submitted that the non-joining of independent witnesses has rendered the entire prosecution story highly doubtful. Mr. Sharma has, therefore, urged that the prosecution has failed to prove its case against the accused beyond all reasonable doubt and the findings of conviction and sentence recorded against the appellant-convict have, therefore, been sought to be quashed and set aside.

9. On the other hand, Mr. D.S. Nainta, learned Additional Advocate General while repelling the submissions made on behalf of learned counsel for the appellant-convict, has urged that the official witnesses are as much good as any independent person and as such, the Court below is stated to have rightly appreciated the evidence as has come on record by way of their testimony. It is also urged that the statements made by the prosecution witnesses are consistent and support the prosecution case on all material aspects. The appeal, therefore, has been sought to be dismissed.

10. We have analyzed the rival submissions and also gone through the evidence available on record. The present is a case registered under Section 20 of the N.D. P.S. Act. The offence under the section ibid is not only heinous but grievous also because the offender not commits an offence of this nature against any individual but the public at large. The illicit trafficking of narcotic drugs and other substances has played havoc in the society as a whole, particularly in our young generation, which got attracted to the drugs and other narcotic substances easily and then become addict thereof. It is for this reason, provision of stringent punishment has been made against an offender, if after holding full trial is found guilty of the commission of offence. At the same time, there are few safeguards also provided under the Act, which save an innocent person from conviction if the investigating agency is found to be lacking in taking care thereof while conducting the search and seizure and the investigation of a case registered under the Act.

11. The sine qua none to infer the commission of an offence under the Act is the recovery of contraband from the actual and physical possession of the accused. The prosecution has successfully pleaded and proved that the police party headed by PW-6 Sub Inspector Krishan Chand has left the Police Station at 11.30 p.m towards Tara Devi and Shoghi side for patrolling and detection of crimes. The police party as per the evidence having come on record by way of the testimony of PWs 1, 3 and 6 first reached at Long Wood from Bharari. They boarded a bus from Long Wood up to Victory tunnel. They boarded another bus from Victory tunnel and reached at Tara Devi around 1.30 p.m. The police party remained at Tara Devi up to 3.00 p.m when collected intelligence (certain secret information) there. Then they started walking on foot on the national highway. When they reached at point 'D' in the spot map Ext. PW-6/B near the bifurcation of road to P.W.D Rest House Tara Devi, the accused was spotted and asked to stop there. All the prosecution witnesses are categoric and specific while deposing so in the witness box.

12. True it is that the place of recovery is a national highway. There is again no quarrel that it is busy road and connecting Shimla with Chandigarh. The time was 3.30 p.m i.e. day time, however, the prosecution case that PW-4 has signaled many vehicles to stop, but of no avail, found corroboration from the testimony of PWs 1, 2, 3 and 6. That place is also isolated, as the market and residential houses are either at Tara Devi or ahead of that place i.e. Shoghi. Since the persons on wheel of the vehicles being driven to and fro did not stop their vehicles, irrespective of signaled by the Investigating Officer and the place an isolated one, it cannot be said that the Investigating Officer has avoided intentionally and deliberately to associate the independent witnesses. The Investigating Officer and the remaining three witnesses of spot have corroborated this aspect of the prosecution case in toto. Meaning thereby that there is a plausible explanation qua non-joining of independent witnesses at the time of conducting search and seizure.

13. The Apex Court has held in ***Girja Prasad*** v. ***State of M.P., (2007) 7 SCC 625*** that the conviction can be based on the testimony of official witnesses, however, if otherwise inspires confidence.

14. This legal position has been reiterated by the Apex Court in ***Makhan Singh*** v***. State of Haryana, (2015) 12 SCC 247***. The relevant extract of reads as follows:

> "……In peculiar circumstances of the case, it may not be possible to find out independent witnesses at all places at all times. Independent witnesses who live in the same village or nearby villages of the accused are at times afraid to come and depose in favour of the prosecution. Though it is well settled that a conviction can be based solely on the testimony of official witnesses, condition precedent is that the evidence of such official witnesses must inspire confidence. In the present case, it is not as if independent witnesses were not available….."

15. Now, if coming to the testimony of the prosecution witnesses PWs 1, 3 and 6, they all while in the witness-box have stated in one voice that they started from Police Station, Bharari at 11.30 a.m., boarded a bus from Long Wood to Victory tunnel and from Victory tunnel to Tara Devi. They reached at Tara Devi at 1.30 p.m. They remained there up to 3.00 p.m. It is, thereafter, they started walking on national highway towards Shoghi side. Accused was nabbed at a place where the road bifurcates to P.W.D Rest House, Tara Devi i.e. one kilometer away from Tara Devi bazaar. Independent witnesses were not present, therefore, the Investigating Officer PW-6 has associated PW-1 Head Constable Pradeep Kumar and HHG Narinder Kumar, PW-2 as independent witnesses and conducted the search of the accused in their presence after obtaining his consent. They all have stated that the charas was wrapped by the accused with tape on his both legs below knee level. They have also supported the prosecution case qua the weighment of the recovered charas and sealing process. It is also established from their testimony that after the recovery of charas, NCB forms Ext. Ext. PW-4/D was filled-in, in triplicate. Thereafter, rukka Ext. PW-6/A was prepared and handed over to Constable Joginder Singh, PW-3. The parcels containing case property were also given to PW-3 for being handed over to the Station House Officer in the Police Station. The registration of FIR Ext. PW-4/A on the basis of rukka Ext. PW-6/A is also satisfactorily proved on record.

16. The appreciation of the statements of PWs 1, 3 and 6 leads to the only conclusion that they are specific and categoric on all material aspects, such as time when they left the Police Station. Time when they reached at Tara Devi, the place where the accused was apprehended and the recovery of charas weighing 1.300 kilograms from his possession. Learned counsel though has argued that the evidence as has come on record by way of their testimonies is contradictory in nature, however, merely for rejection because he failed to point out any inconsistency or contradictions in the statements of the witnesses. The Hon'ble Apex Court in ***Dalel Singh*** V. ***State of Haryana (2010) 1 SCC 149*** and ***State of Punjab*** V. ***Lakhvinder Singh and another (2010) 4 SCC 402*** has held that the minor discrepancies in the statements of witnesses are bound to occur due to the fading of the memories of the witnesses. The same should not be

viewed seriously to doubt the prosecution case, if the same otherwise is found to have proved beyond all reasonable doubt with the help of cogent and reliable evidence.

17. The accused belongs to Patiala. In order to explain his presence in Shimla, no doubt, it is his case that he was here on pleasure trip, as a tourist, however, it cannot be believed so for the reason that during his personal search conducted by the Investigating Officer vide memo Ext. PW-3/A, currency notes worth of `13/- were found in his purse. He, therefore, was not in Shimla as a tourist and rather doing business i.e. to carry charas for someone else may be in the capacity of a carrier. Therefore, the recovery of charas from his physical and conscious possession stands satisfactorily established on record. In this view of the matter, the burden to prove otherwise that he is innocent and has not committed any offence was shifted on the accused. In view of the findings hereinabove, he, however, has failed to discharge the onus upon him and as such, the presumptions envisaged under Sections 35 and 54 of the Act can be raised against him.

18. In similar circumstances, the Apex Court in ***Noor Aga*** *Versus* ***State of Punjab, (2008) 16 SCC 417*** has held as under:

> *"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."*

19. Be it stated that as per the ratio of the judgment *supra* it is the prosecution which has first to prove the foundational facts i.e. proof qua the recovery of the contraband from the exclusive and conscious possession of the accused beyond all reasonable doubt to attract the rigours of Section 35 of the Act and it is only thereafter the burden to prove otherwise that the contraband has not been recovered from his exclusive and conscious possession would shift upon the accused. Also that, the standard of proof to discharge the onus upon the accused to prove his innocence is not so high as compared to that upon the prosecution and the accused can discharge such onus upon him merely on preponderance of probability. However, we are of the firm view that cogent and consistent eye witness count given by PWs 1 and 3 and supported by the testimony of the I.O. PW6 leaves no manner of doubt that the *'charas'* has been recovered

from the physical and conscious possession of the accused. As noticed supra, he however, failed to discharge the onus upon him even by preponderance of probability also. The explanation qua his presence at the place of recovery that he had come to Shimla on a pleasure trip as a tourist is neither plausible nor reasonable and stands discarded as per findings recorded in para supra. In our considered opinion, he had come to carry charas may be for someone else. The fact, however, remains that the charas has been recovered from his physical and conscious possession.

20. Much has been said about the compliance of provisions contained under Section 50 of the N.D. P.S Act. The evidence, as discussed hereinabove, makes it crystal clear that the option of being searched in the presence of a Gazetted officer or Magistrate was sought from the accused vide memo Ext. PW-1/B. He, however, opted for being searched by the police itself. It lies ill in the mouth of the accused that his consent was not obtained for the reason that this part of the prosecution case finds full corroboration from the testimonies of PWs 1 and 3 and that of PW-6, the Investigating Officer. Therefore, the convict cannot be said to have any grievance qua this aspect of the matter

21. True it is that at the time of search and seizure of contraband or narcotic drugs, independent witnesses are required to be associated, however, in the case in hand, as already discussed hereinabove, the Investigating Officer, PW-6 has made efforts to associate someone as independent witness, but failed to do so, as the drivers did not stop their vehicles being plied on the road and the place was isolated. No doubt, an effort has been made to show that P.W.D workshop was situated nearby, as is apparent from the trend of cross-examination of the prosecution witnesses conducted by learned defence counsel, however, without any result as except for bald suggestion, nothing has come on record as to at what distance such workshop was situated. Therefore, the ratio of the judgments of Co-ordinate Benches of this Court in ***Bal Raj Singh*** v. ***State of HP, Latest HLJ 2014(HP) 1120*** and ***Tarun Sharma*** v. ***State of HP, Latest HLJ 2015(HP) 519*** is not attracted in the given facts and circumstances of the case.

22. We, however, draw support qua this aspect of the matter from the judgment of the Apex Court in ***Makhan Singh's case (supra)***, in which it has been held that it is not always possible to associate someone as independent witness to witness the search and seizure and at times even the villagers do not agree to assist the police in the investigation of a case. Also that, if the witnesses examined by the prosecution are consistent that the efforts were made to join independent persons as witnesses, the same is sufficient to discharge the onus upon the prosecution.

23. Now if coming to another aspect of the matter, highlighted by Mr. Sharma, learned defence counsel during the course of arguments that failure of the prosecution to produce the evidence as to whom the case property was entrusted for being produced in the Court and under what condition the same was re-deposited in the Malkhana, has vitiated the trial. We are afraid that such a plea can be raised in defence by the accused for the reason that from the perusal of statement of PW-1 Head Constable Pradeep Kumar it is apparent that the parcel containing case property was produced by learned Public Prosecutor in the Court. The accused and learned defence counsel were also present there. On checking, the seals were found intact. It is thereafter the permission as sought by learned Public Prosecutor to open the same was granted by the trial Court. The defence has not raised any objection qua the manner in which the parcel containing the recovered charas was produced in the Court. Therefore, it lies ill in the mouth of the convict to claim that for want of rapat in rojnamcha or evidence qua production of the case property in the Court, the trial has vitiated. The ratio of the judgment of a Co-ordinate Bench of this Court in ***Rajinder Singh and another*** v. ***State of Himachal Pradesh, Latest HLJ 2015(HP) 1532*** is, therefore, distinguishable on facts.

24. True it is that the trial Court was required to have ordered to re-seal the parcel(s) opened with its permission qua re-sealing the same with the seal of the Court and thereafter to hand over the same to learned Public Prosecutor for being taken to Malkhana of the concerned Police Station in order to ensure that the same is re-deposited in safe condition. ***Though, it appears to us that the trial Court may have re-sealed the parcel containing the case***

property with its own seal, however, omitted to pass an order to this effect in the zimini order of that day. It is not only in this case but also in other cases registered under the Act, our experience shows that the Subordinate Courts have stopped to pass an order qua re-sealing of the parcels and case property opened during the course of recording prosecution evidence with the permission of the Court. Such an approach is not at all appreciated as the same is not in the interest of fair trial. The trial Courts are required to invariably pass an order qua re-sealing of the parcels containing case property in the Court with its own seal and before handing over the same to learned Public Prosecutor or to any other officer/official authorized to receive the same and ensure that the same are properly re-sealed and also to record its satisfaction in the zimini order. We, therefore, direct Registrar (Vigilance) on the establishment of the Registry of this Court to issue instructions in the light of the observations hereinabove to all the Subordinate Courts in the State for its strict compliance with a caution that any deviation or violation thereof shall be viewed seriously including initiation of proceedings against the erring Judicial Officers in accordance with law.

25. The link evidence is also complete because parcel containing the case property was sealed by the Investigating Officer with impression seal 'K' and the seal was handed over to PW-1, who had also brought the same to the Court on the day of his examination. Parcel along with NCB forms and seizure memo were handed over by PW-3 Constable Joginder Singh to PW-5 Station House Officer on that day at 5.30 p.m. PW-5 has re-sealed the same with six seals of impression 'R' and drawn the sample of seal Ext. PW-5/A over a piece of cloth. It is thereafter, he handed over the case property to PW-4 MHC Parkash who had entered the same in Malkhana register vide entries Ext. PW-4/B and retained the same in safe custody. PW-4 has forwarded the case property to Forensic Science Laboratory, Junga vide RC Ext. PW-4/C through Constable Joginder Singh, PW-3. The said witness has stated that the case property was deposited by him in the Laboratory in safe custody. The prepration of special report Ext. PW-1/F also stands proved in this case, which as per the version of PW-1 was handed over to Shri Vijay Kumar, Deputy Superintendent of Police on 17.05.2012 by the Investigating Officer, PW-6 himself. The report of chemical examiner Ext. P-X makes it crystal clear that the parcel containing the case property duly sealed with impression 'K' and 'R' was received in good condition along with NCB forms and the sample of seals. The same was not tampered with. On analyzing the recovered contraband sent for analysis was found to be the extract of cannabis, hence sample of charas.

26. In view of oral as well as documentary evidence discussed hereinabove, we are satisfied that learned trial Court has not committed any illegality or irregularity while arriving at a conclusion that the prosecution has proved its case against the accused beyond all reasonable doubt. The accused has, therefore, been rightly convicted and sentenced. The impugned judgment cannot be said to be legally and factually unsustainable. The same as such is affirmed.

27. For all the reasons hereinabove, this appeal fails and the same is accordingly dismissed.

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

Shri Johli (since deceased) through his legal representative Shri Khub Raj…..Appellant/Plaintiff.

Versus

Tullu ….Respondent/defendant.

RSA No. 549 of 2006
Decided on : 7th July, 2016.

Specific Relief Act, 1963- Section 39- Plaintiff filed a civil suit pleading that he is owner in possession of the suit land- defendant had constructed a house over the portion of abadi deh-

defendant proposed to raise additional structure over abadi deh, which was likely to erode the suit land– suit was opposed by the defendant- trial Court granted the decree of mandatory injunction- an appeal was preferred, which was allowed - held, in second appeal that plaintiff had not sought the decree of mandatory injunction, which was granted by the trial Court- demarcation report does not show any encroachment on the land of the plaintiff- it was not permissible to grant the relief without any prayer, without amending the pleadings- appellate Court had rightly reversed the decree- appeal dismissed. (Para-8 to 15)

Cases referred:

Pasupuleti Venkateswarlu versus The Motor & General TGRaders (1975)1 SCC 770
OM Prakash Gupta versus Ranbir B. Goyal (2002)2 SCC 256

For the Appellant: Mr. Rajesh Mandhotra and Ms. Kanta Thakur, Advocates.
For the Respondent: Mr. R.K.Sharma, Senior Advocate with Ms. Anita Parmar, Advocate.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge(Oral).

The instant Regular Second Appeal stands directed by the plaintiff/appellant against the impugned rendition of the learned Additional District Judge, Mandi camp at Karsog whereby he accepted the appeal of the defendant/respondent herein and also reversed the decree of mandatory injunction rendered by the learned Civil Judge (Senior Division), Karsog), District Mandi, H.P., whereby the latter Court directed the defendant to erect a boundary wall adjoining the land of the plaintiff. The plaintiff/appellant herein stands aggrieved by the judgment and decree of the learned Additional District Judge, Mandi, camp at Karsog. His standing aggrieved, he has therefrom preferred the instant appeal before this Court for seeking from this Court an order reversing the findings recorded therein.

2. Briefly stated the facts of the case are that the plaintiff is owner in possession of land comprising Khata Khatauni No.111 min/175, khasra No.21, measuring 0-3-0 bighas situated in Mohal Nagroan, Tehsil Karsog, District Mandi, H.P. (hereinafter referred to as the "suit land"). The house of the parties and other persons are situtated in the adjoining abadideh land comprising Khata/Khatauni No.135 min/220 min, Khasra No.19, measuring 0-9-8 bgihas situated in Mohal Nagroan/198. The aforesaid abadideh land bearing khasra No.19 is about 7ft. below the suit land of the plaintiff bearing khasra No.21. The defendant had constructed his house over a portion of Abadideh land bearing Khasra No.19. While raising construction, the defendant encroached upon 3 ft., area out of the suit land. The defendant had proposed to raise additional construction over abadideh land as well as on the suit land of the plaintiff. The proposed construction of the defendant was likely to erode the suit land of the plaintiff by erosion and thus, danger of land sliding of boundary wall of the plaintiff land was caused. Hence the suit.

3. The defendant contested the suit and filed the written statement, wherein preliminary objections have been raised qua resjudicata, estopple and maintainability. On merits, it was alleged that the defendant has not encroached upon the suit land. The defendant had constructed his new house on his own land bearing khasra No.19 about eight years back after dismantling the old house. The construction of the house was complete in the year 2003. The plaintiff had previously filed a similar civil suit against the defendant which was dismissed on 19.8.2003. In nutshell, the defendant refuted the entire case of the plaintiff and he prayed for dismissal of the suit.

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

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

1. Whether the plaintiff is entitled for decree of permanent prohibitory injunction, as prayed? OPP.
2. Whether the suit is barred by resjudicata? OPD
3. Whether the plaintiff is estopped by his own act, conduct and deeds from filing the suit? OPD
4. Whether the suit is not maintainable? OPD
5. Whether the defendant has raised the construction on their own land and plaintiff has no cause of action? OPD
6. Relief.

6. On an appraisal of the evidence, adduced before the learned trial Court, the learned trial Court rendered a decree for mandatory injunction upon the defendant/respondent. In an appeal, preferred therefrom by the defendant/respondent herein, the learned first Appellate Court allowed the appeal.

7. Now the plaintiff/appellant has instituted the instant Regular Second Appeal before this Court assailing the findings recorded in its impugned judgment and decree by the learned first Appellate Court. When the appeal came up for admission on 24.05.2007, this Court, admitted the appeal against the judgment and decree, rendered by the learned First Appellate Court as instituted by the plaintiff/appellant, on the hereinafter extracted substantial questions of law:-

a) Whether there has been misreading of evidence by the learned first appellate court particularly in regard to documents Ex.PW5/A and Ex.PW5/D?
b) Whether the learned first appellate court has misconstrued the pleadings of the parties and granted the relief wrongly?

Substantial questions of Law No.1and 2:

8. The plaintiff had instituted a suit against the defendant praying therein for a relief of permanent prohibitory injunction besides had canvassed therein the relief of mandatory injunction. In the relevant paragraph No.3 of the plaint, the plaintiff has averred of the defendant while holding construction upon land owned and possessed by him, his encroaching upon a portion of land owned and possessed by the plaintiff comprised in khasra No.21. He also averred therein of in the defendant succeeding to erect pillars over khasra No.21, his land would suffer erosion besides his boundary wall would collapse with a sequeling effect of his land suffering erosion. Apparently, the plaintiff had not claimed in his suit qua a decree of mandatory injunction being rendered in his favour, decree whereof stood accorded by the learned trial Court. So far as the factum of encroachment at the instance of the defendant upon land comprised in khasra No.21 is concerned, land borne whereon uncontrovertedly stands owned and possessed by the plaintiff, the demarcation report comprised in Ex.PW5/A accompanied by tatima, Ex.PW5/B, holds no apposite reflections therein in portrayal of the defendant while holding construction upon land exclusively owned and possessed by him, his proceeding to encroach upon land comprised in khasra No.21, land borne whereon uncontrovertedly stands exclusively owned and possessed by the plaintiff. In sequel, with the defendant not subjecting to construction any portion of land borne on khasra No.21, land borne whereon stands exclusively owned and possessed by the plaintiff, the prayer made by the plaintiff qua the defendant being restrained from erecting pillars thereon was not amenable to its standing accorded.

Consequently, the concurrently recorded renditions of both the learned Courts below of the plaintiff standing not entitled for any relief of permanent prohibitory injunction for restraining the defendant to hold construction upon his land given his purportedly subjecting to construction a portion of the land owned and possessed by the plaintiff, does not merit any interference.

9. The learned counsel appearing for the plaintiff contended with vigour of the relief of mandatory injunction as stood accorded in favour of the plaintiff by the learned trial Court, inasmuch as its enjoning the defendant to raise a boundary wall in the manner as reflected in the operative portion of the judgment and decree rendered by the learned Civil Judge (Senior Division), Karsog was not amenable to its standing reversed by the learned first Appellate Court. He contends of the rendition of the learned First Appellate Court while reversing the judgment and decree of the learned Civil Judge (Senior Division), Karsog whereby it had afforded to him a relief of mandatory injunction, inasmuch as of the defendant standing mandated to erect a retaining wall to the extent of 26 feet in length and 8 feet in height to protect the land of the plaintiff, stands not anvilled upon a proper appreciation of the manifestations occurring in Ex.PW5/A, manifestations whereof display of the defendant while subjecting to construction land exclusively owned and possessed by him, his excavating a trench holding a depth of 8 feet also its embodying the factum of a boundary wall holding a depth of eight feet existing on the borders of the contiguously located lands of the parties at lis facing the threat of its standing dismantled. He contends of the aforesaid reflections when palpably unveil the factum of hence imminent endangerment ensuing to the land of the plaintiff located above the land of the defendant, the learned trial Court while revering the apposite manifestations occurring therein had tenably proceeded to afford a relief of mandatory injunction in favour of the plaintiff. He also contends of despite the plaintiff not in conformity with the decree of mandatory injunction accorded in his favour by the learned trial Court making a prayer qua it in his plaint yet with the apposite unfoldments occurring in Ex.PW5/A of imminent endangerments ensuing to the land of the plaintiff arising from construction activity carried by the defendant on the land owned and possessed by him. for obviation whereof besides for protecting the land of the plaintiff occurring above the land of the defendant, the factum aforesaid when remained non existent at the time of the institution of the suit rather came into existence during the pendency of the suit, necessarily it was tenable for the learned trial Court to thereupon despite the apposite relief of mandatory injunction not standing asked for by the plaintiff in the plaint to mould the relief to bring it in concurrence with the manifestations in Ex.PW5/A. The learned counsel appearing the plaintiff places reliance upon a decision of the Hon'ble Apex Court reported in ***Pasupuleti Venkateswarlu versus The Motor & General TGRaders (1975)1 SCC 770,*** the relevant paragraph No.4 whereof stands extracted hereinafter:-

> "4. We feel the submissions devoid of substance. First about the jurisdiction and propriety vis-a-vis circumstances which come into being subsequent to the commencement of the proceedings. It is basic to our processual jurisprudence that the right to relief must be judged to exist as on the date a suitor institutes the legal proceeding. Equally clear is the principle that procedure is the handmaid and not the mistress of the judicial process. If a fact, arising after the lis has come to court and has a fundamental impact on the right to relief or the manner of moulding it, is brought diligently to the notice of the tribunal, it cannot blink at it or be blind to events which stultify or render inept the decretal remedy. Equity justifies bending the rules of procedure, where no specific provision or fair play is violated, with a view to promote substantial justice, subject, of course, to the absence of other disentitling factors or just circumstances. Nor can we contemplate any limitation on this power to take note of updated facts to confine it to the trial Court. If the litigation pends, the power exists, absent other special circumstances repelling resort to that course in law or justice. Rulings on this point are legion, even as situations, for applications of this equitable rule are myriad. We affirm the proposition that for making the right or remedy claimed by the party just and meaningful as also legally and factually in accord with the

current realities, the court can, and in many cases must, take cautious cognisance of events and developments subsequent to the institution of the proceeding provided the rules of fairness to both sides are scrupulously obeyed. On both occasions the High Court, in revision, correctly took this view. The later recovery of another accommodation by the landlord, during the pendency of the case has as the High Court twice pointed out, a material bearing on the right to evict, in view of the inhibition written into S. 10 (3) (iii) itself. We are not disposed to disturb this approach in law or finding of fact." (pp.772)

10. The learned counsel appearing for the plaintiff also places reliance upon another decision of the Hon'ble Apex Court reported in ***OM Prakash Gupta versus Ranbir B. Goyal (2002)2 SCC 256,*** the relevant paragraphs No.11 and 12 whereof stand extracted hereinafter:-

"11. The ordinary rule of civil law is that the rights of the parties stand crystallised on the date of the institution of the suit and, therefore, the decree in a suit should accord with the rights of the parties as they stood at the commencement of the lis. However, the Court has power to take a note of subsequent events and mould the relief accordingly subject to the following conditions being satisfied : (i) that the relief as claimed originally has, by reason of subsequent events, become inappropriate or cannot be granted; (ii) that taking note of such subsequent event or changed circumstances would shorten litigation and enable complete justice being done to the parties; (iii) that such subsequent event is brought to the notice of the Court promptly and in accordance with the rules of procedural law so that the opposite party is not taken by surprise. In Pasupuleti Venkateswarlu v. The Motor and General Traders, AIR 1975 SC 1409, this Court held that a fact arising after the lis, coming to the notice of the Court and having a fundamental impact on the right to relief or the manner of moulding it and brought diligently to the notice of the Court cannot be blinked at. The Court may in such cases bend the rules of procedure if no specific provision of law or rule of fairplay is violated for it would promote substantial justice provided that there is absence of other disentitling factors or just circumstances. The Court speaking through Krishna Iyer, J. affirmed the proposition that Court can, so long as the litigation pends, take note of updated facts to promote substantial justice. However, the Court cautioned : (i) the event should be one as would stultify or render inept the decretal remedy, (ii) rules of procedure may be bent if no specific provision or fair play is violated and there is no other special circumstance repelling resort to that course in law or justice, (iii) such cognizance of subsequent events and developments should be cautions, and (iv) the rules of fairness to both sides should be scrupulously obeyed.

12. Such subsequent event may be one purely of law or founded on facts. In the former case, the Court may take judicial notice of the event and before acting thereon put the parties on notice of how the change in law is going to affect the rights and obligations of the parties and modify or mould the course of litigation or the relief so as to bring it in conformity with the law. In the latter case, the party relying on the subsequent event, which consists of facts not beyond pale of controversy either as to their existence or in their impact, is expected to have resort to amendment of pleadings under Order 6, Rule 17 of the CPC. Such subsequent event the Court may permit being introduced into the pleadings by way of amendment as it would be necessary to do so for the purpose of determining real questions in controversy between the parties. In Messrs. Trojan and Co. v. R.M.N.N. Nagappa Chettiar, AIR 1953 SC 235, this Court has held that the decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found; without the amendment of the pleadings the Court would not be entitled to modify or alter the relief. In Sri Mahant Govind Rao v. Sita Ram Kesho and others, (1898) 25 Indian Appeals 195

(PC), their Lordships observed that, as a rule, relief not founded on the pleadings should not be granted." (pp.262-263)

11. However, both the decisions as relied upon by the learned counsel appearing for the plaintiff to bring this Court in agreement with his submission of despite the apposite relief of mandatory injunction which stood afforded to him by the learned trial Court, not standing asked for by the plaintiff in his plaint, yet the defendant not subjecting PW-5 to cross-examination qua the relevant embodiments occurring in Ex.PW5/A of imminent endangerment ensuing to the land of the plaintiff spurring from the act of the defendant excavating his land occurring beneath the land of the plaintiff upto a depth of eight feet, excavation whereof would imminently erode the land of the plaintiff, wherefrom the learned counsel for the plaintiff canvasses of hence the defendant acquiescing to the manifestations in Ex.PW5/A also he thereupon erects a submission of the defendant not standing taken by surprise rather it was apt for the learned trial Court to for obviating endangerment ensuing to the land of the plaintiff to mould relief vis-a-vis the plaintiff in the manner occurring in its pronouncement. However, both the decisions of the Hon'ble Apex Court which stand relied upon by the learned counsel appearing for the plaintiff though expostulate the trite proposition of law of Courts of law holding empowerment to mould relief given the occurrence of events subsequent to the institution of a suit. However, in both the verdicts of the Hon'ble Apex Court, the power of the court to in concurrence with subsequent events mould relief stands mandated therein to be not a plenary power rather it being subjected to imposition thereon of statutory fetters enjoined in the procedural laws. In the verdict of the Hon'ble Apex Court reported in ***Pasupuleti Venkateswarlu's case (supra)*** it has been with specificity pronounced therein of any statutory deterrent factors impeding the Court concerned wherebefore an event subsequent to the institution of the plaint/suit occurs to afford relief in tandem thereof also concomitantly baulk it from moulding relief to bring it in concurrence with supervening events. Also in the judgment of the Hon'ble Apex Court reported in ***Om Prakash Gupta's case (Supra)*** a similar principle stands encapsulated therein of the Court concerned though holding jurisdictional vigour to take notice of supervening events vis-a-vis institution of the suit, especially when the event subsequent to the institution of the suit displays of variance in law occurring subsequent to the institution of the suit whereupon the Court concerned would proceed to mould relief to bring its verdict inconformity with the subsequent occurrence of a change in law vis-a-vis the institution of the plaint uptill the pronouncement of the verdict by the court concerned. Imperatively, hence, even though occurrence of any variation/change in law since the institution of the suit uptill the rendition of a verdict upon the apposite lis by the court concerned is the relevant subsequent event which solitarily is to be borne in mind by the court concerned. Also it is the solitary subsequent event since the institution of a suit uptill the rendition of a verdict thereupon by the Court concerned which is enjoined to be borne in mind by it for its according relief in tandem therewith besides empowers it to mould relief in concurrence therewith. However, when therein it has also been propounded qua occurrence of an event subsequent to the institution of the suit when is not an event which constitutes a change in law rather is an event which has a factual tenor, eruption whereof is enjoined to be incorporated in his plaint by the plaintiff by motioning the court concerned under the apposite provisions of the Code of Civil Procedure for leave standing accorded to him for introducing it in his pleadings, would not render any eruption of a fact other than variation in law, eruption whereof occurs subsequent to the institution of the suit to hold any vigour dehors its standing un-incorporated in the suit by the plaintiff by his resorting before the court concerned to the appropriate statutory procedural mechanism nor would the plaintiff hold any leverage to thereupon canvass of his without asking for leave of the Court to beget an apposite amendment to the plaint his standing entitled to a decree for mandatory injunction nor can the plaintiff contend of the aforesaid apposite principle of the Hon'ble Apex Court as relied upon by him, holding any sinew predominantly when the decree of mandatory injunction not stood prayed for in the plaint nor when he with the leave of the court concerned, concerted to beget an apposite amendment in the plaint to bring the rendition of the learned trial court in conformity therewith, as a corollary any moulding of relief by the court concerned for bringing it in conformity with the subsequent

events is hence a principle of law which does not warrant any conflict with the apposite statutory mechanism embodied in Order 6, Rule 17 of the Code of Civil Procedure nor it can subtract its vigour. Consequently, the verdict of the learned trial Court to proceed to afford to the plaintiff the relief of mandatory injunction even when it stood not prayed for by the plaintiff in his suit merely by its paying reverence to the manifestations in Ex.PW5/A has subtracted the vigour also has denuded the might of the provisions of Order 6, Rule 17 of the Code of Civil Procedure, provisions whereof even in the verdict of the Hon'ble Apex Court rendered in ***Om Prakash Gupta's case (supra)*** stand enjoined to be put in play by the plaintiff for introducing in his plaint any supervening event vis-a-vis the institution of the suit for hence validating the decree in consonance therewith rendered by the Court concerned.

12. The learned counsel appearing for the plaintiff has contended of the apt factual supervening events otherwise, dehors the aforesaid discussion wherefrom the imminent fact emerges to the forefront of the plaintiff not holding any vestige of any right to ask for moulding of relief by the Court concerned in consonance therewith without amending his pleadings for bringing them inconformity with the changed factual scenario manifested in Ex.PW5/A, per se purveying him leverage to yet espouse hereat qua the verdict of the learned Civil Judge (Senior Division), Karsog holding validation, predominantly, with precise reflections occurring in Ex.PW5/A and in Ex.PW5/B qua the excavation activity carried out by the defendant on his land located in contiguity to the land of the plaintiff rendering it amenable to its peeling off besides its facing an imminent threat of erosion. Be that as it may, even otherwise with the manifestations occurring in Ex.PW5/A of imminent endangerment ensuing to the land of the plaintiff which stands located above the land of the defendant, rather with the manifestations occurring therein standing prepared on 19.7.2004, whereas, since then uptill now no motion standing made by the plaintiff before the courts concerned qua the imminent endangerment to his land ensuing from the construction activity held beneath it by the defendant, sequels an inference of the purported apposite imminent threat not assuming any realistic proportion rather hence the grievance, if any, reared by the plaintiff being surmisal. Consequently, it appears of the manifestations occurring in Ex.PW5/A being wholly surmisal also palpably with the authours of Ex.PW5/A not holding the expertise of a geologist , who alone by holding the relevant tests for determining the erosive capacity of the land of the plaintiff, his revelations in his apposite report qua the land of the plaintiff suffering an imminent threat of erosion would conclusively display of the reflections occurring in Ex.PW5/A qua the endangerment ensuing to the land of the plaintiff arising from construction activity held beneath it by the defendant hence garnering vigour. Contrarily when the best evidence of the geologist qua the facet aforesaid stands unadduced by the plaintiff no imputations of credibility can stand fastened to the manifestations occurring in Ex.PW5/A, more so reiteratedly when since 2004 uptill now with the land of the plaintiff not suffering any erosion rather galvanizes an inference of the land of the plaintiff standing not endangered by any construction activity held beneath it by the defendant. Consequently, with the subsequent event aforesaid manifested in Ex.PW5/A while not carrying any tenacity, any reverence thereto by the learned trial Court dehors the aforesaid discussion is wholly inapt.

13. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court are based upon a proper and mature appreciation of the evidence on record. While rendering the apposite findings, the learned first Appellate Court has not excluded germane and apposite material from consideration. Accordingly, both the substantial questions of law are answered in favour of the defendant/respondent and against the plaintiff/appellant.

14. In view of above discussion, the present Regular Second Appeal is dismissed. In sequel, the judgement and decree rendered by the learned Additional District Judge, Mandi camp at Karsog is maintained and affirmed. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Life Insurance Corporation of India & Anr. …. Appellants
Versus
Smt. Shakuntla Sharma & Ors. …. Respondents

RSA No. 474 of 2006
Reserved on: 01.07.2016
Date of decision: 7.07.2016

Limitation Act, 1963- Article 55- Plaintiff filed a civil suit for declaration pleading that he was Development Officer in LIC- defendant No. 3 was appointed as direct agent- according to the plaintiff, defendant no. 3 should have been placed under corporation and could not have been appointed as a direct agent- objection was taken that suit was barred by limitation- suit was dismissed by the trial Court- an appeal was preferred, which was allowed- held, in second appeal that defendant No. 3 was appointed as direct agent on 19.8.1999- suit was filed in March, 1999- plaintiff had issued notice regarding wrongful appointment, which was duly received- defendant no. 3 was appointed as direct agent in contravention of the circular of the Corporation- plaintiff suffered recurring loss by his appointment- in these circumstances, suit was not barred by limitation- appeal dismissed. (Para-23 to 35)

Cases referred:

Dudh Nath Pandey (dead by L.R's.) Vs. Suresh Chandra Bhattasali (dead by L.R's.), AIR 1986 Supreme Court 1509

Krishnapasuba Rao Kundapur Vs. Dattatraya Krishnaji Karani, AIR 1966 Supreme Court 1024

Babu Ram alias Durga Prasad Vs. Indra Pal Singh (Dead) by LRS., (1998) 6 SCC 358

Satya Gupta (Smt.) alias Madhu Gupta Vs. Brijesh Kumar, (1998) 6 Supreme Court Cases 423

For the appellants: Mr. Ashwani K. Sharma, Senior Advocate with Mr. Nishant Verma, Advocate.

For the respondents: Mr. G.D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.:

By way of the present appeal, the appellants have challenged the judgment and decree passed by the Court of learned District Judge, Kangra at Dharamshala, dated 01.09.2006, in Civil Appeal No. 123-N/XIII/05, vide which, learned Appellate Court has allowed the appeal by setting aside the judgment and decree dated 31.12.2004 passed by the Court of learned Civil Judge (Junior Division)-II, Nurpur, in Civil Suit No. 57/99.

2. The present appeal has been admitted on the following substantial questions of law:-

1. Whether the impugned judgment passed by Ld. First Appellate Judge is the result of total misreading and misappreciation of pleadings, materials and evidence adduced on record by the parties and misinterpretation of the stipulations of Circulars Ex. PA and Ex. DW1/B and thus, the resultant findings and conclusions drawn by Ld. First Appellate Judge are wrong and perverse?

> 2. Whether the suit filed by the plaintiff seeking decree of declaration was time barred under Article: 55 of the Schedule of Limitation Act and the same did not deserve to be entertained on this count?

3. Brief facts necessary for the purpose of adjudication of the present appeal are that Rakesh Sharma, hereinafter referred to as the plaintiff, filed a suit for declaration with consequential relief of mandatory injunction for directing defendants No. 1 and 2 to place defendant No. 3 under the organization of the plaintiff and to give to the plaintiff all the incentives of the insurance business done by defendant No. 3 as detailed and described in the head note. The case of the plaintiff was that he was a Development Officer of Life Insurance Corporation of India and was posted with defendant No. 2 at Nurpur. Plaintiff had appointed Smt. Suman Sharma, daughter-in-law of defendant No. 3, resident of Lubh, P.O. Makrahan, Tehsil Jawali, District Kangra, as his agent with Code No. 0152-15B on 31.05.1991 to enhance his insurance business within the area falling in his jurisdiction. According to the plaintiff, there was a circular dated 24.04.1980 (Ext. PA) issued by defendant No. 1 Corporation, Para-3 of which provided as under:-

> "When a near relative of an agent working under a Development Officer is recruited as an agent, then the new agent should also be placed under the same Development Officer. The new agent should not be placed under any other Development Officer nor should he/she be placed direct."

4. The defendant organization appointed defendant No. 3 as direct agent on 15.08.1994 with Code No. 0315-15B by ignoring Para-3 of the Memo dated 24.04.1980. According to the plaintiff, defendant No. 3 was a close relative of Smt. Suman Sharma, therefore, defendant No. 3 should have been placed under the organization of the plaintiff and he could not have been appointed as a direct agent. According to the plaintiff, the cause of action arose on 15.08.1994 when the defendant Corporation illegally and arbitrarily appointed defendant No. 3 as direct agent in the area of jurisdiction of the plaintiff. According to him, the cause of action also accrued in January, 1997 when the plaintiff served notice to the defendant. It is in these circumstances, the plaintiff filed the suit.

5. A joint written statement was filed by the defendants. Amongst other preliminary objections, one of the objections taken by the defendants was that the suit was hopelessly time barred. On merit, the stand of the defendant was that prior to the appointment of Suman Sharma, her sister-in-law, Raj Sharma daughter of defendant No. 3 was also agent of defendant Corporation. It was further the case of the defendant that circular relied upon by the plaintiff was not applicable and in fact defendant No. 3 was granted the agency as it was a case of re-appointment of the terminated agency and it was not as if defendant No.3 was granted a fresh agency. As per defendants, defendant No. 3 had worked as an agent with the defendant Corporation from 1963 to 1982 in Branch Office, Dharamshala under agency Code No. 684145 which was a direct agency. Case of defendant No. 3 was covered vide circular of the defendant Corporation dated 09.07.1968, (Ext.DW1/B) relevant para of which is reproduced herein below:-

> "Agents, whose services have been terminated for any reasons whatsoever, should not be reappointed. If the Divisional Manager feels that some person has to be re-appointed, he should refer the matter to the Zonal Manager concerned whose decision in this regard shall be final. The agency, if granted, in any such case, will be treated as "Direct".

6. On these basis, the defendant stated that the plaintiff was not entitled to any relief. It was further averred that the agency of daughter-in-law of defendant No. 3 was terminated in the year 1997 and, therefore, the question of diverting the business does not arise.

7. On the basis of the pleadings on record, learned trial Court framed the following issues:-

1. Whether the appointment of defendant No. 3 as direct agent in the defendant corporation, is illegal, null and void, as alleged? ... OPP

2. Whether the plaintiff is entitled to all the benefits/incentives accruing through the insurance business done by the defendant No. 3 as an agent of LIC, as alleged? ... OPP

3. Whether the plaintiff is entitled for relief of permanent injunction as prayed for? ... OPP

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

5. Whether the plaintiff has no cause of action against the defendants? ... OPD

6. Whether the plaintiff is estopped by his act and conduct from filing the present suit? ... OPD

7. Whether the civil court has got no jurisdiction to entertain and try the present suit? ... OPD

8. Relief.

8. The issues so framed by the learned trial Court were answered as under:-

Issue No. 1	:	No
Issue No. 2	:	No
Issue No. 3	:	No
Issue No. 4	:	Yes.
Issue No. 5	:	No
Issue No. 6	:	No
Issue No. 7	:	No.
Relief ………	:	Suit is dismissed as per operative part of the judgment.

9. Feeling aggrieved of the said judgment passed by the learned trial Court, the plaintiff filed an appeal. The appeal so filed by the plaintiff was allowed by learned Appellate Court vide judgment and decree dated 01.09.2008.

10. Learned Appellate Court held that the provisions of both the Memos have to be read harmoniously. It further held that Baldev Raj Sharma was appointed under the provisions of Ext.DW1/B as direct agent and his appointment could not have been direct keeping in view the provisions of Ext. PA as his daughter-in-law had been appointed as an agent under the plaintiff. Accordingly, learned Appellate Court held that the provisions contained in Ext.DW1/B were subjugate to the provisions contained in Ext. PA and when a near relative of an agent is sought to be reappointed also, he cannot be appointed as a direct agent and he has to be placed under the same Development Officer under whom the earlier agent being a near relative has been appointed. In this view of the matter, the learned Appellate Court further held that the plaintiff was entitled to all consequential benefits on account of insurance business done by Baldev Raj Sharma.

11. Mr. Ashwani K. Sharma, learned Senior Advocate appearing for the appellants has challenged the said findings returned by the learned Appellate Court on the ground that the same are result of mis-interpretation of two circulars and further that the relief granted by the learned Appellate Court was beyond the pleadings and the learned Appellate Court has failed to appreciate that deceased Baldev Raj Sharma was not directly appointed but it was a case of re-engagement.

12. Mr. G.D. Verma, learned Senior Advocate appearing for the respondents on the other hand argued that there was no infirmity with the judgment and decree passed by the learned Appellate Court, which had rightly decreed the suit of the plaintiff. He further argued that Baldev Raj Sharma was not re-appointed but his appointment was a fresh and direct appointment. According to him, the plea of the appellants based on the assumption that deceased Baldev Raj Sharma was reappointed without any genesis and was based on conjectures rather than the records. Mr. Verma also submitted that it was incorrect that the relief granted in favour of the plaintiff by the learned Appellate Court was beyond the pleadings.

13. I have heard learned counsel for the parties and have also gone through the records of the case as well as the judgments passed by the learned Courts below.

14. I will deal with both the substantial questions of law separately.

(a) <u>Substantial Question of Law No. 1:</u>

Whether the impugned judgment passed by Ld. First Appellate Judge is the result of total misreading and misappreciation of pleadings, materials and evidence adduced on record by the parties and misinterpretation of the stipulations of Circulars Ex. PA and Ex. DW1/B and thus, the resultant findings and conclusions drawn by Ld. First Appellate Judge are wrong and perverse?

15. Ext. DW1/C communication dated 19.08.1994 is the document vide which late Baldev Raj Sharma was granted agency by the Branch Manager of Life Insurance Corporation of India, Nurpur, contents of the same are quoted herein below:-

> "Reference your letter dated 17.8.94 on the above subject. We are pleased to inform you that the competent authority has allowed the granting of the agency to Sh. Baldev Raj Sharma on DIRECT Agency. The agency papers are also returned herewith."

16. A perusal of the same demonstrates that late Baldev Raj Sharma was granted a "direct agency". Now in this background I will discuss the relevant contents of Memos Ext. PA dated 24.04.1980 and Ext. DW1/A dated 09.07.1968.

17. The relevant extract of Ext. PA circulated on 24.04.1980 is quoted herein below:-

> "When a near relative of an agent working under a Development Officer is recruited as an agent, then the new agent should also be placed under the same Development Officer. The new agent should not be placed under any other Development Officer nor should he/she be placed direct."

18. The relevant extract of Ext. DW1/B dated 09.07.1968 is quoted herein below:-

> "Agents, whose services have been terminated for any reasons whatsoever, should not be reappointed. If the Divisional Manager feels that some person has to be re-appointed, he should refer the matter to the Zonal Manager concerned whose decision in this regard shall be final. The agency, if granted, in any such case, will be treated as "Direct".

19. It is apparent from the contents of circular dated 24.04.1980 that when a near relative of an agent working under a Development Officer is recruited as an agent, then the new agent has to be under the same Development Officer. Further, a perusal of the relevant extract of circular dated 09.07.1968 demonstrates that it is clearly provided therein that agents, whose services have been terminated for any reasons whatsoever, should not be reappointed. It further mentions that if the Divisional Manager feels that some person has to be reappointed, he should refer the matter to the Zonal Manager concerned whose decision in this regard shall be final. It is further mentioned that the agency, if granted, in any such case, will be treated as "Direct".

20. In my considered view, a harmonious reading of communication Ext. DW1/C and relevant extracts of Ext. PA and Ext. DW1/B leaves no room for any doubt whatsoever that the agency granted to late Baldev Raj Sharma was not by way of reappointment but it was a **direct agency** allotted to him and in this view of the matter keeping in view the fact that it is not disputed that daughter-in-law of deceased Baldev Raj Sharma was working under the plaintiff in 1994, the new agent i.e. Baldev Raj Sharma also had to be placed under the same Development Officer i.e. the plaintiff.

21. Therefore, in my considered view that the findings returned by the learned Appellate Court to the effect that Baldev Raj Sharma was appointed as direct agent and because his daughter-in-law was already appointed as an agent under the plaintiff, therefore, Baldev Raj Sharma could not have been appointed as direct agent and he should have been appointed as an agent under the plaintiff i.e. the Development Officer under whom the near relative of Baldev Raj Sharma was recorded as an agent are absolutely correct.

22. In the present case, it is clear from a perusal of Ext. DW1/C that Baldev Raj Sharma was granted a direct agency by the appellant Corporation. At the time when he was granted direct agency his daughter-in-law stood recruited as the agent under the plaintiff who was a Development Officer. The contention of the learned counsel for the appellant that deceased Baldev Raj Sharma was reappointed and not granted a direct agency is not only in contrast to the contents of communication dated 19.08.1994 Ext. DW1/C but his contention is also contrary to what is contained in circular dated 09.07.1968 Ext. DW1/B because as per the said circular an agent whose services have been terminated cannot be reappointed and if he again is to be granted an agency then the same can be done only by way of treating him as a direct agent. Therefore, subsequent appointment of Baldev Raj Sharma for all intents and purposes was direct appointment. This direct appointment of Baldev Raj Sharma was bad because as per circular dated 24.04.1980, no new agent could be placed as a direct agent whose near relative was working under a Development Officer. Therefore, it was incumbent upon the appellant to have had placed deceased Baldev Raj Sharma under the plaintiff when he was appointed afresh on 19.08.1994 by the appellant. This substantial question of law is answered accordingly.

(b)**Substantial Question of Law No. 2:**

Whether the suit filed by the plaintiff seeking decree of declaration was time barred under Article: 55 of the Schedule of Limitation Act and the same did not deserve to be entertained on this count?

23. Mr. Ashwani K. Sharma, learned Senior Counsel for the appellants argued that the claim of the plaintiff was hopelessly time barred under Article 55 of the Schedule of Limitation Act and this very important aspect of the matter has been ignored by the learned Appellate court while decreeing the suit. According to Mr. Sharma, the appointment of deceased Baldev Raj Sharma as a direct agent vide Ext. DW1/C communication dated 19.08.1994. However, the suit has been filed by the plaintiff in March,1999. He has argued that under Article 55 of the Schedule of Limitation Act, the period of limitation within which the suit was to be filed by the plaintiff was three years.

24. Mr. G.D. Verma, learned Senior Advocate, appearing for the respondents has argued that neither the suit filed by the plaintiff was barred by limitation nor was there any issue framed in this regard by the learned trial Court. According to him, this plea cannot be raised for the first time in the Regular Second Appeal.

25. In order to substantiate his contention, Mr. Verma has relied upon the following judgments:-

1. ***Dudh Nath Pandey (dead by L.R's.) Vs. Suresh Chandra Bhattasali (dead by L.R's.)***, reported in ***AIR 1986 Supreme Court 1509***.

2. ***Krishnapasuba Rao Kundapur (dead) after him his l.r. and another Vs. Dattatraya Krishnaji Karani***, reported in ***AIR 1966 Supreme Court 1024***.

3. ***Babu Ram alias Durga Prasad Vs. Indra Pal Singh (Dead) by LRS.***, reported in ***(1998) 6 Supreme Court Cases 358***.

4. ***Satya Gupta (Smt.) alias Madhu Gupta Vs. Brijesh Kumar***, reported in ***(1998) 6 Supreme Court Cases 423***.

26. In order to meet the said objections raised by Mr. G.D. Verma, Mr. Ashwani K. Sharma has argued that as the plea of limitation is a legal plea, therefore, the same can be raised at any time.

27. A perusal of the record of the present case will demonstrate that the suit was presented on 19.03.1999. It has been averred by the plaintiff in Para-6 of the plaint that cause of action arose to the plaintiff against the defendants on 15.08.1994 when the defendant-Corporation illegally and arbitrarily appointed defendant No. 3 as a direct agent. He has further averred in this para of the plaint that cause of action also accrued on various subsequent dates when the plaintiff approached the officials of defendant-Corporation and also in the year 1997 when the plaintiff served notices in this regard upon defendants No. 1 and 2.

28. The plaintiff has placed on record Ext. PW2/B and Ext. PW2/F, copies of registered legal notices sent on behalf of the plaintiff to the defendants, wherein he had raised the issue of the wrong appointment of deceased Baldev Raj Sharma as direct agent. The acknowledgement receipts of the said legal notices are also exhibited on record. The receipt of said legal notices has not been denied by the defendants. The plaintiff has also placed on record Ext. PW2/H, copy of communication addressed by him to the defendants dated 13.05.1998.

29. In my considered view, it stands duly proved on record that the appointment of deceased Baldev Raj Sharma as a direct agent by the defendant-Corporation was in contravention of the provisions of the circular of the defendant-Corporation. As a result of the wrong appointment of Baldev Raj Sharma as a direct agent, the plaintiff was suffering continuing wrong. He served legal notices in this regard upon the defendants which are dated 19.02.1997. Before this also, he had raised the issue with the defendants vide communication dated 28.07.1996 Ext. PW2/A. After the issuance of the above mentioned legal notices, he has again raised the issue with the defendants vide Ext. PW2/H dated 13.05.1998.

30. Therefore, keeping in view the fact that appointment of Baldev Raj Sharma as direct agent was a continuing wrong inflicted upon the plaintiff by the defendant-Corporation as it was resulting in recurring loss to the plaintiff. It cannot be said that the suit filed by the plaintiff was time barred. Each business transaction conducted by Baldev Raj Sharma on account of his having been appointed as direct agent gave a fresh cause of action to the plaintiff. It is not the case of the defendants that no business was procured by Baldev Raj Sharma as a direct agent within three years prior to the filing of the suit by the plaintiff. In this view of the matter, there is no merit in the submissions made on behalf of the appellants that the judgment passed by the learned Appellate Court is not sustainable as the suit was time barred. Even otherwise, it is a matter of record that no issue was framed in this regard by the learned trial Court. The only inference which can be drawn is that the point of limitation was not pressed by the defendants before the learned trial Court.

31. The Hon'ble Supreme Court of India in ***Dudh Nath Pandey (dead by L.R's.) Vs. Suresh Chandra Bhattasali (dead by L.R's.)***, reported in ***AIR 1986 Supreme Court 1509***. has held as under:-

> "This plea was however negatived by the High Court as it has never been taken when the case was remanded to the First Appellate Court by judgment dated 8th February, 1961. Besides the question requires investigation into certain facts which was not possible in the Second Appeal. The High Court

however reversed the finding of the First Appellate Court on the question of limitation relying on the so-called admission of the defendant in the written statement and the evidence of the witnesses produced on behalf of the defendant. Virtually, the High Court has made a fresh appraisal of the evidence and has come to a different finding contrary to the finding recorded by the First Appellate Court which the High Court could not do in the exercise of power under S. 100 of the Civil P.C. Even on merits, if the High Court had to rely upon the alleged admission in the written statement, the admission must be taken as a whole and it is not permissible to rely on a part of the admission ignoring the other. The High Court, in our opinion, has erred in making a fresh appraisal of the evidence to come to a different conclusion. Even otherwise, the plaintiff has to stand on his own strength.

32. The Hon'ble Supreme Court of India in ***Krishnapasuba Rao Kundapur Vs. Dattatraya Krishnaji Karani***, reported in ***AIR 1966 Supreme Court 1024***, has held that a plea which had not been taken by a party in the Courts below is no longer open to it to be raised before the High Court.

33. The Hon'ble Supreme Court of India in ***Babu Ram alias Durga Prasad Vs. Indra Pal Singh (Dead) by LRS.***, reported in ***(1998) 6 Supreme Court Cases 358***, has held that the High Court in second appeal exceeded its jurisdiction under Section 100 in giving a finding on an issue which was not pressed in the trial Court.

34. The Hon'ble Supreme Court of India in ***Satya Gupta (Smt.) alias Madhu Gupta Vs. Brijesh Kumar***, reported in ***(1998) 6 Supreme Court Cases 423***, has held in Para-16 as under:-

> "At the outset, we would like to point out that the findings on facts by the Lower Appellate Court as a final Court on facts, are based on appreciation of evidence and the same cannot be treated as perverse or based on no evidence. That being the position, we are of the view that the High Court, after reappreciating the evidence and without finding that the conclusions reached by the lower appellate court were not based on the evidence, reversed the conclusions on facts on the ground that the view taken by it was also a possible view on the facts. The High Court, it is well settled, while exercising jurisdiction under Section 100, C.P.C., cannot reverse the findings of the lower appellate court on facts merely on the ground that on the facts found by the lower appellate court another view was possible.

35. Thus, the arguments raised by the learned counsel for the appellants that the suit was hopelessly time barred and this aspect of the matter has also not been looked into by the learned Appellate Court, is without any merit. The substantial question of law is answered accordingly.

36. Therefore, in view of the findings returned by me on both the substantial questions of law, there is no merit in the present appeal and the same is dismissed with cost. Miscellaneous application(s) pending, if any, also stand disposed of.

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

Sh. Sarjan & ors. ……Appellants.

Versus

Smt. Bimla & ors. ……Respondents.

RSA No. 592 of 2015.
Date of decision: July 7, 2016.

Specific Relief Act, 1963- Section 34- Plaintiffs filed a civil suit seeking declaration that they have become owners by way of adverse possession- suit was dismissed by the trial Court- counter-claim filed by the defendant was allowed and the plaintiffs were directed to hand over the possession of the suit land to the defendants- appeal filed by the plaintiffs was dismissed- it was found during the pendency of the second appeal that respondent No. 5 had died during the pendency of the suit – respondent No. 4 had also died during the pendency of the appeal in the Appellate Court- question of abatement and substitution of the legal representatives can be decided by the Court where death had taken place- judgment and decree passed by the Courts set aside- suit remanded to the trial Court to determine the question of substitution and thereafter to send the file to the Appellate Court. (Para- 2 to 8)

Cases referred:
Chet Ram versus Ami Chand & ors., Latest HLJ 2015(HP) 1440
T. S. Gnanavel Versus T.S. Kanagaraj and Another, (2009)14 SCC 294

For the appellants : Mr. Suneet Goel, Advocate.
For the respondents : Mr. B.C. Verma, Advocate, for respondents No. 1 to 3.
None for respondents No. 6 to 8.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. *(Oral)*

RSA No. 592 of 2015 & CMP Nos. 3429 & 3430 of 2016

Plaintiffs are in second appeal. They are aggrieved from the judgment and decree dated 11.9.2015 passed by learned Additional District Judge-II, Shimla camp at Rohroo in Civil Appeal No. RBT-81-R/13 of 2014/2013.

2. The suit filed by the plaintiffs for declaration that they have become owners of the suit land by way of adverse possession and permanent prohibitory injunction restraining the defendants from causing any interference in the suit land comprised in Khewat No. 46 min, Khatauni No. 96, Khasra Nos. 5, 364, 490, 491, 759, 761, 766 and 776, Kita 8, measuring 1-64-94 hectares situated in Mohal Saundari, Tehsil Chirgaon, District Shimla, H.P. was dismissed by learned Civil Judge (Senior Division), Court No. 1, Rohroo on 26.4.2013 and Counter Claims preferred by the defendants were decreed and the decree for possession of the suit land passed in their favour. The plaintiffs were directed to handover the possession of the suit land to the defendants within two months. Learned Lower Appellate Court has dismissed the appeal filed by the plaintiffs. The legality and validity of the impugned judgment and decree has been questioned before this Court in the present appeal.

3. Process against the respondents-defendants was issued in the appeal. Notices issued to respondents No. 4 and 5 were received back with the report that they have expired. This has led in filing the two applications, as aforesaid, under Order 22 Rule 4 (4) of the Code of Civil Procedure for seeking exemption from substitution of the legal representatives of the said respondents on the ground that they have neither filed the written statement to the suit in the trial Court nor contested the same at any stage and rather allowed themselves to be proceeded against *exparte.*

4. The death certificates, annexed to the applications aforesaid, reveal that respondent No. 5 Moti Ram has expired on 20.6.2012 i.e. during the pendency of the suit in the trial Court whereas respondent No. 4 Nand Ram on 13.10.2014 during the pendency of the appeal in the learned Lower Appellate Court.

5. Be it stated that in a case where the defendant(s) has failed to file written statement and if written statement is filed to contest the suit or allow himself to be proceeded

against exparte, the plaintiff can be exempted from substitution of the legal representatives of the said defendant. However, the application for the purpose is required to be filed during the pendency of the suit/appeal in the Court below. I am drawing support in this regard from the judgment of this Court in ***Chet Ram*** *versus* ***Ami Chand & ors., Latest HLJ 2015(HP) 1440*** in which after taking note of the law laid down by the Apex Court in **T. S. Gnanavel** Versus ***T.S. Kanagaraj and Another***, (2009)14 SCC 294, that the defendants died during the pendency of the suit for specific performance of the contract for sale and no exemption was sought at the instance of the plaintiff from bringing on record the heirs and legal representatives of the said defendants before the judgment was pronounced, the judgment and decree was held to be nullity and as such quashed.

6. In view of the ratio of the judgment *supra,* the exemption from substitution of the legal representatives of respondents No. 4 and 5 cannot granted at this stage as the same could have only been sought before the judgment was pronounced by the trial Court/lower Appellate Court.

7. The judgment and decree passed by both Courts below are, therefore, quashed and set aside. The suit is remanded to the trial Court for fresh disposal after deciding the question of abatement of the suit on the death of deceased defendant No. 5 Shri Moti Ram and substitution of his legal representatives with further direction to remit the record thereafter to the lower Appellate Court for similar action i.e. disposal of the appeal afresh after deciding the question of abatement of the appeal, if any, on the death of deceased respondent No. 4 Nand Ram and the substitution of his legal representatives.

8. The parties through learned Counsel representing them are directed to appear in the trial Court on *1.8.2016*. There shall be a direction to the trial Court to decide the suit afresh in the light of this judgment at the earliest, however, not beyond 30th September, 2016. On receipt of the record of the suit, there shall be a direction to the lower Appellate Court to decide the appeal afresh at the earliest however, not beyond 31st December, 2016.

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

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Shankar Singh and others. ....Petitioners.

Versus

State of HP and another. ... Respondents.

CWP No. 3031 of 2009.
Reserved on 24.6.2016.
Decided on: 07.07.2016.

Constitution of India, 1950- Article 226- Petitioners are owners of the land which was utilized by respondents for the construction of the road without compensating them in accordance with law- respondents admitted the use of the land for construction of the road and stated that no objection was raised by the petitioners at the time of construction of road - now petitioners cannot be permitted to claim that their land should be acquired and they should be compensated- held, that land of the petitioners was utilized for the construction of the road- no material was placed on record to show that the utilization of land was with the consent of the petitioners- it was not explained as to why, the land of the petitioners was not acquired, whereas, land of other persons was acquired- notification was issued after decision of the Court dated 23.12.2008- no material was placed on record to show that petitioners were told that no compensation would be paid to them- petition cannot be said to be hit by delay and laches- State is not entitled to utilize the land of the petitioner without compensating them in accordance with

law- petition allowed and respondents directed to initiate the proceedings for acquisition of the land of the petitioners. (Para-6 to 22)

Cases referred:
Shankar Dass Vs. State of Himachal Pradesh and Connected Matter, 2013(2) Him L.R. (FB) 698
K.B. Ramachandra Raje Urs (Dead) By Legal Representatives. Vs. State of Karnataka and others (2016) 3 Supreme Court Cases 422
Raj Kumar Vs. State of H.P. & others decided on 29.10.2015
Tukaram Kana Joshi and others through power of attorney holder Vs. Maharashtra Industrial Development Corporation and others, (2013) 1 Supreme Court Cases 353
Jeet Ram Vs. State of Himachal Pradesh and others, Latest HLJ 2016 (HP) 615

For the petitioners. : Mr. R.K. Gautam, Sr. Advocate with Ms. Megha Kapoor Gautam, Advocate.
For respondents. : Mr. V. S Chauhan, Advocate General.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.

By way of present petition, the petitioners have prayed for the following reliefs:-

"(i) That the respondents may kindly be directed to make payment to the petitioners for the land situated in Khata Khatauni No. 29 Khasra No. 171/1 measuring 2.7 Bighas for the construction of the road as per rates of compensation already settled by the District Judge vide its award dated 28.2.2006 and upheld by this Hon'ble Court vide judgment dated 23.12.2008 along with solecium, interest etc. etc.;

(ii) That in alternative of prayer No.(i) above, the respondents may be directed to initiate land acquisition proceedings under Land Acquisition Act and to make the payment of compensation according to the provisions of Land Acquisition Act."

2. The case of the petitioners is that the respondent-department acquired land for the construction of Namhol-Asha Majari Road and for the said purpose it issued a Notification under Section 4 of the Land Acquisition Act. After complying with the provisions as envisaged in the Land Acquisition Act, an award was passed by respondent No.2 on 20.1.1997. Against the said award, reference petitions were also preferred in the Court of learned District Judge which were also decided on 28.2.2006. Vide judgment dated 23.12.2008 in RFA No. 359 of 2006 and connected matters, this Court dismissed all the appeals and cross-objections which were filed by the respective parties against the award passed in reference petitions by the learned District Judge.

3. Petitioners are owners in possession of land measuring 2.7 bighas comprised in Khata Khatauni No. 29, Khasra No. 171/1, out of which 0.13 bighas of land has been utilized by the respondents for the construction of Namhol-Asha Majari road from the above stated khasra number without acquiring the same. As per petitioners, respondents by mistake or otherwise ignored this portion of land comprised in Khasra No. 171/1 to be included in the notification issued under the Land Acquisition Act for the purposes of acquiring the land required for the construction of road. Thus, as a result of the said act of omission and commission of the respondents, the land of the petitioners stands utilized by the respondents for the purpose of the construction of the road mentioned above without compensating them in accordance with law. It is further their case that they are rustic and illiterate villagers and they came to know of the factum of their land having been utilized without them being adequately compensated as per law when the matters were decided by this Court vide its judgment dated 23.12.2008. It is in these circumstances that the petitioners thereafter have approached this Court with the prayer that the respondents be directed to compensate the petitioners in terms of the award/rates of

compensation settled by learned District Judge vide order dated 28.2.2006 which has been upheld by this Court vide its judgment dated 23.12.2008.

4. In its reply, respondents have not denied the factum of the construction of road through the land of the petitioners, however, the stand of the State is that at the time when the said land of the petitioners was utilized for the purpose of construction of the road no objection was raised by the petitioners and now at such a belated stage petitioners cannot be permitted to plead that their land should be acquired and they should be compensated for their land, which has

been utilized for the construction of the road. According to the respondents, petition is hit by delay and laches and there is no justifiable explanation given by the petitioners as to why they have approached the Court so late in the year 2009 when the road was constructed between the years 1982-1990.

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

6. In order to substantiate its case that at this stage no relief can be granted to the petitioner, learned Additional Advocate General has relied upon a Full Bench judgment of this Court in **Shankar Dass** Vs. **State of Himachal Pradesh and Connected Matter**, 2013(2) Him L.R. (FB) 698. The following was the question referred for adjudication by Full Bench of this Court:-

> *"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 has been willingly surrendered either orally or otherwise or with implied or express consent by the owners at the relevant time, can they seek a direction in a writ petition filed after a long time for a direction to the State to initiate land acquisition proceedings in respect of their such land which has been utilized for the purposes of construction of the road?"*

7. The reference was answered by the Full Bench of this Court in the following manner:-

> "As per the view of the majority, the Reference is answered as follows:
>
> "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." Post these cases in the respective Benches."

8. The Hon'ble Supreme Court in **K.B. Ramachandra Raje Urs (Dead) By Legal Representatives.** Vs. **State of Karnataka and others** (2016) 3 Supreme Court Cases 422 has held in para 28 as under:-

> "28. It has been vehemently argued on behalf of the respondents that the writ petition ought not to have been entertained and any order thereon could not have been passed as it is inordinately delayed and the appellant has made certain false statements in the pleadings before the High Court details of which have been mentioned hereinabove. This issue need not detain the Court. Time and again it has been said that while exercising the jurisdiction under Article 226 of the Constitution of India the High Court is not bound by any strict rule of limitation. If substantial issues of public importance touching upon the fairness

of governmental action do arise, the delayed approach to reach the Court will not stand in the way of the exercise of jurisdiction by the Court. Insofar as the knowledge of the appellant-writ petitioner with regard to the allotment of the land to Respondent 28 Society is concerned, what was claimed in the writ petition is that it is only in the year 1994 when Respondent 28 Society had attempted to raise construction on the land that the fact of allotment of such land came to be known to the appellant-writ petitioner."

9. The Hon'ble Supreme Court in SLP(C) No(s) 2373/2014, **Raj Kumar** Vs. **State of H.P. & others** decided on 29.10.2015 has held as under:-

"There is in our opinion considerable merit in the submission made by Mr. Nag. It is true that the appellant had approached the High Court rather belatedly inasmuch the land had been utilized some time in the year 1985-86 while the writ petition was filed by the appellant in the year 2009. At the same time it is clear from the pleadings in the case at hand that the user of the land owned by the appellant is not denied by the State in the counter affidavit filed before the High Court or that filed before us. It is also evident from the averments made in the court affidavit that the State has not sought any donation in its favour either by the appellant or his predecessor in interest during whose life time the road in question was constructed. All that is stated in the counter affidavit is that the erstwhile owner of the land "might have donated" the land to the State Government. In the absence of any specific assertion regarding any such donation or documentary evidence to support the same, we are not inclined to accept the ipsit dixit suggesting any such donation. If that be so as it indeed is, we fail to appreciate why the State should have given up the land acquisition proceedings initiated by it in relation to the land of the appellant herein. The fact that the State Government had initiated such proceedings is not in dispute nor is it disputed that the same were allowed to lapse just because the road had in the meantime been taken under the Pradhan Mantri Gram Sadak Yojna. It is also not in dispute that for the very same road the land owned by Kanwar Singh another owner had not only been notified for acquisition but duly paid for in terms of Award No. 10 of 2008."

10. The Hon'ble Supreme Court in **State of U.P. and Others** Vs. **Manohar** has held as under:-

"5. As a matter of fact, the appellants were unable to produce even a scrap of evidence indicating that the land of the respondent had been taken over or acquired in any manner known to law or that he had ever been paid any compensation in respect of such acquisition. That the land was thereafter constructed upon, is not denied.

6. Having heard the learned counsel for the appellants, we are satisfied that the case projected before the Court by the appellants is utterly untenable and not worthy of emanating from any State which professes the least regard to being a welfare State. When we pointed out to the learned counsel that, at this stage at least, the State should be gracious enough to accept its mistake and promptly pay the compensation to the respondent, the State has taken an intractable attitude and persisted in opposing what appears to be a just and reasonable claim of the respondent.

7. Ours is a constitutional democracy and the rights available to the citizens are declared by the Constitution. Although Article 19(1)(f) was deleted by the 44th Amendment to the Constitution, Article 300A has been placed in the Constitution, which reads as follows: "300A- Persons not to be deprived of property save by authority of law _ No person shall be deprived of his property save by authority of law."

8. This is a case where we find utter lack of legal authority for deprivation of the respondent's property by the appellants who are State authorities. In our view, this case was an eminently fit one for exercising the writ jurisdiction of the High Court under Article 226 of the Constitution. In our view, the High Court was somewhat liberal in not imposing exemplary costs on the appellants. We would have perhaps followed suit, but for the intransigence displayed before us."

11. The Hon'ble Supreme Court in **Tukaram Kana Joshi and others through power of attorney holder** Vs. **Maharashtra Industrial Development Corporation and others**, (2013) 1 Supreme Court Cases 353 has held as under:-

"16. The High Court committed an error in holding the appellants non-suited on the ground of delay and non-availability of records, as the Court failed to appreciate that the appellants had been pursuing their case persistently. Accepting their claim, the statutory authorities had even initiated the acquisition proceedings in 1981, which subsequently lapsed for want of further action on the part of those authorities. The claimants are illiterate and inarticulate persons, who have been deprived of their fundamental rights by the State, without it resorting to any procedure prescribed by law, without the Court realizing that the enrichment of a welfare State, or of its instrumentalities, at the cost of poor farmers is not permissible, particularly when done at the behest of the State itself. The appellants belonged to a class which did not have any other vocation or any business/calling to fall back upon, for the purpose of earning their livelihood.

17. Depriving the appellants of their immovable properties was a clear violation of Article 21 of the Constitution. In a welfare State, statutory authorities are bound, not only to pay adequate compensation, but there is also a legal obligation upon them to rehabilitate such persons. The non-fulfilment of their obligations would tantamount to forcing the said uprooted persons to become vagabonds or to indulge in anti-national activities as such sentiments would be born in them on account of such ill-treatment. Therefore, it is not permissible for any welfare State to uproot a person and deprive him of his fundamental/constitutional/human rights, under the garb of industrial development.

18. The appellants have been deprived of their legitimate dues for about half a century. In such a fact situation, we fail to understand for which class of citizens the Constitution provides guarantees and rights in this regard and what is the exact percentage of the citizens of this country, to whom constitutional/statutory benefits are accorded, in accordance with the law."

12. This Court in **Jeet Ram** Vs. **State of Himachal Pradesh and others,** Latest HLJ 2016 (HP) 615 has held as under:-

"4. No person can be deprived of his property without following due process of law. Respondents have utilized the land of the petitioner without paying him any compensation. There is no contemporaneous record placed on record by the respondent-State to show that the petitioner had consented for the construction of the road through his land. It is evident from the contents of Annexure P-1 that the nature of land in Khasra No. 279, as per Jamabandi for the year 2001-02, is Bagicha. A valuable piece of land of the petitioner has been utilized in an arbitrary manner by the respondent-State, for the purpose of construction/widening of the Shillaru-Reog road.

5. It is also argued by Mr. Anup Rattan, Additional Advocate General, that there is delay in filing the present petition, as construction of the road on the suit land was only undertaken on 5.6.2006. Immediately thereafter, the petitioner had served a notice upon the respondents on 30.4.2007. Some action ought to have been taken on notice dated 30.4.2007. Petitioner was constrained to serve another notice on

22.9.2009. Despite that no action has been taken by the respondent-State to redress the grievance of the petitioner.

6. Legitimate right of a citizen, that too pertaining to valuable property, can not be defeated merely on the technical objections. There ought to be difference in the approach of a private litigant vis-à-vis State. The State stands on a higher pedestal. It is the duty of the functionaries of the State to maintain the Rule of Law. There can not be any estoppel/ waiver against the constitutional /fundamental/ legal rights.

13. In view of the above discussed law, now I revert to the facts of the present case. The factum of the land of the petitioners having been utilized for the purposes of construction of Namhol-Asha Majari road is not disputed by the respondent-State. There is no material produced on record by the State from which it can be inferred that the said road was utilized by the State for the construction of the road with the consent of the petitioners implied or otherwise. There is no cogent explanation given by the State as to why the land of the petitioners was not acquired as per the provisions of Land Acquisition Act when the land of similarly situated persons was duly acquired under the provisions of Land Acquisition Act and they have been duly compensated for the utilization of their land as per law.

14. It is a matter of record that in the present case notification under Section 4 of the Land Acquisition Act was published in the Rajpatra on 2.10.1993. It is also a matter of record that the award passed by the Land Acquisition Collector pertaining to the land owners similarly situated as the petitioners whose land were utilized for the construction of the road in issue was announced on 20.1.1997 and the reference petitions against the said award were decided by the Court of learned District Judge vide award dated 28.2.2006. It is also a matter of record that appeals and cross-objections filed against the award passed by the learned District Judge were decided by this Court vide its judgment dated 23.12.2008 in RFA No. 359 of 2006 and other connected matters. The reasons as to why the petitioners have approached this Court in the year 2009 by way of writ petition are mentioned in para 7 of the same which are reproduced hereinbelow:-

"7. That the petitioners are rustic and illiterate villagers and could not approach this Hon'ble Court earlier, however since the matter has been recently decided by this Hon'ble High Court vide its judgment dated 23.12.2008 Annexure P-3 regarding the land acquired for the same road where the land of the petitioners as mentioned hereabove is situated, therefore, it is duty of the respondents to make the payment of compensation as per the rate already settled by the Hon'ble High Court regarding amount of compensation for the acquisition of land in the area and as per the award passed by the learned District Judge dated 28.2.2006and upheld by this Hon'ble Court vide judgment dated 23.12.2008. The petitioners are entitled for compensation to the tune of Rs. 2 thousand per biswas alongwith solacium, interest and other amounts as per the mandatory provisions of the Land Acquisition Act."

15. The following is the reply which has been filed by respondents to the said para of the writ petition:-

"7&8. That the contents of these paras are wrong as such denied in view of detailed preliminary submission para-2 & 3."

16. In my considered view there is not an inordinate delay of 35 years in filing of the writ petition as has been stated in the preliminary objections taken in the rely by the State. Notification under Section 4 itself was issued on 13th September, 1993. This fact is duly borne out from the award passed by the Land Acquisition Collector dated 20.1.1997. The present petition has been filed by the petitioners after the decision of this Court dated 23.12.2008 in RFA No. 359 of 2006 and other connected matters which appeals and cross-objections were filed by the aggrieved parties against the award passed by the learned District Judge in reference

petitions preferred against the award passed by the Land Acquisition Collector. The petitioners have stated that they could not approach the Court earlier being rustic and illiterate villagers. Reply to the said averments made in the writ petition by the State is cryptic.

17. Not only this, for the first time the State has taken the stand about the land of the petitioners being utilized on account of no objection being raised by them is in the reply which has been filed to the writ petition. As per the judgment of Full Bench of this Court 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, the petitioners can invoke the jurisdiction refuting such express or implied consent or the stand of the State on voluntarily surrender only within the time within which such a relief can be claimed in a civil suit. It has also been held that once such a question has been raised in the writ the same can be considered in the writ petition.

18. As I have already held above this stand of the State for the first time has been taken in the reply which has been filed by the State to the writ petition. In other words, there is no material on record produced by the State to the effect that the State had already made it evident to the petitioners that no compensation shall be paid to them as their land has been utilized with their consent and from that date the writ was not preferred by the petitioners within the time within which the relief could have been claimed by them in a civil suit.

19. Therefore, in my considered view, in view of the law laid down by the Hon'ble Supreme Court and Full Bench of this Court it cannot be said that the petition filed by the petitioners is hit by delay and laches.

20. It is settled law that no person can be deprived of his property without following due process of law. It is not disputed by the respondent-State that they have utilized the land of the petitioners without paying compensation. No material has been placed on record by the State to show that the petitioners had consented for the construction of the road through their land thus the fact remains that the land of the petitioners has been utilized by the State for the purpose of construction of the road in issue without following the procedure of law and without compensating them as per law. In this view of the matter and in view of the law discussed above in my considered view the right of the petitioners pertaining to valuable right of property cannot be defeated on technical objections like delay and laches especially keeping in view the fact that the land has been utilized by the State and the status of the State is on high pedestal as compared to a private litigant.

21. Further keeping in view the fact that it is the duty of the functionaries of the State to maintain the Rule of Law, the State cannot be permitted to deprive due and just compensation for the utilization of their land which has been used by the State for the construction of the road.

22. It is reiterated that the State has not been able to demonstrate that the petitioners had consented for the use of their land for the purpose of road and even otherwise, keeping in view the fact that right to property is a constitutional right, there cannot be estoppel/waiver against constitutional/fundamental/legal rights.

Accordingly, the present writ petition is allowed and the respondents are directed to initiate the process for the acquisition of the land of the petitioners in accordance with law and complete the entire proceedings within a period of one year. The respondents shall be at liberty to compensate petitioners for the land which has been utilized by the State on the basis of the award passed by the learned District Judge in Land Ref Pet No. 12 of 2002 and connected matters dated 28.2.2006 which has been upheld by this Court in RFA No. 359 of 2006 and connected matters. The writ petition is allowed in the above terms. No order as to cost.

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

Shashi Pal ……..Petitioner

Versus

State of Himachal Pradesh and another ……..Respondents

CrMMO No. 343/2015
Reserved on: July 5, 2016
Decided on: July 7, 2016

Code of Criminal Procedure, 1973- Section 482- Complaint was filed by the petitioner for registering the case for the commission of offences punishable under Section 166-B, 337 and 338 of Indian Penal Code pleading that daughter of the informant had suffered pain and was taken to hospital- she was prescribed medicines- she again complained of pain- she was referred to respondent No. 2 who noticed that her appendix had burst- operation was conducted- respondent No. 2 never visited the patient despite repeated requests- her condition deteriorated and she was sent to PGI which concluded that Doctor was negligent while performing duty- complaint was filed, which was dismissed- aggrieved from the order, present petition has been filed- held, that contents of the complaint prima facie disclose the negligence of respondent No. 2 while treating daughter of the informant- merely because affidavit has not been filed along with application under Section 156(3) Cr.P.C. cannot lead to its rejection- order set aside and SHO directed to register the case against respondent No. 2 and to complete investigation. (Para-7 to 11)

Cases referred:

Priyanka Srivastava v. State of U.P. (2015) 6 SCC 287
Ramdev Food Products (P) Ltd. v. State of Gujarat (2015) 6 SCC 439

For the petitioner : Mr. N.K. Thakur, Senior Advocate with Ms. Jamuna Kumari, Advocate.
For the respondents : Mr. Parmod Thakur, Additional Advocate General, for respondent No. 1.
Mr. Rajesh Mandhotra, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge (oral)

This petition is directed against Order dated 15.9.2015 rendered by the learned Judicial Magistrate 1st Class (IV) Una, District Una, HP in Criminal Complaint No. 128-I-14 under Section 156(3) CrPC, whereby request of the petitioner for registering a case under Sections 166-B, 337 and 338 IPC, has been rejected. .

2. "Key facts" necessary for the adjudication of the present petition are that the petitioner is a permanent resident of villaeg Bharolian Kalan, Tehsil and District Una, Himachal Pradesh and has got a daughter named Alka Sharma. She is 20 years of age. On 19.4.2014, Alka Sharma complained of stomach pain and petitioner took her to Regional Hospital, Una and after giving some medicines, she was sent back. She was attended by Dr. Bansal. Again on 5.5.2014, Ms. Alka Sharma, complained about the pain and she was taken to the Regional Hospital Una. She was admitted in the hospital by Dr. Bansal. Alka had been taking medicines as prescribed by Dr. Bansal. On 22.5.2014, in the midnight she again complained of pain in the stomach. On 23.5.2014 she was taken to hospital where Dr. Bansal advised some tests and after seeing the report of the tests, Ms. Alka was referred to respondent No. 2. Respondent No.2 advised ultrasound. Respondent No.2 observed that the patient had a problem of appendix which had burst. Operation was done on 23.5.2014. Thereafter, respondent No.2 told the petitioner that food pipe of patient was damaged and she was kept under observation till 25.5.2014. On 26.5.2014, respondent No.2 cleaned the operated surface and replaced the gauge. Till 31.5.014, respondent

No. 2 never visited the patient despite repeated requests. On 31.5.2014, condition of the patient deteriorated. Dr. Dharoch referred the patient to PGI Chandigarh. Alka Sharma was taken to PGI Chandigarh. Head of Department, Department of General Surgery, Chandigarh supplied information on the request of petitioner on medical report of the patient. Medical report dated 27.2.2015 is at **Annexure** P-1, relevant portion of which is reproduced herein below:

> "Patient Alka (C.R. No. 201402864300) who was admitted through emergency services of PGIMER, Chandigarh on 31.5.2014 with diagnosis of faecal fiotula following surgery for appendicular perforation on 23.5.2014 in a hospital at RH, Una (HP). She underwent lapurtomy and ileotrass verse anastomosis in the above mentioned hospital. She was re-exaplored in emergecny at PGIMER, Chandigarh at 31.5.2014 with a diagnosis of faecal fiotula where leak was found from the Ileotrass verse anastomosis with multiple perforation in the terminal ileum although the disclosure of caecum was intact. Therefore, right hemicolectomy was done with end ileostomy and also distal mucous fistula was made . comparison of caecum is an uncommon differential diaprosis for acute appendicitis. Anastomotic leak is a known complication after any gastrointestinal anastomosis. Therefore, it cannot be affirmatively concluded that the treating doctor was negligent while performing his duties."

3. Petitioner's father made a complaint under Section 156 (3) CrPC for giving necessary directions to the SHO Sadar, Una, for registering an FIR under relevant sections/ provisions of law. Learned JMIC (IV), Una, dismissed the complaint on 15.9.2015 by making observation that the complaint filed by the petitioner was not supported by any affidavit and it can not be concluded that the doctor was negligent in performance of his duties as per expert report from PGI dated 27.2.2015.

4. Mr. N.K. Thakur, learned Senior Advocate has vehemently argued that the Ms. Alka was not suffering from appendicitis. She had been wrongly operated for the problem of appendicitis. According to him, as per report of the PGI, respondent No. 2 was negligent in duties. He further contended that the order passed by the court below was unwarranted and uncalled for and the matter is to be investigated by the police.

5. Mr. Rajesh Mandhotra, Advocate has supported Order dated 15.9.2015.

6. I have heard the learned counsel for the parties at length and also gone through the record carefully.

7. Alka Sharma was taken to the hospital on 19.4.2014 and thereafter on 5.5.2014. She felt severe pain in the stomach on 23.5.2014. She was operated upon by respondent No. 2 on 23.5.2014. Her health deteriorated. She was taken to PGI Chandigarh. She was operated upon with the diagnosis of faecal fiotula where leak was found from the ileotrass verse anastomosis with multiple perforation in the terminal ileum although the disclosure of caecum was intact. Surgeon has undertaken right hemicolectomy with end ileostomy and also distal mucous fistula was made.

8. Mr. Rajesh Mandhotra, Advocate submits that his client on 26.5.2014 was out of station but he was in constant touch with Dr. Indu Bhardwaj. According to the contents of reply, patient was advised not to take food. However, ryles tube of patient was removed and some food was given to the patient against the advice of the doctor, which led to deterioration of the condition of patient. It is evident from the report, reproduced above, that it was not a case of appendicitis, rather she was diagnosed in PGI for faecal fiotula where leak was found from the ileotrass verse anastomosis with multiple perforation in the terminal ileum although the disclosure of caecum was intact. Right hemicolectomy with end ileostomy and also distal mucous fistula was done. Report of the PGI if read in its totality leaves no manner of doubt that respondent No. 2 was prima facie negligent in diagnosing the disease and has operated the patient primarily for appendicitis though, as per report of PGI, there was faecal fiotula where leak

was found from the ileotrass verse anastomosis with multiple perforation in the terminal ileum although the disclosure of caecum was intact. Court has also gone through annexure R-2 filed with the reply.

9. Whether the condition of Alka Sharma has deteriorated as argued by Mr. Rajesh Mandhotra, Advocate, after removal of food pipe or not, would be clear from the evidence adduced by the parties.

10. Contents of annexure P-3, complaint, prima facie disclose negligence of respondent No.2 while treating Ms. Alka Sharma. Learned Judicial Magistrate 1st Class has erred in law by dismissing the complaint only on the ground that no affidavit was filed.

11. Their Lordships of the Hon'ble Supreme Court in **Priyanka Srivastava v. State of U.P.** reported in (2015) 6 SCC 287 have held that application under Section 156(3) CrPC seeking direction for registration of FIR must be supported by an affidavit. Purpose of filing of such affidavit is to prevent abuse of process. Their lordships have further held that remedy available under Section 156(3) CrPC is not of routine nature. Exercise of power thereunder requires application of judicial mind. Magistrate exercising said power must remain vigilant with regard to nature of allegations made in application and not to issue direction without proper application of mind. Their lordships have held as under:

> 20. The learned Magistrate, as we find, while exercising the power under Section 156(3) Cr.P.C. has narrated the allegations and, thereafter, without any application of mind, has passed an order to register an FIR for the offences mentioned in the application. The duty cast on the learned Magistrate, while exercising power under Section 156(3) Cr.P.C., cannot be marginalized. To understand the real purport of the same, we think it apt to reproduce the said provision:
>
> "156. Police officer's power to investigate congnizable case. -(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.
>
> (2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was no empowered under this section to investigate.
>
> (3) Any Magistrate empowered under section 190 may order such an investigation as above-mentioned."
>
> 27. Regard being had to the aforesaid enunciation of law, it needs to be reiterated that the learned Magistrate has to remain vigilant with regard to the allegations made and the nature of allegations and not to issue directions without proper application of mind. He has also to bear in mind that sending the matter would be conducive to justice and then he may pass the requisite order. The present is a case where the accused persons are serving in high positions in the bank. We are absolutely conscious that the position does not matter, for nobody is above law. But, the learned Magistrate should take note of the allegations in entirety, the date of incident and whether any cognizable case is remotely made out. It is also to be noted that when a borrower of the financial institution covered under the SARFAESI Act, invokes the jurisdiction under Section 156(3) Cr.P.C. and also there is a separate procedure under the Recovery of Debts due to Banks and Financial Institutions Act, 1993, an attitude of more care, caution and circumspection has to be adhered to.
>
> 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 the 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.

12. Their Lordships of the Hon'ble Supreme Court in **Ramdev Food Products (P) Ltd. v. State of Gujarat** reported in (2015) 6 SCC 439 have held that power to direct investigation under Section 156 (3) CrPC is distinguished from power to direct investigation under Section 202(1) CrPC. Their lordships have further held that where on account of credibility of information available, or weighing the interest of justice, it is considered appropriate to straightaway direct investigation, a direction under Section 156(3) CrPC is issued. Power under Section 202 CrPC is available for limited purpose to seek report from police to decide whether or not there is sufficient ground to proceed in the case. Their lordships have held as under:

[14] The two provisions are in two different chapters of the Code, though common expression 'investigation' is used in both the provisions. Normal rule is to understand the same expression in two provisions of an enactment in same sense unless the context otherwise requires. Heading of Chapter XII is "Information to the Police and their Powers to Investigate" and that of Chapter XV is "Complaints to Magistrate". Heading of Chapter XIV is "Conditions Requisite for Initiation of Proceedings". The two provisions i.e. Sections 156 and 202 in Chapters XII and XV respectively are as follows :

"156. Police officer's power to investigate cognizable case.

(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under section 190 may order such an investigation as above- mentioned.

202. Postponement of issue of process.-

(1) Any Magistrate , on receipt of a complaint of an offence of which he is authorized to take cognizance or which has been made over to him under section 192, may, if he thinks fit, [and shall in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction] postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made, -

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200.

(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath:

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant."

15. Cognizance is taken by a Magistrate under Section 190 (in Chapter XIV) either on "receiving a complaint", on "a police report" or "information received" from any person other than a police officer or upon his own knowledge.

38. In Devrapalli Lakshminaryanan Reddy & Ors. vs. V. Narayana Reddy & Ors, 1976 3 SCC 252 National Bank of Oman vs. Barakara Abdul Aziz & Anr, 2013 2 SCC 488 Madhao & Anr. vs. State of Maharashtra & Anr, 2013 5 SCC 615 Rameshbhai Pandurao Hedau vs. State of Gujarat, 2010 4 SCC 185, the scheme of Section 156(3) and 202 has been discussed. It was observed that power under Section 156(3) can be invoked by the Magistrate before taking cognizance and was in the nature of pre-emptory reminder or intimation to the police to exercise its plenary power of investigation beginning Section 156 and ending with report or chargesheet under Section 173. On the other hand, Section 202 applies at post cognizance stage and the direction for investigation was for the purpose of deciding whether there was sufficient ground to proceed.

13. It is a fact that the affidavit has not been filed with the application filed by the petitioner being ignorant of the procedure. However, the present petition has been duly supported by an affidavit. In normal circumstances, Court might have remanded the matter to the Judicial Magistrate 1st Class with a direction to permit the petitioner to file an affidavit alongwith the complaint. However, in the interests of justice, since affidavit has been filed with this petition, it would amount to sufficient compliance and the matter need not be remanded back to the court below.

14. Accordingly, the present petition is allowed. Order dated 15.9.2015 rendered by the learned Judicial Magistrate 1st Class (IV) Una, District Una, HP in Criminal Complaint No.

128-I-14 is quashed and set aside. Station House Officer, Police Station Sadar, Una, District Una, Himachal Pradesh is directed to register a case under Sections 166-B, 337 and 338 IPC against respondent No.2, forthwith and to complete the investigation within three months.

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BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

State of H.P. ……Appellant.
Versus
Puran Bahadur & another …….Respondents.

Cr. Appeal No. 241 of 2008.
Reserved on: July 05, 2016.
Decided on: July 07, 2016.

N.D.P.S. Act, 1985- Section 20 and 29- Accused were sitting in the rain shelter – they tried to run away on seeing the police- they were apprehended- accused P was found to be in possession of 2.750 kgs. charas- he was charged under Section 20 of N.D.P.S. Act while accused B was charged under Section 29 of N.D.P.S. Act- accused were tried and acquitted by the trial Court- held, in appeal that personal search of the accused was carried out- accused were required to be asked independently whether they wanted to be searched before the gazetted officer or before the Magistrate- they were asked by one consent memo- thus, there was non-compliance of Section 50 of N.D.P.S. Act- case property was also not produced before SHO- prosecution version was not proved and accused were rightly acquitted- appeal dismissed. (Para-13 to 17)

Case referred:

State of Rajasthan v. Parmanand, (2014) 5 SCC 345

For the appellant: Mr. V.S.Chauhan, Addl. AG with Mr. Vikram Thakur, Dy. AG and Mr. Puneet Rajta, Asstt. AG.

For the respondent: Ms. Kanta Thakur, Advocate as amicus curiae.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 27.10.2007, rendered by the learned Addl. Sessions Judge, (Fast Track Court), Kangra at Dharamshala, H.P., in Sessions case No. 19-D/VII/07, 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 the intervening night of 25/26.3.2007, the police personnel were on patrolling in Government vehicle. When they were coming back to Police Station Dharamshala at about 12:30 AM and when they reached near the Post Office and rain shelter they found accused sitting in the rain shelter. Both of them tried to run away. They were apprehended. They were carrying contraband. They disclosed their identity. Accused Puran Bahadur was found in possession of polythene bag which was smelling of charas. They were given notice as to whether they wanted to be searched before the Gazetted Officer or the Magistrate whereby they consented to be searched by the police party. The In-charge Police Party informed Addl. S.P. regarding the apprehending of the accused. The Addl.

S.P. reached the spot. Thereafter, the police officials firstly gave their personal search to both the accused. Nothing incriminating was recovered from them. The personal search of the accused was conducted in the presence of Addl. S.P. Accused Puran Bahadur was found possessing polythene bag which was containing charas in the shape of *"tikkies"*. It weighed 2.750 kgs. Two samples of 25 grams each were taken out. The bulk as well as the samples were packed and sealed in a cloth piece on the spot. Thereafter, the case property was taken to the Police Station. It was deposited in the malkhana. The sample was sent for chemical analysis. Accused Puran Bahadur was charged under Section 20 and accused Bhim Bahadur was charged under Section 29 of the ND & PS Act. 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 eleven witnesses. The accused were also examined under Section 313 Cr.P.C. According to them, they were falsely implicated. They also examined one witness in defence. The learned trial Court acquitted the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. V.S.Chauhan, Addl. AG has vehemently argued that the prosecution has proved its case against the accused. On the other hand, Ms. Kanta Thakur, Advocate, has supported the judgment of the learned trial Court dated 27.10.2007.

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. Surjeet Kumar testified that on 26.3.2007 SI Gulzari Lal accompanied by police officials including him were on patrolling duty in a jeep. At 12:30 AM, when they were at Post Office Chowk near rain shelter, the accused were standing near the rain shelter. On seeing the police party they tried to run away. They were apprehended. A polythene bag of white colour was found with the accused Puran Bahadur. It contained charas. Accused consented to be searched before the gazetted officer. Addl. S.P. Patial was called and thereafter the search of the accused was conducted. Charas in the shape of *"tikkies"* was recovered in the polythene bag. It weighed 2.750 kgs. Two samples of 25 grams each were drawn. The samples and the bulk charas was packed and sealed with seal "A" at four places each. The impression of seal was taken separately. The seal after use was handed over to Vinod Kumar. NCB form in triplicate was filled in at the spot. In his cross-examination, he admitted that near the rain shelter there was Complaint Office of the HPSEB. None was visible at that time in the Complaint Office. There was Park Café nearby.

7. PW-4 Const. Madan Lal, deposed that MHC Pawan Kumar handed over to him one parcel sealed along with a form vide RC No. 59/21 on 15.4.2007, which he deposited at FSL Junga and handed over the receipt to MHC.

8. PW-5 HC Mohinder Singh deposed that on receipt of rukka, he recorded FIR on the instructions of ASI Jatinder Kumar. On 26.3.2007, SI Gulzari Lal deposited three parcels. He entered the same in register No. 19.

9. PW-6 HC Pawan Kumar deposed that on 3.4.2007, he has taken charge of MHC from HC Mohinder Singh. On 15.4.2007 he sent sample along with NCB form through Const. Madan Lal to FSL Junga vide RC No. 59/21. The receipt was handed over to him after depositing the same at FSL Junga.

10. PW-7 ASI Vinod Kumar deposed the manner in which the accused were apprehended. They were apprised of their right to be searched before the gazetted officer. The accused told that they will get searched before a gazetted officer. Addl. S.P. Santosh Patial was informed telephonically. He reached the spot. The search was carried out whereby charas was recovered. It weighed 2.750 kgs. Sealing proceedings were completed on the spot. In his cross-examination, he denied the suggestion that bag was found in the rack of the bus.

11. PW-8 Addl. S.P. Santosh Patial deposed that he proceeded to the spot. Accused were present on the spot. The accused were given option if they wanted to be searched before him or before any other gazetted officer. They consented to be searched before him. Their written consent was taken. The polythene was searched. It contained charas as noticed hereinabove.

12. PW-11 SI Gulzari Lal deposed that he was on patrolling duty on 26.3.2007. When they reached near rain shelter, two persons were found sitting inside the rain shelter. They tried to run away. They were apprehended. Addl. S.P. was informed. He reached the spot. The polythene bag Ext. P-5 was recovered from accused Puran Bahadur. All the codal formalities were completed on the spot. FIR Ext. PW-5/A was registered. He denied the suggestion in his cross-examination that no recovery from the accused was effected. He admitted that in Ext. PW-11/B, he has not shown the electric pole.

13. The accused were apprehended near the rain shelter. Accused Puran Bahadur was carrying a polythene bag. It contained charas. All the codal formalities were completed on the spot. The case property was deposited with PW-5 HC Mohinder Singh. The samples were sent to FSL Junga by MHC Pawan Kumar on 15.4.2007 through Const. Madan Lal vide RC No. 59/21. It was found to be charas as per report Ext. PW-10/A.

14. In the instant case, since the charas was recovered from the polythene bag, the personal search of the accused was not required to be carried out. However, the fact of the matter is that the personal search of both the accused was carried out as per consent memo Ext. PW-11/A. We have gone through consent memo Ext. PW-11/A. The accused were required to be asked independently whether they wanted to be searched before the gazetted officer or before the Magistrate. Both the accused were asked in the present case by the same consent memo Ext. PW-11/A as to whether they wanted to be searched before the police officer or gazetted officer or Magistrate. According to Section 50 of the ND & PS Act, there are only two officers i.e. nearest Gazetted Officer or nearest Magistrate. There is no third option mentioned in Section 50 of the ND & PS Act.

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 non-compliance of the mandatory procedure under Section 50 of the N.D & P.S. Act, in the present case, has vitiated the entire proceedings initiated against the accused.

17. The case property was also not produced before PW-10 SHO R.P. Jaswal. PW-10 SHO R.P. Jaswal has not deposed that he was on leave on that date when the accused were apprehended and the contraband was recovered. It was only if the SHO himself was the I.O., he was not required to fill up column Nos. 9 to 11 of the NCB form. Thus, the prosecution has failed to prove its case against the accused beyond reasonable doubt and there is no occasion for us to interfere with the well reasoned judgment of the learned trial Court dated 27.10.2007.

18. Accordingly, there is no merit in this appeal and the same is dismissed. Bail bonds are discharged.

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BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

State of H.P. ……Appellant.

Versus

Surender Kumar & ors. …….Respondents.

Cr. Appeal No. 589 of 2008.
Reserved on: July 05, 2016.
Decided on: July 07, 2016.

N.D.P.S. Act, 1985- Section 20 and 29- A car was intercepted by the police – accused 'T' was driving the car, accused 'S' was sitting on the front seat, while accused 'M' was sitting on the rear seat- Accused 'S' tried to hide the bag on seeing the police- search of the bag was conducted during which 4.5 kgs charas was recovered- accused were tried and acquitted by the trial Court- held, in appeal that vehicle was intercepted at 3:00 A.M- police had no prior information that charas was being transported, thus, it was a case of a chance recovery- no independent witnesses could have been present at 3:00 A.M- non association of independent witness is not material in such circumstances - some additional information was supplied in new NCB form but that is not sufficient to doubt the prosecution version- codal formalities were completed at the spot- accused were travelling in the same vehicle- prosecution case was proved beyond reasonable doubt- appeal accepted and accused S convicted of the commission of offence punishable under Section 20 of N.D.P.S. Act and accused T and M convicted of the commission of offence punishable under Section 29 of N.D.P.S. Act. (Para-14 to 19)

Case referred:

Hamid Bhai Azambhai Malik vs. State of Gujarat, (2009) 3 SCC 403

For the appellant: Mr. V.S.Chauhan, Addl. AG with Mr. Vikram Thakur, Dy. AG and Mr. Puneet Rajta, Asstt. AG.

For the respondents: Mr. Manoj Pathak, Advocate, for respondent No. 1.
Mr. Ashish Verma, Advocate, vice counsel for respondents No. 2 & 3.

The following judgment of the Court was delivered:

<u>Justice Rajiv Sharma, J.</u>

The State has come in appeal against the judgment dated 6.6.2008, rendered by the learned Sessions Judge, Kinnaur Sessions Division at Rampur Bushahr, H.P., in Sessions

trial No. 11 of 2007, 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 6.11.2006, at about 3:00 AM, SI Balwant Singh, Police Post Luhri along with other police officials was on nakabandi at Kot nullah. Maruti car bearing registration No. HR-20E-0102 came from Chhonti side and the police stopped the car to check documents. Accused Tara Chand was driver of the car. Accused Surinder Kumar was sitting on the front seat of the car. Accused Surinder Kumar tried to hide the bag in the car. The accused were apprised of their right to be searched before a Magistrate or gazetted officer vide Ext. PW-5/A. The search of the bag was carried out. It contained charas. It weighed 4 kg. 500 grams. in the shape of balls and sticks. Out of the recovered charas, two samples of 25 grams each were taken out and sealed in separate parcels with seal impression "H" and bulk of charas was also sealed separately with impression "H". NCB form in triplicate was filled in at the spot. The specimen impression was also taken on separate cloth. Rukka Ext. PW-11/E was prepared and sent to the Police Station, upon which FIR Ext. PW-3/A was registered. The case property was deposited with MHC of the Police Station. It was sent to chemical examination. It was found to be charas vide report Ext. PY. 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 eleven 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. AG has vehemently argued that the prosecution has proved its case against the accused. On the other hand, Mr. Manoj Pathak Advocate appearing for respondent No. 1 and Mr. Ashish Verma, Advocate appearing vice counsel for respondents No. 2 & 3 have supported the judgment of the learned trial Court dated 6.6.2008.

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 HHC Neel Chand deposed that on 20.11.2006 MHC Pushap Dev handed over to him one sealed parcel along with sample of seals, vide RC No. 67/06 which he took to CFSL, Chandigarh. It was sent back with objection and he again deposited the same with MHC PS Ani on 22.11.2006. On 23.11.2006, the samples were again handed over to him and he deposited the same at CFSL, Chandigarh on 24.11.2006 under receipt. In his cross-examination, he deposed that the objection raised at Chandigarh was oral. The officials of CFSL, Chandigarh told him that NCB form was old and he was asked to bring the report on new form. New NCB form was filled in at PS Anni and then the same was taken to CFSL, Chandigarh.

7. PW-3 Insp. Daya Sagar, testified that on 6.11.2006 HC Darshan Singh brought rukka to the Police Station and he recorded FIR Ext. PW-3/A. On the same day at 12:45 PM, SI Balwant Singh produced before him three sealed parcels stated to be containing charas, which were sealed with seal impression "H" and thereafter, he resealed all the three parcels with seal "X". He filled in column No. 11 of the NCB form. Thereafter, he handed over the sealed parcels along with NCB form to MHC PS Ani. There was objection regarding NCB form from CFSL, Chandigarh and new NCB form was filed in upon which his signatures are Ext. PW-3/B.

8. PW-5 Const. Mukesh Kumar testified that at 3:00 AM, one maruti car came from Chhonti side. It was signaled to stop. The documents of the vehicle were checked. The driver disclosed his identity. Another person sitting with the driver was accused Surinder Kumar. He was carrying bag on his lap. One person was sitting on the rear seat, who disclosed his name as Mani Ram. The name of the driver was Tara Chand. The accused consented to be searched before the police. Search of the bag was carried out. It contained charas. It weighed 4 kg. 500

grams. All the codal formalities were completed on the spot. I.O. sent rukka to PS Anni through HHC Darshan Singh. In his cross-examination, he deposed that the consent was obtained from all the three accused persons and memos were prepared from all the accused persons. He denied the suggestion that NCB form was filled up in his presence. NCB form was filled in at the spot. In his cross-examination by Mr. Swadesh Kainthla, Advocate, he denied the suggestion that the bag Ext. P-1 was not searched in presence of accused Tara Chand. He also denied that no charas was recovered from accused Tara Chand. In his cross-examination by Mr. Puneet Gupta Advocate, he denied the suggestion that the accused were falsely implicated.

9. PW-6 HHC Darshan Singh deposed the manner in which the car was intercepted, charas was recovered and codal formalities were completed on the spot. In his cross-examination by Mr. Ramesh Negi, Advocate, he admitted that village Kot was at a distance of 3 minute walk from Kot Nullah. He also admitted that village Chhonti was at a distance of 1.5 km. from the spot. He denied the suggestion in the cross-examination by Mr. Swadesh Kainthla and Mr. Puneet Gupta, Advocates that nothing was recovered in the presence of accused Tara Chand.

10. PW-7 HC Pushap Dev deposed that on 18.11.2006, MHC Lal Chand handed over to him case property along with samples, sample seals and NCB form. He sent one of the sample along with the NCB form and sample of seal through Const. Neel Chand to CFSL, Chandigarh on 20.11.2006 vide RC No. 67/06. MHC Neel Chand came back from CFSL, Chandigarh on 22.11.2006 and told that CFSL, Chandigarh had raised objection. He called S.I. Balwant Singh from PP Luhri to fill the new NCB form. S.I. Balwant Singh came and filled the new NCB form. On 23.11.2006, he again sent the samples along with new NCB form to CFSL, Chandigarh through HHC Neel Chand, who deposited the same there under receipt.

11. PW-8 MHC Gulab Chand deposed that MHC Lal Singh handed over one parcel of sample weighing about 25 grams duly sealed with seal impression “H” and “X” along with NCB form in triplicate vide RC No. 61/06 dated 13.11.2006, which he took to CFSL, Chandigarh but the same were brought back as objection was raised by CFSL, Chandigarh. He deposited the same back with MHC On 16.11.2006.

12. PW-10 ASI Lal Singh deposed that on 6.11.2006 SI Daya Sagar handed over to him two sealed parcels containing 25 grams charas each and sealed with seal “H” and resealed with seal “X” along with one parcel of bulk charas containing 4.450 Kg charas, duly sealed with seal “H and resealed with seal “X”. The parcels were deposited with him along with NCB form in triplicate. The same were deposited by him in the malkhana. On 13.11.2006, the samples of seal and parcel of charas along with NCB form were handed over by him to HHC Gulab Chand for depositing the same with CFSL, Chandigarh vide RC No. 61/06, copy of which is Ext. PW-10/A. The parcels were received back with oral objection on 16.11.2006 and the same were kept deposited in malkhana of PS Anni.

13. PW-10-A SI Balwant Singh also deposed the manner in which the maruti car was intercepted, charas was recovered from the possession of the accused Surender Kumar. The bag carried by accused Surender Kumar was searched. It contained charas. All the codal formalities were completed on the spot. New NCB form was filled by him vide Ext. PW-3/B. He filled in column Nos. 1 to 8 and columns No. 9 to 11 were filled by SHO Daya Sagar. The resealing was done by SHO PS Ani and he deposited the case property with MHC. In his cross-examination, he deposed that NCB form PW-10/B was not tagged with case file inadvertently, but it remained in police file. He had gone to PS Anni on 23.11.2006 and on the same day he filled the columns No. 1 to 8 and SHO Daya Sagar filled column No. 9 to 12. He denied the suggestion that no charas was recovered from the accused.

14. The accused were acquitted by the learned trial Court on the premise that Section 42 of the ND & PS Act has not been complied with. Independent witnesses, though available were not examined. There is variation in the contents of new NCB form Ext. PW-3/B vis-à-vis old format Ext. PW-10/B. The vehicle in which the accused were travelling was intercepted at 3:00 AM, which was coming from Chhonti side towards Luhri. It was a chance

recovery. The police had no prior information that charas was being transported. Thus, Section 42 of the ND & PS Act was not required to be complied with.

15. Their lordships of the Hon'ble Supreme Court in the case of ***Hamid Bhai Azambhai Malik vs. State of Gujarat,*** reported in ***(2009) 3 SCC 403,*** have held that Section 42 of the ND & PS Act is invocable only if search is made by police officer or authority concerned, upon prior information. When such information or intimation or knowledge comes to the notice of investigating Officer in the course of regular patrolling or investigation of some other offence, it is not necessary to follow the conditions incorporated in Section 42 in all cases. It has been held as follows:

> "12. Coming to the factual background it has to be noted as follows:
>
> The search was made by the raiding party at about 4.30 P.M. on 15. 12.1995. Section 42 will be invocable only if the search is made by the police officer or the concerned authority, upon the prior information. If such a person has reason to believe from personal knowledge or information given by any person and obliged to take down in writing as such the information about the accused having possessed of and dealing with contraband article like 'charas' came to be appraised of by the concerned PSI Mr. K,D,Pandya, LCB Branch of Bharuch Police Station, in course of his investigation of an offence, registered vide CR No.II-135 of 1995. Therefore, it is settled proposition of law when such an information or intimation or knowledge comes to the notice of the Investigating officer in course of the regular patrolling or an investigation of some other offence, it is not necessary to follow in all cases the conditions incorporated in Section 42."

16. Thus, in the instant case, the learned trial Court has erred in law by holding that Section 42 of the ND & PS Act was not complied with.

17. The maruti car was intercepted at 3:00 AM. The place was isolated and desolate. No independent witnesses could be present at 3:00 AM, though PW-6 HHC Darshan Singh has stated that village Kot was at a distance of 3 minute walk from Kot Nullah. He also admitted that village Chhonti was at a distance of 1.5 km. from the spot. The statements of official witnesses, as stated hereinabove, are trustworthy and inspire confidence.

18. The learned trial Court has given undue importance by comparing contents of NCB form Ext. PW-10/B vis-à-vis new format Ext. PW-3/B. According to the old format of NCB form also, the charas was recovered on 6.11.2006 at Kot nullah and two samples of 25 grams each were drawn and the net weight of the contraband was 4.500 kgs. The description of the contraband was also given. It was signed by S.I. Balwant Singh. Ext. Ext. PW-10/B was returned by CFSL, Chandigarh and new NCB form was filled in by PW-10-A SI Balwant Singh. He has filled in column Nos. 1 to 8 of Ext. PW-3/B and columns No. 9 to 11 have been filled in by the SHO. PW-10-A SI Balwant Singh had gone to PS Luhri to fill up the new form. Merely that some additional information was supplied in Ext. PW-3/B has not prejudiced the case of the accused since earlier there were only 7 columns in the NCB form and in the new format Ext. PW-3/B, there were 12 columns. The additional information was required to be supplied. Column Nos. 9 to 11 of Ext. PW-3/B have been filled in by the SHO and column No. 12 has been filled in by the MHC, PS Anni. The date, time and place of seizure has remained the same. The weight of the contraband has also remained the same. The seals were embossed on Ext. PW-3/B as well as on Ext. PW-10/B. It has come in the statement of PW-5 Const. Mukesh Kumar that the I.O. took two samples of 25 grams each out of the recovered bulk of charas and sealed the bulk and samples in a piece of cloth with seal "H" and prepared seizure memo Ext. PW-5/C. PW-10-A SI Balwant Singh has also deposed that the charas was put in saffron cloth and said cloth was put in bag and the bag was put in white coloured cloth and was sealed with seal "H". He has produced the case property and accused at Police Station Anni. The SHO re-sealed the case

property and put seal on the NCB form and deposited the same with MHC PS Anni. The MHC has also admitted that the case property was sealed with seal "H" and resealed with seal "X".

19. The learned trial Court has also erred in law that the prosecution has failed to prove as to wherefrom the accused collected Rs. 45,000/-. It has come in the statement of PW-10-A SI Balwant Singh that he made inquiry from accused and they told that they contributed Rs. 15,000/- each and purchased the recovered charas for Rs. 45,000/-. The accused had come to this area for this purpose of purchasing charas. The accused were travelling in the same Maruti car bearing registration No. HR-20E-0102. Two accused, namely, Surender Kumar and Tara Chand are residents of Narwana, Thesil Narwana, Distt. Jind (Haryana) and accused Mani Ram is resident of Vill. Sulehsa, Tehsil Narwana, Distt. Jind (Haryana). The accused have conspired and agreed to buy charas from the area and were travelling in a Maruti car bearing registration No. HR-20E-0102, when their car was intercepted on 6.11.2006 at about 3:00 AM at Kot nullah. Thus, the prosecution has proved its case against the accused beyond reasonable doubt.

20. Accordingly, the appeal preferred by the State is allowed. The judgment of the trial Court dated 6.6.2008 is set aside. Accused Surender Kumar is convicted under Section 20 of the ND & PS Act. Accused Tara Chand and accused Mani Ram are convicted under Section 29 of the ND & PS Act. The accused be heard on the quantum of sentence on 18.7.2016. The Registry is directed to prepare and sent the production warrants to the quarter concerned.

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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
Mehar Chand ……..Respondent

Cr. Appeal No. 197/2011
Reserved on: July 5, 2016
Decided on: July 7, 2016

N.D.P.S. Act, 1985- Section 20- Police party received an information that accused was indulging in the business of selling brown sugar and Charas to the public- information under Section 42 was sent - search of the house of the accused was conducted during which a bag was found, which was containing 900 grams charas and 2 grams brown sugar – accused was tried and acquitted by the trial Court on the ground that ownership of the house was not proved- however, PW-1 admitted that accused was married to J and was residing with her- police officials had also stated this fact- accused was found in verandah of the house- recovery was effected from the house- case property was sent to FSL, Junga for analysis, where it was found to be charas – it was duly proved that accused was in conscious and exclusive possession of the contraband- loss of 50 grams weight is minimal and can be due to weather conditions prevailing in the area- prosecution version was proved beyond reasonable doubt- accused convicted of the commission of offences punishable under Sections 20 (b)(ii)(B) and 20(I)(a) of N.D.P.S. Act. (Para-16 to 20)

Cases referred:

State of H.P. vrs. Mehboon Khan and analogous matters, Latest HLJ 2014 (HP) (FB) 900

For the appellant : Mr. V.S. Chauhan, Additional Advocate General with Mr. Vikram Thakur, Deputy Advocate General.

For the respondent : Mr. T.S. Chauhan and Mr. Arjun Lall, Advocates.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

The State has come in appeal against Judgment dated 18.2.2011 rendered by the learned Special Judge, Fast Track, Kullu, Himachal Pradesh in Sessions Trial No. 44 of 2009, whereby respondent-accused (hereinafter referred to as 'accused' for convenience sake), who was charged with and tried for offence under Sections 20(b)(ii)(B) and 20(I)(a) of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'Act' for convenience sake), has been acquitted by the learned trial Court.

2. Prosecution case, in a nutshell, is that on 21.12.2008, ASI Lal Chand alongwith other police officials was present at village Dhungri at about 5.30 PM in connection with patrolling duty. He received a secret information that Jai Wanti had contracted marriage with one Mehar Chand, resident of village Kais. Mehar Chand was indulging in the business of selling brown sugar and *Charas* to general public from the house of Jai Wanti. As the information was reliable and police party had not time to obtain search warrant from the Court, so, *Rukka* /information was sent to Dy.SP Manali by the Incharge of the patrolling party as per the provisions of Section 42 of the Act through Constable Sumer Bahadur. Thereafter, police party proceeded towards the house of accused. ASI Lal Chand called Pradhan of Gram Panchayat, Nasogi Shri Kehar Singh by contacting him on mobile and also Hukam, on his mobile. ASI asked both the persons to reach near the house of Jai Wanti. On the way to the house of Jai Wanti, Kehar Singh and Hukam Singh met the police party at about 5.50 PM. They were associated in the raiding party and police party reached the house of Jai Wanti at about 6.05 PM. Police party saw one person standing in the verandah of the house who disclosed his name as Mehar Chand. ASI told Mehar Chand that police wanted to search his house. House was searched in the presence of independent witnesses. Before entering the house, ASI gave his personal search to Mehar Chand in the presence of Kehar Singh and Hukam Chand. During the search of the house, police party found rucksack bag on a cot in the southern room in between the clothes. Bag was checked, in which one polythene envelope was found. Polythene envelope was opened and police found *Bhang/Charas* in form of pancake and marbles in it. Police also recovered two small paper packets containing narcotic substance like heroin. It was found to be brown sugar. Police also recovered small hand balance and weights of 50 gram, 20 gram, 10 gram, 5 gram, 2 gram and 1 gram. *Charas* weighed 900 grams and brown sugar weighed 2 grams. IO has drawn two samples of *Charas* weighing 25 grams each for the purpose of analysis and also drawn two samples of 1 gram each from brown sugar. Samples were wrapped in polythene envelopes and thereafter they were wrapped inside cloth. The *Pullinda*s were sealed with seal impression 'O'. Rest of the *Charas* was also put in the same polythene envelope and thereafter wrapped in a piece of cloth. *Pullinda* containing 850 grams of *Charas* was sealed with six seal impressions of seal 'O'. Specimens of seals were obtained on the pieces of cloth. IO also filled in NCB-I form in triplicate. Seal after use and after taking samples of seal was entrusted to Pradhan Kehar Singh. *Rukka* was sent to the Police Station. FIR was registered. Site map was prepared. Police party went to the Police Station at about 11.30 pm, where SI Om Prakash resealed the case property with seal impressions of 'R'. Incharge Police Station filled up relevant columns of NCB form and handed over case property to MHC Mohinder Singh at about 11.45 PM. IO also sent special report to Dy.SP Manali on 22.12.2008. Samples were sent to FSL for chemical analysis. Bulk *Charas* was also sent for analysis during the course of trial. Investigation was completed. Challan was put in the Court after completing all the codal formalities.

3. Prosecution has examined as many as eleven witnesses to prove its case against the accused. Accused was also examined under Section 313 CrPC. He pleaded innocence. Accused was acquitted as noticed above. Hence, this appeal by the State.

4. Mr. V.S. Chauhan, Additional Advocate General with Mr. Vikram Thakur, Deputy Advocate General have vehemently argued that the prosecution has proved its case against the accused.

5. Mr. T.S. Chauhan and Mr. Arjun Lall, Advocates, have supported Judgment dated 18.2.2011.

6. We have heard the learned counsel for the parties and also gone through the Judgment and record carefully.

7. Kehar Singh (PW-1) is the independent witness. He testified that he was Pradhan, Gram Panchayat, Nasogi since 2005. ASI Lal Chand called him to village Nasogi on 21.12.2008 at about 5.30 PM. There was another person who was a resident of village Dhungri. He did not recall his name. Police was present in the house of Chuni Lal. Police had recovered *Bhang*. It was weighed in his presence. *Charas* weighed 900 grams and smack weighed 2 grams. Police sealed it and prepared documents. His signatures were obtained on the documents. He admitted his signatures on Exts. PW-1/A, PW-1/B, PW-1/C and PW-1/D. He was declared hostile and cross-examined by the learned Public Prosecutor. In his cross-examination by the learned Public Prosecutor, he has admitted that ASI Lal Chand made a telephonic call to him on 21.12.2008 that the police was to conduct search of house of Jai Wanti and he should reach the spot. He admitted that when Police party and Hukam Singh went to the spot, accused was standing in the verandah. He also admitted that he disclosed that he had married Jai Wanti and was residing with her in the her house. He admitted that the police gave personal search to the accused prior to the search of the house of. Ext. PW-1/A was prepared to this effect. He admitted that when they went inside the house, a bag was lying on the Charpai. He did not recall this fact. He denied the suggestion that bag was opened in his presence and it was found containing *Charas*. He also denied that the bag was having a small polythene containing brown sugar. He admitted that one small scale and weights of 50 grams, 20 grams, 10 grams, 5 grams, 2 grams and 1 gram were found. He admitted that two samples each weighing 25 grams were separated from cannabis and remaining was put in the parcel and was also sealed. He admitted that three impressions of seal 'O' were put on each parcel. He also admitted that two samples each containing 1 gram heroin were prepared which were sealed with three seal impressions of 'O'. He admitted that police seized cannabis, brown sugar, scale, roll of polythene vide seizure memo Ext. PW-1/B. His signatures were also obtained on it. He also put his signatures on arrest memo Ext. PW-1/C. He admitted that his signatures were obtained on bulk parcel Ext. P1 and samples parcels Ext. P2 and Ext. P3. He admitted that the police recorded his statement vide mark A. He admitted that the accused was alone in the house on that day. In his cross-examination by the learned defence Counsel, he deposed that his signatures were obtained in the morning of 22.12.2008 by the police in the Police Station. He also admitted that Chuni Lal was not present in the house. He stated that Mehar Chand had not married Jai Wanti. He had seen the accused in the house of Jai Wanti only on that day.

8. HC Upender Singh (PW-2) deposed that the Dy.SP Ashish Sharma handed over an information under Section 42 on 21.12.2008 at about 6 PM vide Ext. PW-2/A. He made entry in the register at Sr. No. 15 vide Ext. PW-2/B.

9. SI Om Prakash (PW-3) deposed that ASI Lal Chand handed over two sample parcels of *Charas* and two sample parcels of brown sugar and one bulk parcel. Each sample parcel was sealed with three seal impressions of 'O' and the bulk parcel was sealed with six impressions of seal 'O'. He also handed over sample seal 'O', NCB-I form in triplicate at 11.30 AM on 21.12.2008. He resealed each sample parcel with three impressions of seal 'R' and bulk parcel was sealed with six impressions of 'R'. Sample seal was taken separately on a piece of cloth and one such sample is Ext. PW-3/A. Column Nos. 9 to 11 of NCB form were filled in by him. He handed over all the parcels, sample seals, NCB-I form to MHC Mohinder Singh for depositing in Malkhana.

10. Constable Om Prakash (PW-4) has carried the contraband and relevant documents to FSL vide RC No. 209/08. He deposited the same with FSL on 26.12.2008.

11. Constable Sumer Bahadur (PW-5) deposed that Lal Chand received a secret information that accused was residing in the house of Jai Wanti and was selling *Charas*.

Information was reduced into writing vide Ext. PW-2/A. It was handed over to him to carry to the Dy.SP Manali at 5.35 PM. He handed over the same to Dy.SP Manali at 6 PM.

12. Mohinder Singh (PW-6) testified that SI Om Prakash handed over five parcels, NCB-I form in triplicate, copy of FIR, copy of seizure memo, sample seals 'O' and 'R' to him on 21.12.2008. One parcel was sealed with six impressions of seal 'A' and six impressions of seal 'R', two samples, each sealed with three impressions of seals 'O' and 'R' each, two other samples sealed with seals 'O' and 'R'. He made entry at Sr. No. 585 in the Malkhana Register vide Ext. PW-6/A. He filled in column No. 12 of the NCB form, Ext. PW-3/B. Road certificate was issued. He handed over case property to constable Om Prakash to be carried to FSL Junga vide RC No. 209/08. Case property remained intact till it remained in his custody. In his cross-examination, he has admitted that there was only one entry of sending sample to FSL and there was no entry of taking out case property from the Malkhana.

13. Inspector Sanjay Sharma (PW-9) deposed that ASI Lal Chand handed over the case file to him on the completion of investigation and on the receipt of the report of analysis Ext. PW-9/A. He prepared the *Challan* and presented the same in the Court. Bulk parcel was sent during the course of trial to FSL. FSL report is Ext. PW-9/A.

14. HC Bhupinder (PW-10) testified the manner in which secret information was recorded and sent to Dy.SP Manali through constable Sumer Bahadur by ASI Lal Chand. Raiding party was constituted. Pradhan, Gram Panchayat Kehar Singh and another person met them on the way. They were associated by them. They reached the house of Jai Wanti at 6.05 PM. Accused was present in the verandah. He revealed his name as Mehar Chand. ASI Lal Chand gave his personal search to the accused in his presence. Accused was told that police wanted to search the house. Memo Ext. PW-1/A was prepared. Search of house was conducted. Bag was found. It was opened and it was found containing polythene bag. *Charas* was found inside the polythene bag in the shape of pancakes and balls. Small packets made of lined papers were found. They contained brown sugar. One roll of wrapping paper was found inside the bag. Another polythene bag containing balance and weights of 50, 20, 10, 5, 2 and 1 grams were found. *Charas* weighed 900 grams. Brown sugar weighed 2 grams. Two samples each weighing 25 grams were separated for the purpose of analysis. Samples each containing 1 gram brown sugar were also prepared. These samples were packed in different pieces of cloth. Sample was sealed with three impressions of seal 'O'. Bulk *Charas* was put back in same envelope from which it was recovered. All the articles were seized vide memo Ext. PW-1/B which was signed by him, Pradhan Kehar Singh and other person who was present with them. *Rukka* mark B was prepared and handed over to him with the direction to carry it to Police Station Manali. He handed over the *Rukka* to ASI Brij Lal, who recorded the FIR and handed over the case file to him. In his cross-examination he denied that signatures of Hukam Singh were forged. He denied the suggestion that Hukam Singh and Kehar Singh were not called telephonically. He denied that Kehar Singh Pradhan was only called at Police Station. He further denied the suggestion that no cannabis was recovered from the possession of accused from the house of Jai Wanti. He denied the suggestion that the accused did not reside in the house of Jai Wanti.

15. ASI Lal Chand (PW-11) testified that he received a secret information. Copy of information is Ext. PW-2/A. It was sent to the Dy.SP Manali through Constable Sumer Bahadur. Thereafter police proceeded to the house of Jai Wanti. They reached there at 6.05 PM alongwith Kehar Singh and Hukam Singh, independent witnesses. Accused was found standing in the verandah. Accused was apprised that they wanted to search the house. Search of house was conducted. Contraband was recovered. All the codal formalities were completed at the spot. Case property was taken into possession. He prepared *Rukka* and sent the same to Police Station. Case property was produced before SI Om Prakash. He resealed the same. He also prepared special report. In his cross-examination, he denied the suggestion that no secret information was received by him or that he had not sent the same through Sumer Bahadur to Dy.SP Manali. He denied the suggestion that Hukam Singh was not with them or that he has not signed the documents. He denied the suggestion that the documents were prepared in the Police Station. He

also denied the suggestion that since accused had declined to become witness, therefore false case was made against him.

16. A Secret information was received by PW-11 Lal Chand. He reduced the same into writing. It was sent to Dy.SP Manali. He associated two witnesses PW-1 Kehar Singh and Hukam Singh. Accused had married Jai Wanti. When they reached the house of Jai Wanti, accused was in the verandah. He disclosed his identity. He was told by the police that they wanted to search the house. House was searched. *Charas* and brown sugar were recovered. Codal formalities were completed at the spot. Contraband was produced before SI Om Prakash (PW-3). Samples were sent to FSL through PW-4 Constable Om Prakash. Bulk *Charas* was also sent to FSL Junga through Constable Sumer Bahadur on 18.12.2009. Contraband was found to be *Charas* as well as brown sugar as per reports, Ext. PW-9/A and Ext. PW-9/B. Learned trial Court acquitted the accused on the ground that the police has not proved ownership of the house. However, fact of the matter is that PW-1 Kehar Singh though declared hostile, but has categorically deposed that the accused disclosed that he was married to Jai Wanti and was residing with her in her house. PW-10 Bhupinder has also deposed that secret information was received by ASI Lal Chand that accused had married Jai Wanti and was residing with her in her house and was selling narcotics. PW-11 ASI Lal Chand has also deposed that information was received that Mehar Chand had married Jai Wanti and was residing with her at Gharat Aage near Nasogi and was dealing in brown sugar and *Charas*. Police was not required to prove ownership of the house. Police had prior information that accused was residing in the house of Jai Wanti. Accused was found standing in verandah of the house owned by Jai Wanti. PW-1 Kehar Singh Pradhan Gram Panchayat Nasogi, though was declared hostile but admitted his signatures on Exts. PW-1/A, PW-1/B, PW-1/C and PW-1/D. He has deposed that the contraband was not recovered in his presence. But he has admitted that they had gone inside the house. He has admitted that one scale and weights of 50, 20, 10, 5, 2 and 1 gram were recovered. He admitted that two samples each weighing 25 grams were separated from cannabis and remaining was put in the parcel and was also sealed. He admitted that three impressions of seal 'O' were put on each parcel. He also admitted that two samples each containing 1 gram heroin were prepared which were sealed with three seal impressions of 'O'. He admitted that the contraband was taken into possession vide Ext. PW-1/B. He has admitted that his statement was recorded by the police vide mark B. He admitted his signatures on bulk parcel Ext. P1 and sample parcels Ext. P2 and Ext. P3. PW-10 Bhupinder has also deposed the manner in which secret information was received. Police party went to the house of Jai Wanti where accused was found standing in the verandah and contraband was recovered and all the codal formalities were completed. He was handed over *Rukka*. He took it to the Police Station, on the basis of which FIR was recorded. Statement of PW-10 Bhupinder has duly been corroborate by PW-11 Lal Chand. Case property and NCB form were produced by him before S.I. Om Prakash. He resealed the same with seal impression of 'R'. Case property was resealed by Om Prakash. It was deposited with MHC Police Station Manali by SI Om Prakash. He deposited the same in Malkhana. He filled in column No. 12 of NCB form Ext.PW-12/B. Case property was sent by him to FSL Junga through Constable Om Prakash on 25.12.2008. He deposited the same with FSL on 26.12.2008. Bulk property was sent to FSL Junga as noticed herein above through Sumer Bahadur. Case property has reached FSL Juna intact and all the seals were found intact. It was also accompanied by NCB form. Report is Ext. PW-9/B. Samples were also sent through Om Prakash on 26.12.2008 and bulk was sent to FSL through Sumer Bahadur on 18.12.2008. According to the reports, the contraband was found to be *Charas*.

17. Accused has not challenged the reports Ext. PW-9/A and Ext. PW-9/B. These reports were per se admissible. It was not necessary for the police to examine Constable Sumer Bahadur, who has taken bulk *Charas* to FSL on 18.12.2009. In fact, bulk was also deposited in Malkhana as per Ext. PW-6/A. Prosecution has conclusively proved that house was searched in the presence of PW-1 Kehar Singh and official witnesses. It was not necessary for the prosecution to prove that a particular room was occupied by accused. It was sufficient that accused was found in the house since he was living with his wife Jai Wanti, in her house.

According to learned trial Court, accused was not alone in the house on that day. Prosecution has proved to the hilt that accused was living in the house of Jaiwanti and he was in conscious and exclusive possession of the contraband recovered from him. PW-1 Kehar Singh has also deposed, as noticed hereinabove, that the accused at the time of the search was all alone. Loss of weight of 50 grams is minimal. It could be due to weather conditions prevailing in the area where the sample/bulk was kept.

18. Judgment relied upon by the learned trial Court in **Sunil vs. State** has been overruled by this Court in the case of **State of H.P. vrs. Mehboon Khan and analogous matters,** reported in **Latest HLJ 2014 (HP) (FB) 900.** The Full Bench of this Court has categorically held that there is no legal requirement of the presence of particular percentage of resin to be there in the sample and the presence of the resin in purified or crude form is sufficient to hold that the sample was that of Charas. It has been held as follows:

> "………….The separated resin is cannabis resin not only when it is in 'purified' form, but also when in 'crude' form or still mixed with other parts of the plant. Therefore, the resin mixed with other parts of the plant i.e. in 'crude' form is also charas within the meaning of the Convention and the Legislature in its wisdom has never intended to exclude the weight of the mixture i.e. other parts of the plant in the resin unless or until such mixture proves to be some other neutral substance and not that of other parts of the cannabis plant. Once the expert expressed the opinion that after conducting the required tests, he found the resin present in the stuff and as charas is a resinous mass and after conducting tests if in the opinion of the expert, the entire mass is a sample of charas, no fault can be found with the opinion so expressed by the expert nor would it be appropriate to embark upon the admissibility of the report on any ground, including non-mentioning of the percentage of tetrahydrocannabinol or resin contents in the sample………….
>
> f. We are also not in agreement with the findings recorded by the Division Bench in Sunil's case that " mere presence of tetrahydrocannabinol and cystolithic hair without there being any mention of the percentage of tetrahydrocannabinol in a sample of charas is not an indicator of the entire stuff analyzed to be charas" for the reason that the statute does not insist for the presence of percentage in the stuff of charas and mere presence of tetrahydrocannabinol along with cystolithic hair in a sample stuff is an indicator of the same being the resin of cannabis plant because the cystolithic hair are present only in the cannabis plant. When after observing the presence of tetrahydrocannabinol and cystolithic hair, the expert arrives at a conclusion that the sample contains the resin contents, it is more than sufficient to hold that the sample is of charas and the view so expressed by the expert normally should be honoured and not called into question. Of course, neutral material which is not obtained from cannabis plant cannot be treated as resin of the cannabis plants. The resin rather must have been obtained from the cannabis plants may be in 'crude' form or 'purified' form. In common parlance charas is a hand made drug made from extract of cannabis plant. Therefore, any mixture with or without any neutral material of any of the forms of cannabis is to be considered as a contraband article. No concentration and percentage of resin is prescribed for 'charas' under the Act"

19. Prosecution was required to prove only that accused was residing in the house of Jai Wanti. Prosecution has proved beyond reasonable doubt that the contraband was recovered from the conscious and exclusive possession of the accused

20. Accordingly, the appeal is allowed. Judgment dated 18.2.2011 rendered by the learned Special Judge, Fast Track, Kullu, Himachal Pradesh in Sessions Trial No. 44 of 2009 is set aside. The accused is convicted for the commission of offence punishable under Sections 20

(b)(ii)(B) and 20(I)(a) of the Narcotic Drugs & Psychotropic Substances Act, 1985. Accused be produced to be heard on quantum of sentence on 18.7.2016. Bail bonds of the accused are cancelled.

21. Registry is directed to prepare and send the production warrant to the quarter concerned.

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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
Suneel Dutt and others ……..Respondents

Cr. Appeal No. 108/2012
Reserved on: July 5, 2016
Decided on: July 7, 2016

Indian Penal Code, 1860- Section 498-A and 306 read with Section 34- Deceased was married to accused R as per Hindu rites and customs- she used to disclose that she was being beaten and tortured by her father-in-law, mother-in-law and brother-in-law for bringing insufficient dowry – she died due to asphyxia after consuming phosphate releasing poison- accused were tried and acquitted by the trial Court- held, in appeal that 25 injuries were found on the person of the deceased- probable time between injury and the death was few minutes to few hours – injuries were possible with danda, kick and fist blows- prosecution witnesses categorically deposed that deceased used to tell about the harassment and the torture for bringing insufficient dowry- injuries could not be self inflicted – this shows that deceased was mercilessly beaten by the accused- statements of official witnesses cannot be discarded- deceased could only confide to her close relative – act of the accused had led the deceased to commit suicide- trial Court had wrongly acquitted the accused- appeal allowed- accused convicted of the commission of offences punishable under Sections 498-A and 306 read with Section 34 of Indian Penal Code. (Para-17 to 25)

Case referred:
S. Mahaboob Basha v. State of Karnataka (2014)10 SCC 244

For the appellant : Mr. V.S. Chauhan, Additional Advocate General.
For the respondents : Mr. Dheeraj K. Vashishta, vice Counsel.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

By way of the present appeal, the State has come before this Court laying challenge to Judgment dated 20.9.2010 rendered by the learned Additional Sessions Judge, Ghumarwin, District Bilaspur, HP (camp at Bilaspur) in Sessions Trial No. 9/7 of 2008, whereby respondents-accused (hereinafter referred to as 'accused' for convenience sake), who were charged with and tried for offences under Sections 498(A), 306 /34 IPC, have been acquitted.

2. Case of the prosecution, in a nutshell, is that Rattan Lal, uncle of deceased Veena Devi lodged an FIR Ext PW-1/A dated 13.7.2008 at 7.10 hours stating that they were three brothers and eldest Roshan Lal died six years back leaving two daughters and one son. Younger daughter Veena Devi had been married to Suneel Dutt son of Rattan Lal of village Ladhyana as

per Hindu rites and ceremonies. On 13.7.2008, he received a telephonic message from his son-in-law and relative Rattan Lal that Veena Devi had expired. He came with the villagers to Bharari Hospital and found Veena Devi lying dead outside the hospital. He apprehended that accused tortured the deceased physically and mentally forcing her to consume poisonous substance resulting into her death. Veena Devi used to disclose that her father-in-law, mother-in-law and brother-in-law used to give her beatings and also tortured her for bringing insufficient dowry. She also disclosed to him that she was beaten by accused when she visited her parents house. Inquest papers were prepared. Post mortem was conducted by PW-13 Dr. N.K. Sankhyan with Dr. Satish Sharma. Doctor opined that the deceased died due to asphyxia after consuming Phosphate releasing poison, as per final opinion Ext. PW-13/F. Site plan Ext. PW-15/A was prepared search of the house of accused was conducted and a Cypher-guard 10% EC bottle was recovered from the room below the kitchen of the accused. It was taken into possession vide memo Ext PW-2/A. On 20.7.2008, IO also recorded the statement of accused Suneel Kumar under Section 27 of the Indian Evidence Act. Accused got recovered a bamboo stick from the maize field and also disclosed that he gave beatings to Veena Devi with it. It was taken into possession vide Ext. PW-1/C. Investigation was completed. Challan was put in the Court after completing all the codal formalities.

3. Prosecution has examined as many as eighteen witnesses to prove its case against the accused. Accused were also examined under Section 313 CrPC. Their case of denial simpliciter. Learned trial Court acquitted the accused. Hence, the present appeal by the State.

4. Mr. V.S. Chauhan, Additional Advocate General has vehemently argued that the Prosecution has proved its case against the accused.

5. Mr. Dheeraj K. Vashishta, Advocate, has supported Judgment dated 20.9.2010.

6. We have heard the learned counsel for the parties and also gone through the record carefully.

7. Rattan Lal (PW-1) is the uncle of deceased Veena Devi. According to him, his elder brother Roshan Lal expired six years back. He had three children. Both daughters of his brother were brought up by him and he also performed their marriages. Veena Devi was married to accused on 17.4.2008. He had given dowry to his niece according to his status and resources. After her marriage, Veena Devi visited his house after 15 days of marriage. Thereafter, she again visited on 22.5.2008 and thereafter three days prior to her death. When Veena Devi visited his house for the first time, she told that her husband, father-in-law and mother-in-law were harassing her for bringing insufficient dowry and they were demanding money to purchase a vehicle. On 22.6.2008, when she visited his house, she told him that now accused had started harassing her even more and also gave her beatings. She told him that all the accused were giving her beatings with *Danda*s. When she visited his house three days prior to her death, she told that accused were harassing her more for money for the purchase of vehicle. He told her that he alongwith his son, who was residing at Delhi would come to her house and make the accused understand. He had also made accused Suneel to understand twice in his house. On 13.7.2008, at 3.00 AM, accused Suneel and his father Rattan Lal informed him that Veena Devi had died at Bharari Hospital. Thereafter, he alongwith villagers reached Bharari Hospital. When he reached Bharari Hospital, he found that the dead body of Veena Devi was lying outside the hospital near the gate. When he inspected the body, he found that there were injuries on her body. Veena had died by consuming poison. She died because accused used to maltreat and harass her for insufficient dowry. He visited Police Station Bharari and lodged FIR Ext. PW-1/A. Post mortem of the deceased was conducted. Police took into possession a vial of Cypher-guard poison. Accused Suneel Kumar made disclosure statement Ext. PW-1/B that he could get the *Danda* recovered in the field near house. Thereafter, accused Suneel got *Danda* recovered from maize field situate beside the house. In his cross-examination, he denied that the wife and son of Roshan Lal were mentally disturbed. Volunteered that they were simpletons. He denied the suggestion that his brother Roshan Lal died of mental tension. Volunteered that he was suffering from cancer. He

had looked after him during his illness. He denied the suggestion that before marriage, he took Veena Devi to psychiatrist at Bhota. He admitted that at the time when marriage was settled, accused had raised no demand for dowry nor it was settled that any dowry would be given. On three occasions when Veena Devi visited his house, she told him that accused were demanding money for the purchase of vehicle. Except money, accused did not demand anything. He admitted that Veena Devi was taken to a private doctor on 11.7.2008 by her mother-in-law.

8. Raghunath (PW-2) has corroborated the statement of PW-1, Rattan Lal. Veena Devi met him after 15 days of marriage and told him that her in-laws were maltreating her on account of demand for dowry. On the intervening night of 12/13.7.2008 at 3.30 AM, Rattan Lal rang him up and told that his sister-in-law had informed him that Veena Devi had died in Bharari Hospital. He alongwith others visited Bharari Hospital alongwith Rattan Lal. When they reached the hospital, dead body of Veena Devi was lying near the gate and all the accused were present there. He has noticed injuries on her arm and froth was coming from her mouth.

9. Nirmla Devi (PW-3) deposed that Veena Devi was niece of her husband. She was married to accused Suneel on 17.4.2008. Entire expenses of marriage were borne by her husband. After her marriage, Veena Devi came to their house three times. Every time she used to tell that accused used to harass her and used to give her beatings for bringing insufficient dowry. She also told that accused were demanding money for purchase of vehicle. She visited their house two days prior to her death and told that accused were harassing her and giving beatings to her on account of demand of money for purchasing vehicle. On the intervening night of 12/13.7.2008, information was received that Veena Devi had died. In her cross-examination, she deposed that accused did not permit her to disclose her miseries to any person and the little time she used to get, she used to tell the miseries to her. She denied the suggestion that she had taken Veena Devi to a psychiatrist at Bhota. She also denied the suggestion that when they reached Hospital, accused had disclosed that two days ago Veena Devi was hit by an ox.

10. Parmeshwari Devi (PW-4) deposed that the marriage was solemnised on 17.4.2008. Veena Devi died after 2 ½ months of marriage. 3-4 prior to her death, she had visited her parents house. She also visited her house for taking milk. On that day, she asked her as to why she had grown weak. She told that her husband, mother-in-law and father-in-law were ill-treating her on account of demand of money for the purchase of tractor and her husband was also giving her beatings.

11. Arvind Kumar (PW-5) deposed that on 12/13.7.2008, at about 1.15 AM, accused Rattan Lal and Savitri came to his house and told that their daughter-in-law was ill and was to be taken to Bharari Hospital. He took Veena in his car to Bharari Hospital.

12. Jagdish Ram (PW-7) deposed that 10-15 days after the marriage, Veena Devi had come to her parents' house and she also met him. He found that she had grown weak. She told him that her in-laws were torturing her physically and mentally for dowry. He came to know about her death on 13.7.2008. He signed inquest papers. He visited the Police Station with Rattan Lal.

13. Vidya Devi (PW-8) deposed that Veena Devi visited her house 15 days after marriage. She told her that her father-in-law, mother-in-law were harassing her and her husband used to give her beatings after consuming liquor. On 22.6.2008, she again met her she told her that her mother-in-law gives her beatings and her father-in-law abuses her and her husband gives her beatings after consuming liquor.

14. Rakesh Kumar (PW-9) deposed that on 13.7.2008, he was associated in the investigation of the case and in his presence and in the presence of Raghunath, house of Sunita Devi , mother-in-law of deceased was searched by the police. During search, a small vial of Aluminum Cyber Guard 10 EC was recovered from the store room besides the kitchen. It was sealed and taken into possession vide Ext. PW-2/A. Specimen of seal was taken and handed over to Raghunath after use.

15. Dr. Bharti Ranoute (PW-11) deposed that on 12.7.2008, Veena Devi visited CHC Bharari. She was suffering from fever and anxiety. Urine test for pregnancy was conducted. It was found negative. She was advised to get herself admitted in the hospital. however, she was not admitted. She was advised to get admitted since as per blood test, she was suffering from typhoid.

16. Dr. N.K. Sankhyan (PW-13) conducted post-mortem with Dr. Satish. He has noticed following ante mortem injuries:-

"List of antemortem injuries: -

1. Four small reddish coloured abrasions on right side of face lateral to right angle of mouth, each abrasion was in area of 0.2 cm x 0.2 cm.
2. reddish coloured linear abrasion present on right side of neck. It was 1.5 cm in length, directing below upwards and lateral to medial side.
3. reddish coloured contusion on outer surface of right shoulder in area of 3 cm x 5 cm underlying bones and joints were normal.
4. Reddish coloured contusion was present on outer surface of right arm in area of 7 cm x 3.5 cm in upper 1/3rd portion of right arm.
5. In the middle 1/3rd portion of right arm, there was reddish coloured contusion on its outer surface in area of 2cm x 3 cm underlying bones were normal.
6. On outer surface of right arm in its middle 1/3rd portion there were reddish coloured contusion in area of 0.5 cm x 0.5 cm. Underlying bone was normal.
7. In middle 1/3rd portion of right arm on its medial surface there was reddish coloured contusion sin area of 8 cms x 7 cms. Underlying bone was normal.
8. In middle 1/3rd portion of right arm on medial surface there was reddish coloured contusion in area of 7 cm x 1.5 cm. Underlying bone was normal.
9. In upper half portion of left forearm on its posteriolateral surface, there was reddish coloured contusion in area of 6 cmz x 8 cms. Underlying bones were normal.
10. In upper half portion of left arm on its outer surface, there was reddish coloured contusion in area of 8 cms. X 6 cms. Underlying bone was normal.
11. In upper 1/3rd portion of left arm on its outer surface there was reddish coloured contusion in area of 3cms x 3 cms. Underlying bone was normal.
12. There was reddish coloured contusion of back surface of left ankle in area of 3 cms. X 2.5 cms. Underlying bones and joints were normal.
13. There was reddish coloured contusion on outer surface of right knee in area of 2.5 cms. X 1.5 cms. Underlying bones and joints were normal.
14. There was reddish coloured contusion present on inner surface of right leg just below the knee, in area of 1.5 cms. X 1.5 cms. Underlying bones were normal.
15. In middle 1/3rd portion of right thigh, on its outer surface, there was reddish coloured contusion in area of 3 cms. X 1.5 cms. Underlying bones were normal.
16. In lower half portion of right thigh on front surface, there was greenish coloured contusion in area of 4 cms. X 3 cms.

17. In the lower 1/3rd portion of left thigh, there was reddish coloured contusion in area of 9 cms. X 3 cms. , it was on outer surface of thigh. Unerlying boen was normal.
18. There was greenish coloured contusion on outer surface of left thigh in its lower half portion in area of 8 cmz. X 2 cms. Underlying bone was normal.
19. There was greenish coloured contusion in outer surface of left high in its middle 1/3rd portion in area of 10 cms. X 5 cms. Underlying bones were normal.
20. Reddish coloured contusion was present on outer surface of left thigh in its upper half portion in area of 5cms. X 2 cms. Underlying bone was normal.
21. There was greenish coloured contusion on outer surface of left thigh in its half half portion in area of 9 cms. X 4 cms. Under lying bone was normal.
22. Reddish coloured contusion was present on outer surface of left thigh in its upper 1/3rd portion in area of 4.5 cms. X 3 cms. Underlying bone was normal.
23. There was greenish coloured contusion on frontolateral of left leg in its half portion in area of 3cms. X 2 cms. Underlying bones were normal.
24. Reddish coloured contusion was present on outer surface of left leg in area of 3cms. X 2 cms. In its middle 1/3rd portion. Under lying bones were normal.
25. There was reddish coloured contusion on outer surface of left leg in its lower half portion in area of 2cms. 1.5 cms. Underlying bones were normal."

17. The post-mortem report is Ext. PW-13/D. According to final opinion, Ext. PW-13/F, a few injuries out of injuries No.1 to 25 mentioned in the post-mortem report were possible with *Danda* Ext. P1 and some of the injuries were possible with kick and fist blows. The probable time that elapsed between injuries and death was few minutes to few hours and the probable time between death and post mortem was six hours to 24 hours. According to post-mortem report, Veena Devi died due to asphyxia due to consuming Phosphate releasing poison.

18. Giatri Devi (PW-14) deposed that whenever, Veena Devi used to visit her, she informed her that the accused used to harass her.

19. Iqbal Mohd. (PW-15) deposed that on 13.7.2008, Rattan Lal lodged an FIR Ext. PW-1/A in the Police Station. He visited the hospital where dead body was kept. Photographs were taken. Site map was prepared. Accused were present in the hospital. Post mortem was got conducted. House of accused was searched. *Danda* Ext. P1 was recovered. He obtained marriage certificate. In his cross-examination, he has admitted that accused had brought deceased to the hospital after her condition deteriorated. Doctor declared her dead. Factum of death was conveyed by Suneel Dutt to the uncle of deceased.

20. Marriage of deceased was solemnised with the accused Suneel Dutt on 17.4.2008. She lost her father and was brought up by her uncle Rattan Lal. He performed marriage of deceased with Suneel Dutt.

21. FIR Ext. PW-1/A was lodged by PW-1 Rattan Lal. It is specifically mentioned that Veena Devi was physically and mentally tortured and she was forced to consume poisonous substance. In laws of deceased harassed her for bringing insufficient dowry. Whenever she used to come to his house, she used to narrate about maltreatment meted to her by her in laws. Veena Devi had visited three times prior to her death and told him that her father-in-law, mother-in-law and husband were maltreating her more and more. Rattan Lal (PW-1) has categorically deposed

that Veena Devi used to tell him that her husband, father-in-law and mother-in-law were harassing her for bringing insufficient dowry. She was given beatings by them. He has noticed injuries on the dead body when he visited Bharari Hospital. PW-2 Raghunath has also deposed that deceased used to tell him that her in laws were maltreating her for bringing insufficient dowry. He has also noticed injuries on her arm and froth coming from her mouth. PW-1 Rattan Lal and Raghunath (PW-2). Nirmla Devi (PW-3) has also deposed that accused used to harass her and used to give beatings for bringing insufficient dowry. PW-4 Parmeshwari Devi also deposed that husband, mother-in-law and father-in-law of deceased were maltreating her for bringing insufficient dowry. PW-3 Arvind Kumar testified that he took Veena Devi to Hospital. PW-7 Jagdish Ram also deposed that whenever, Veena Devi met him, she told that she was being mentally and physically tortured by in laws. He has signed the inquest papers. PW-8 Vidya Devi stated that Veena Devi used to tell her that her mother-in-law used to give her beatings, father-in-law used to abuse her and her husband used to give her beatings after consuming liquor. PW-9 Rakesh Kumar is the witness of recovery. A small vial of Cypher-guard 10% EC was taken into possession vide Ext. PW-1/A. PW-11 Dr. Bharti Ranoute has stated that deceased was suffering from fever when she was brought to the hospital on 12.7.2008. Dr. N.K. Sankhyan, (PW-13) has noticed 25 injuries on the body of Veena Devi. According to his final opinion Ext. PW-13/F, deceased died due to asphyxia after consuming Phosphate releasing poison. Deceased has died within less than three months of marriage. She was tortured mentally and physically by all the accused. They used to harass her for bringing insufficient dowry. They were asking her to bring more money to buy vehicle. Learned trial Court has acquitted the accused on the ground that PW-1 Rattan Lal has not stated in FIR that the accused were asking for money to buy vehicle. FIR is not an encyclopaedia. PW-1 Rattan Lal who is uncle of deceased and has got married her with accused Suneel Dutt, on 17.4.2008, has categorically stated in FIR that Veena Devi was harassed for bringing insufficient dowry and she was thus physically and mentally tortured. According to the contents of FIR, she was also beaten up by accused. PW-1 Rattan Lal and PW-2 Raghunath have also noticed as many as 25 injuries on the body of Veena Devi. These could not be self inflicted injuries. There is no merit in the contention of the learned Advocate for the respondent that the deceased was hit by an ox. It is, thus, evident that she was mercilessly beaten up by accused. They have abetted in committing suicide by Veena Devi by consuming poison. Nirmla Devi, PW-3 has also categorically stated in her deposition before the Court that the deceased used be beaten up by accused for bringing insufficient dowry. She, in her statement, recorded under Section 161 CrPC, has also stated that Veena Devi was given beatings by Suneel Dutt, Savitri Devi (mother-in-law) and Rattan Lal (father-in-law) for bringing insufficient dowry.

22. Learned trial Court has wrongly relied upon explanation under Section 162 CrPC while acquitting accused. It is true that the witnesses produced by prosecution are uncle, aunt and other relatives of the deceased. But it is settled law that statements of close relatives can be relied upon if they inspire confidence. It was a sensitive matter. Deceased could only confide in her close relations about harassment and beatings given to her for bringing insufficient dowry. Consistent harassment by all the accused, physical and mental, has forced Veena Devi to consume poison. She was left with no other alternative but to end her left. She has lost her father and her marriage with Suneel Dutt was performed by her uncle, PW-1 Rattan Lal. Accused have abetted commitment of suicide by Veena Devi. Acts of accused have forced Veena Devi to commit suicide. She has visited only three days before her death and told that she was being harassed by the accused for bringing insufficient dowry. Acts of the accused have created such circumstances that Veena Devi was left with no other option but to commit suicide.

23. Their Lordships of the Hon'ble Supreme Court in **S. Mahaboob Basha v. State of Karnataka** reported in (2014)10 SCC 244, have held that examination of independent witnesses to the acts of ill-treatment and cruelty can not be insisted upon. Their lordships have held as under:

> "8. It is brought on evidence that the appellant-first accused married second time and has begotten three children through his second wife and on account of his second marriage, difference arose between the spouses …….. By the learned Courts below,

PW 1 was subjected to thorough cross-examination and despite the same, nothing was elicited from her to discredit her testimony..”

24. Accused have subjected the deceased to cruelty. The prosecution has proved its case against the accused under charged sections beyond reasonable doubt.

25. In view of the discussions and analysis made hereinabove, the present appeal is allowed. Judgment dated 20.9.2010 rendered by the learned Additional Sessions Judge, Ghumarwin, District Bilaspur, HP (camp at Bilaspur) in Sessions Trial No. 9/7 of 2008 is set aside. The accused are convicted for the commission of offence under Sections 498-A and 306/34 IPC. Accused be produced to be heard on quantum of sentence on 18.7.2016.

26. The registry is directed to prepare and send the production warrant to the quarter concerned. Bail bonds are cancelled.

List on 18.7.2016.

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BEFORE HON’BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Tek Chand and others …..Petitioners.

Vs.

State of Himachal Pradesh and another …..Respondents.

CWP No.: 5023 of 2010
Reserved on: 01.07.2016
Date of Decision: 07.07.2016

Constitution of India, 1950- Article 226- Petitioners are owners of the land which is being threatened to be utilized by respondents for construction/widening of Tattapani-Lamshar Khanderi Savindhar Road constructed under the Pradhan Mantri Gram Sarak Yojna- respondents asserted that no objection was raised by the petitioner at the time of survey of the road- there is no provision of acquisition of land under PMGSY- held, that State cannot deprive a citizen of his property without following due process of law- road can only be constructed under PMGSY only on furnishing of affidavits by land owners that they will not claim any compensation for utilization of the land- right to property is a constitutional right and no person can be deprived of the same- writ petition allowed and direction issued to the respondents not to utilize the land of the petitioner without consent of the petitioner or in the alternative without acquiring the same. (Para-7 to 12)

Cases referred:

Tukaram Kana Joshi and others Vs. Maharashtra Industrial Development Corporation and others (2013) 1 Supreme Court Cases 353
State of U.P. and others Vs. Manohar (2005) 2 Supreme Court Cases 126
Jeet Ram Vs. State of Himachal Pradesh and others, Latest HLJ 2016 (HP) 615
Lal Chand Vs. State of H.P. and others, CWP No. 2540 of 2009, decided on 13.05.2016

For the petitioners: Mr. Hamender Chandel, Advocate.
For the respondents: Mr. Vikram Thakur and Mr. Puneet Razta, Deputy Advocate Generals.

The following judgment of the Court was delivered:

***Ajay Mohan Goel, J.* :**

This writ petition has been filed praying for the following reliefs:

(i) That the respondents may be restrained from constructing the road through the land of the petitioners comprised in Khasra Nos. 264, 266, 271, 272, situated at Mohal Thogi, Tehsil Karsog, District Mandi, H.P.

(ii) That the respondents may be directed to construct the said road through the nearby Government land.

(iii) That in alternative the respondents may be directed to acquire the petitioner's land lawfully before making further construction after paying due compensation for land, damaged trees as well as compensating the loss as to the crops, plants and horticulture.

(iv) That the entire record pertaining to the construction of the road from the respondents be summoned for the kind perusal of this Hon'ble Court.

(v) Any other relief which this Hon'ble Court deem just and proper keeping in view the facts and circumstances of the case may kindly be granted in favour of the petitioners and against the respondents."

2. Case of the petitioners in brief is that they are owners in possession of land comprised in Khasra Nos. 264, 266, 271 and 272, situated at Mohal Thogi, Tehsil Karsog, District Mandi, H.P. and in the course of the construction/widening of 'Tattapani-Lamshar Khanderi Savindhar Road' which has been constructed under the Pradhan Mantri Gram Sarak Yojna (hereinafter referred to as 'PMGSY'), the abovesaid land of the petitioners is being threatened to be utilized by the respondents without acquiring the same and without adequately compensating the petitioners. It is further the case of the petitioners that they have approached the authorities concerned and have intimated them that they are not willing to permit the construction/widening of the said road by utilizing their land without due compensation, however, despite their request and notices, the respondents were persisting to utilize the land of the petitioners without acquiring the same in accordance with law. Hence in these circumstances, the petitioners filed the present writ petition.

3. A perusal of the reply filed by the State demonstrates that the factum of the intent of the respondents to utilize the land of the petitioners is not denied. However, as per the respondents, no objection was raised by the petitioners at the time of survey of the road and the earlier construction carried out of the road in issue which was being partially widened to facilitate the plying of heavy vehicles. It is further the case of the respondent-State that the road has been constructed under PMGSY, in which there is no provision of acquisition of land and payment of compensation to land owner. According to the State, as per the said Scheme, beneficiaries of the area are getting connectivity and they have to arrange the land free from all encumbrances and free of cost as the construction of the road is done on the demand of the public. It is further the case of the respondent-State that the petitioners are claiming the compensation unnecessarily, whereas they alongwith other beneficiaries are getting benefit of the road facility.

4. During the pendency of the petition, the petitioners filed CMP No. 19385 of 2013 praying therein that the respondents be restrained from carrying out any construction activity over the land of the petitioners which was apprehended at the time when the said miscellaneous application was filed. The reply filed to the said application by the respondent-State reveals that it is mentioned therein that on the objection of the petitioners, no widening work has been done on that portion of the land which is adjoining to the suit land and no land of the petitioners has been used for widening of the road.

5. Be that as it may, the fact of the matter remains that the petitioners are not willing to let the respondents utilize their land for the purpose of construction/widening of the road in issue which has been constructed under the PMGSY without the petitioners being adequately compensated in accordance with law and according to the State, no compensation can be paid to the petitioner because there is no provision of compensating the land owners under the PMGSY and further the petitioners themselves are the beneficiaries of the project in issue.

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

7. In my considered view, the respondent-State cannot deprive a citizen of his property without following the due process of law. No doubt under the PMGSY, there is no provision of acquiring the land and compensating the land owner for the use of the land, but the fact still remains that roads are constructed under the abovementioned Schemes only when the land owners either give an affidavit in writing that they shall not be claiming any compensation for utilization of their land or the said land is duly donated in accordance with law by the land owner in favour of the department. Thus, there is no provision under the PMGSY that the respondents can utilize the land of a person without his consent in writing to the effect that he shall not claim any compensation for the same or without the said land having been donated in favour of the department as per law.

8. Right to property is a Constitutional right guaranteed under Article 300 (A) of the Constitution of India, according to which, no person shall be deprived of his property save by authority of law.

9. The Hon'ble Supreme Court in **Tukaram Kana Joshi and others** Vs. **Maharashtra Industrial Development Corporation and others** (2013) 1 Supreme Court Cases 353 has held that the State, especially a welfare State which is governed by the rule of law, cannot arrogate itself to a status beyond one that is provided by the Constitution. It has also held that in a welfare State, statutory authorities are bound not only to pay adequate compensation, but there is also a legal obligation upon them to rehabilitate such persons. It has also held that it is not permissible for any welfare State to uproot a person and deprive him of his fundamental/constitutional/human rights, under the garb of development.

10. The Hon'ble Supreme Court in **State of U.P. and others** Vs. **Manohar** (2005) 2 Supreme Court Cases 126 has held that ours is a constitutional democracy and the rights available to the citizens are declared by the Constitution. Although Article 19(1)(f) was deleted by the Forty-fourth Amendment to the Constitution, Article 300-A has been placed in the Constitution of India, which expressly provides that no person shall be deprived of his property save by authority of law.

11. This Court has repeatedly held in **Jeet Ram** Vs. **State of Himachal Pradesh and others**, Latest HLJ 2016 (HP) 615 and **Lal Chand** Vs. **State of H.P. and others**, CWP No. 2540 of 2009, decided on 13.05.2016 that no person can be deprived of his property without following the due process of law.

12. Thus, in view of what has been discussed above, the present writ petition is disposed of with the directions that the respondent-State shall not utilize the land of the petitioners subject matter of the present petition for the purpose of construction/widening of 'Tattapani-Lamshar Khanderi Savindhar Road' without the express consent of the petitioners as is envisaged in the PMGSY or without the said land being donated by the petitioners to the concerned department as per law or in the alternative without acquiring the said land as per the provisions of the Land Acquisition Act.

With the said directions, the writ petition is disposed of.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Tilak Ram …..Appellant.

Vs.

Dhani Ram and others …..Respondents.

RSA No.: 102 of 2007
Reserved on: 03.06.2016
Date of Decision: 07.07.2016

Specific Relief Act, 1963- Section 24- Plaintiffs filed a civil suit for declaration pleading that suit land is recorded in joint ownership in possession of the plaintiffs and 'D'- suit land was earlier owned and possessed by one 'P', grand-father of plaintiffs no. 1 and 2 and great grand-father- after the death of 'P', suit land was inherited by his two sons T and M- nature of the suit land was ancestral- defendants had got mutation attested in their favour on the basis of Will stated to have been executed by 'D'- 'D' was not competent to execute the Will- defendant pleaded that land was rightly mutated on the basis of Will- suit was decreed by the trial Court- an appeal was preferred, which was dismissed- aggrieved from the judgment, present appeal has been preferred- held, in appeal that the fact that Will was not valid was not challenged in the second appeal, only nature of the property was questioned- D had inherited the property after the death of her husband- she had no child, therefore, property was to devolve in accordance with Section 15 of Hindu Succession Act on the heirs of her husband- plaintiffs are heirs of the deceased and property vested in the plaintiffs- Courts had rightly passed the judgment- appeal dismissed.

(Para-16 to 19)

Cases referred:

Vishwanath Agrawal Vs. Sarla Vishwanath Agarawal (2012) 7 Supreme Court Cases 288
Veerayee Ammal Vs. Seeni Ammal (2002) 1 Supreme Court Cases 134
Satya Gupta Vs. Brijesh Kumar (1998) 6 Supreme Court Cases 423

For the appellant: Mr. Vinod Gupta, Advocate.
For the respondents: Mr. G.R. Palsra, Adovocate.

The following judgment of the Court was delivered:

***Ajay Mohan Goel, J.* :**

The present appeal has been filed by the appellant-defendant against judgment passed by the Court of learned Additional District Judge, Mandi in Civil Appeal No. 47 of 2004 dated 28.12.2006 vide which, the appellate Court has dismissed the appeal filed by the present appellant and upheld the judgment and decree passed by the Court of learned Civil Judge (Junior Division), Chachiot at Gohar in Civil Suit No. 24 of 2002 dated 14.01.2004.

2. This appeal was admitted on the following substantial questions of law on 29.11.2010:

1. Whether the devolution of interest in coparcenary property on the death of a male Hindu having interest in such a property, having been survived by the family relation specified in Clause 1 of the schedule shall be treated as self acquired property and is liable to devolve by testamentary or intestate succession.

2. Whether Section 6 of the Hindu Succession Act postulates that a family having acquired interest in coparcenary property after the death of a husband could further devolve the property by testamentary ror intestate succession. If so, its effect thereto.

3. Brief facts necessary for the adjudication of the present case are that the plaintiffs/respondents (hereinafter referred to as 'plaintiffs') filed a suit for declaration and injunction to the effect that the suit land was recorded in joint ownership and possession of plaintiffs and Smt. Dromti, Wd/o late Sh. Som Dutt and one another as per revenue records. According to the plaintiffs, the suit land was earlier owned and possessed by one Sh. Poushu, grand father of plaintiffs No. 1 and 2 and great grand father of plaintiffs No. 3 to 5. After the death of Sh. Poushu, the suit land was inherited by two sons, namely Tana and Mastu. Thus, the suit land was ancestral, joint Hindu family and coparcenary property of the plaintiffs. It was further averred that Tana had three sons, namely Tulsi Ram, Hari Ram and Rameshwar. Tulsi Ram was the father of plaintiffs No. 3 to 5. Mastu died leaving behind one son, Som Dutt and

Dromti was the widow of said Som Dutt. Som Dutt had died issueless and after his death, his property was inherited by the plaintiffs being coparceners and legal heirs of the husband of Smt. Dromti. As per the plaintiffs, after the death of Dromti, they went to Patwari Halqua to inform about her death. There they came to know that defendant had come to Patwarkhana with an alleged Will of Smt. Dromti qua the suit land. Plaintiffs on inquiry came to know that the alleged Will had been executed on 17.12.1994 which was procured by defendant qua the suit land, which was a result of clear manipulation on the part of defendant, who had played an active role in the execution and registration of the said Will in collusion and in connivance with the scribe and attesting witnesses of the same, which was without the consent and knowledge of the testator. According to the plaintiffs, the Will was neither a genuine nor valid one and late Smt. Dromti had not executed any such Will nor otherwise she could have had legally bequeathed the said property to the defendant because the property was ancestral, joint Hindu family and coparcenary property of the parties. It was further stated in the plaint that the alleged Will was shrouded with suspicious circumstances as Dromti was an old and ailing woman of more than 80 years of age and she besides being feeble was also not mentally capable of expressing her free mind. According to the plaintiffs, the alleged Will was the outcome of mis-representation and collusion between the defendants, scribe and witnesses as the testator during her life time never disclosed the alleged Will to the plaintiffs who are her husband's, brothers and nephews. As per the plaintiffs, they were looking after and rendering all services to Dromti and there was no occasion for her to execute the alleged Will in favour of the defendant.

4. On these basis, the suit was filed by the plaintiffs for declaration that Will No. 127, dated 17.12.1994 was wrong, illegal, null and void and inoperative and that it did not confer any right, title or interest upon the defendant. According to the plaintiffs, the defendant was also liable to be restrained from causing any unlawful interference in the peaceful possession and enjoyment of the plaintiffs over the suit property through a decree of permanent prohibitory injunction.

5. In the written statement, the defendant denied the case of the plaintiffs. According to the defendant, the suit land was joint *inter se* the parties and the share of the deceased Dromti was in the hands of the defendant because Dromti was living in the house of defendant and was looked after by him. As per the defendant, Dromti had executed and registered the Will in issue with full consent and willingness and the plaintiffs were fully aware about the said Will.

6. On the basis of the pleadings of the parties, learned trial Court framed the following issues on 17.06.2003:

> 1. *Whether Will No. 127 dated 17.12.1994 us a genuine Will, as alleged? OPD*
>
> 2. *Whether the suit of the plaintiff is not maintainable in the present form?OPD*
>
> 3. *Whether the suit of the plaintiff is barred by limitation? OPD*
>
> 4. *Whether the plaintiff has no cause of action to file the suit? OPD*
>
> 5. *Whether the plaintiffs are estopped by their own act and conduct to file the suit? OPD*
>
> 6. *Whether the suit land is ancestral, Joint Hindu family, Coparcenary property of the plaintiffs, as alleged? OPP*
>
> 7. *Whether the plaintiffs are legal heirs of husband of late Smt. Drompti Devi, as alleged? OPP*
>
> 8. *Relief.*

7. On the basis of averments produced on record by the respective parties, the following findings were returned on the said issues by the learned trial Court:

Issue No. 1: No.
Issue No. 2: No.
Issue No. 3: No.
Issue No. 4: No.
Issue No. 5: No.
Issue No. 6: Yes.
Issue No. 7: Yes.
Relief: Suit succeeds and is decreed per operative part of the judgment.

8. The suit of the plaintiffs was accordingly decreed in the following terms:

"It is ordered that the suit of the plaintiffs succeeds and is decreed to the effect that plaintiffs who are in possession of the suit land and being legal heirs of husband of deceased Drompti Devi have every right to protect their land from defendant, who has failed to succeed the property on the basis of alleged will, which has been declared by me as invalid and void. The defendant is also restrained by way of permanent prohibitory injunction from causing any sort of interference in peaceful possession and enjoyment of the plaintiffs over the suit land. Keeping in view the facts and circumstances of the case, the parties are left to bear their own costs."

9. The learned trial Court on the basis of appreciation of evidence placed on record by the respective parties thus held that the defendants had failed to prove the attestation of the alleged Will as per the requirements of law and accordingly, the alleged Will Ex. DW2/A was bad and invalid Will. It further held that defendant Tilak Raj had taken active part in the execution of the Will as he had called the witnesses himself and had got the Will registered himself and signatures of the marginal witnesses were also procured by him afterwards, which also rendered the Will highly suspicious. Thus, the learned trial Court held that Will Ex. DW2/A was not a genuine Will. Learned trial Court further held that the suit land was ancestral joint Hindu family and coparcenary property of the plaintiffs and they were the legal heirs of deceased husband of Dromti.

10. Feeling aggrieved by the said judgment and decree passed by the learned trial Court, the defendant filed an appeal.

11. The said appeal was dismissed by the learned Appellate Court vide judgment dated 28.12.2006 in Civil Appeal No. 47 of 2004.

12. Learned Appellate Court framed the following points for determination:

"1. *Whether the lower Court had not granted sufficient opportunity to the defendant to lead evidence and the defendant is entitled to lead additional evidence?*

2. Whether the judgment and decree are not sustainable in the eyes of law?

3. Final order."

13. The learned Appellate Court returned the following findings on the points so formulated by it:

"Point No. 1: No.
Point No. 2: No.
Final order: Appeal dismissed as per operative part of judgment.

14. It was held by the learned Appellate Court that sufficient opportunities were granted to the defendant by the learned trial Court to lead evidence and the defendant was thus not entitled to lead any additional evidence. Learned Appellate Court held that the facts stated by

the defendant in his application did not fall within the purview of Order 41 Rules 28, 29 and Sections 107 and 151 of the Code of Civil Procedure. Learned Appellate Court also held that it stood proved on record that the suit land was ancestral, joint Hindu family and coparcenary property qua Dromti and the plaintiffs and they being legal heirs of Som Dutt had inherited the same. According to the learned Appellate Court, the findings returned to this effect by the learned lower Court did not require any interference. It also held that the execution of the Will had not been proved in accordance with law as DW-2 and DW-3 who were the attesting witnesses had categorically stated that Smt. Dromti had not put her thumb mark in their presence on the Will. Learned Appellate Court has also held that both these witnesses had stated that they signed the Will later on which was already prepared. Learned Appellate Court further held that the defendant had taken prominent part in the execution of the Will, which fact stood admitted by defendant Tilak Raj in his cross-examination and thus, the execution of the Will was shrouded by suspicious circumstances, which had not been removed by the defendant. Therefore, on the basis of the said findings returned by the learned Appellate Court, it dismissed the appeal.

15. I have heard the learned counsel for the parties and also gone through the records of the case as well as the judgments passed by the learned Courts below.

16. The factum of the alleged Will executed by deceased Dromti not being proper and valid has been concurrently decided by both the Courts below in favour of the plaintiffs and against the appellant/defendant. Judgments to this effect passed by both the Courts below has not been challenged in the Second Appeal as is evident from the grounds of appeal. Therefore, this Court shall now return its findings on the substantial questions of law, on which the appeal was admitted.

17. Before proceeding further, it is relevant to refer to certain judgments of Hon'ble Supreme Court with regard to the scope of interference by this Court while exercising its power under Section 100 of the Code of Civil Procedure.

18. The Hon'ble Supreme Court in **Vishwanath Agrawal** Vs. **Sarla Vishwanath Agarawal** (2012) 7 Supreme Court Cases 288 in paragraphs No. 36 and 37 has held:

> "36. *In Major Singh v. Rattan Singh (Dead) by LRs and others[15], it has been observed that when the courts below had rejected and disbelieved the evidence on unacceptable grounds, it is the duty of the High Court to consider whether the reasons given by the courts below are sustainable in law while hearing an appeal under Section 100 of the Code of Civil Procedure.*
>
> *37. In Vidhyadhar v. Manikrao and another[16], it has been ruled that the High Court in a second appeal should not disturb the concurrent findings of fact unless it is shown that the findings recorded by the courts below are perverse being based on no evidence or that on the evidence on record, no reasonable person could have come to that conclusion. We may note here that solely because another view is possible on the basis of the evidence, the High Court would not be entitled to exercise the jurisdiction under Section 100 of the Code of Civil Procedure. This view of ours has been fortified by the decision of this Court in Abdul Raheem v. Karnataka Electricity Board & Ors."*

19. The Hon'ble Supreme Court in **Veerayee Ammal** Vs. **Seeni Ammal** (2002) 1 Supreme Court Cases 134 has held:

> *"7. Section 100 of the Code of Civil Procedure (hereinafter referred to as "the Code") was amended by the Amending Act No.104 of 1976 making it obligatory upon the High Court to entertain the second appeal only if it was satisfied that the case involved a substantial question of law. Such question of law has to be precisely stated in the Memorandum of Appeal and formulated by the High Court in its judgment, for decision. The appeal can be heard only on the question, so formulated, giving liberty to the respondent to argue that the case*

before the High Court did not involve any such question. The Amending Act was introduced on the basis of various Law Commission Reports recommending for making appropriate provisions in the Code of Civil Procedure which were intended to minimise the litigation, to give the litigant fair trial in accordance with the accepted principles of natural justice, to expedite the disposal of civil suits and proceedings so that justice is not delayed, to avoid complicated procedure, to ensure fair deal to the poor sections of the community and restrict the second appeals only on such questions which are certified by the courts to be substantial question of law. We have noticed with distress that despite amendment, the provisions of Section 100 of the Code have been liberally construed and generously applied by some judges of the High Courts with the result that objective intended to be achieved by the amendment of Section 100 appears to have been frustrated. Even before the amendment of Section 100 of the Code, the concurrent finding of facts could not be disturbed in the second appeal. This Court in Paras Nath Thakur v. Smt.Mohani Dasi (Deceased) & Ors. [AIR 1959 SC 1204] held:

"It is a well settled by a long series of decisions of the Judicial Committee of the Privy Council and of this Court, that a High Cour,t on second appeal, cannot go into questions of fact, however, erroneous the findings of fact recorded by the courts of fact may be. It is not necessary to cite those decisions. Indeed, the learned counsel for the plaintiff-respondents did not and could not contend that the High Court was competent to go behind the findings of fact concurrently recorded by the two courts of fact."

8. To the same effect are the judgments reported in Sri Sinha Ramanuja Jeer Swamigal v. Sri Ranga Ramanuja Jeer alias Emberumanar Jeer & Ors. [AIR 1961 SC 1720], V.Ramachandra Ayyar & Anr. v. Ramalingam Chettiar & Anr.[AIR 1963 SC 302] and Madamanchi Ramappa & Anr. v. Muthaluru Bojjappa [AIR 1963 SC 1633]. After its amendment, this Court in various judgments held that the existence of the substantial question of law is a condition precedent for the High Court to assume jurisdiction of entertaining the second appeal. The conditions specified in Section 100 of the Code are required to be strictly fulfilled and that the second appeal cannot be decided on merely equitable grounds. As to what is the substantial question of law, this Court in Sir Chunilal v. Mehta & Sons Ltd. v. Century Spinning & Manufacturing Co.Ltd. [AIR 1962 SC 1314] held that:

"The proper test for determining whether a question of law raised 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 and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion or 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."

9. In Kondiba Dagadu Kadam v. Savitribai Sopan Gujar & Ors. [JT 1999 (3) SC 163] this Court again considered this aspect of the matter and held:

"6. If the question of law termed as substantial question stands already decided by a large bench of the High Court concerned or by the Privy Council or by the Federal Court or by the Supreme Court, its merely wrong application on facts of the case would not be termed to be a substantial question of law. Where a point of law has not been pleaded or is found to be arising between the parties in the absence of any factual format, a litigant should not be allowed to

raise that question as substantial question of law in second appeal. The mere appreciation of the facts, the documentary evidence or the meaning of entries and the contents of the document cannot be held to be raising a substantial question of law. But where it is found that the appellate court has assumed jurisdiction which did not vest in it, the same can be adjudicated in the second appeal, treating it as substantial question of law. Where the first appellate court is shown to have exercised its discretion in a judicial manner, it cannot be termed to be an error either of law or of procedure requiring interference in second appeal. This Court in Reserve Bank of India & Anr. v. Ramakrishna Govind Morey (AIR 1976 SC830) held that whether trial court should not have exercised its jurisdiction differently is not a question of law justifying interference."

10. The question of law formulated as substantial question of law in the instant case cannot, in any way, be termed to be a question of law much less as substantial question of law. The question formulated in fact is a question of fact. Merely because of appreciation of evidence another view is also possible would not clothe the High Court to assume the jurisdiction by terming the question as substantial question of law. In this case Issue NO.1, as framed by the Trial Court, was, admittedly, an issue of fact which was concurrently held in favour of the appellant-plaintiff and did not justify the High Court to disturb the same by substituting its own finding for the findings of the courts below, arrived at on appreciation of evidence."

20. Similarly, it has been held by the Hon'ble Supreme Court in **Satya Gupta** Vs. **Brijesh Kumar** (1998) 6 Supreme Court Cases 423:

"16. At the outset, we would like to point out that the findings on facts by the Lower Appellate Court as a final Court on facts, are based on appreciation of evidence and the same cannot be treated as perverse or based on no evidence. That being the position, were] are of the view that the High Court, after reappreciating the evidence and without finding that the conclusions reached by the Lower Appellate Court were not based on the evidence, reversed the conclusions on facts on the ground that the view taken by it was also a possible view n the facts. The High Court, it is well settled, while exercising jurisdiction under Section 100, C.P.C., cannot reverse the findings of the Lower Appellate Court on facts merely on the ground that on the facts found by the Lower Appellate Court another view was possible."

21. It has been urged in the present appeal that the judgments passed by both the learned Courts below are liable to be set aside because both the Courts below have erred in not appreciating the provisions of Section 6 of the Hindu Succession Act, and the fact that devolution of interest in coparcenary property on male Hindu having interest in such property shall be treated as self acquired property and as such, it could devolve by testamentary or intestate succession. It was on this ground that learned counsel for the appellant urged that the judgments and decrees passed by both the Courts below were liable to be set aside. No other point was argued.

22. Section 6 of the Hindu Succession Act as it stood before its amendment in the year 2005 is reproduced hereinbelow:

"6. Devolution of interest in coparcenary property: When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:

Provided that, if the deceased had left him surviving a female relative specified in Class I of the Schedule or a male relative specified in that class

who claims through such female relative, the interest of the deceased in the Mitakahsra coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

Explanation 1. For the purposes of this Section, the interest of a Hindu Mitakshra coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

Explanation 2. Nothing contained in the proviso to this Section shall be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein."

23. As per the plaintiffs, they are the brothers and nephews of Som Dutt, S/o Poushu and husband of deceased Dromti. Defendant claims himself to be nephew of Dromti. According to him, Dromti was his *Bua.* Interestingly, the case set up by the present appellant in the written statement filed by him to the plaint was that the share of deceased Dromti Devi was in the hands of the defendant because deceased Dromti was living in the house of defendant and she was looked after by him. Thus, according to him, for this reason, she had executed the registered Will in his favour and the defendant was therefore owner of the suit property by virtue of the same having been bequeathed in his favour by deceased Dromti by way of a Will. It is therefore clear that as far as the written statement filed by the defendant is concerned, it was not his case that he had inherited the property by virtue of the provisions of the Hindu Succession Act.

24. As I have already mentioned above, the factum of the alleged Will executed by Dromti not having been proved in accordance with law has been concurrently decided against the appellant by both the learned Courts below. This finding has attained finality as there is no substantial question of law framed challenging the findings so returned by the learned Courts below. The substantial questions of law on which the present appeal has been argued by the appellant are only with regard to devolution of interest in coparcenary property on the death of male Hindu having interest in the same who is survived by a family relation specified in Clause-1 of the Schedule and the effect of the provisions of Section 6 of the Hindu Succession Act. A perusal of the record of the case categorically demonstrates the relationship between the plaintiffs and deceased Dromti and her husband. It is also established from the material on record that deceased Dromti inherited the suit property after the death of her husband. The property inherited by her was not the self acquired property of her husband, but the same had been inherited by her husband from his ancestors. Further, the evidence produced on record by the plaintiffs, i.e. pedigree table Ex.-PA, mutation, Mauja Katwahari, Number Hadbast 92 and Jamabandi for the year 1938-39, mutation No. 67 Ex. PW-3/A clearly establish that the suit land was ancestral joint Hindu family and coparcenary property. The defendant has not been able to prove to the contrary.

25. It is also an admitted position that Som Dutt and Dromti Devi had no children. Section 15 of the Hindu Succession Act provides as under:

*"**15. General rules of Succession in the case of female.** (1) The property of a female Hindu dying intestate shall devolve according to the rules set out in Section 16-*

(a) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband;

(b) secondly, upon the heirs of the husband;

(c) thirdly, upon the mother and father;

(d) fourthly, upon the heirs of the father; and

(e) lastly, upon the heirs of the mother.

(2) Notwithstanding anything contained in sub-section (1)-

(a) any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter), not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the father; and

(b) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the husband."

26. In the present case, it is not disputed that the suit property was inherited by deceased Dromti from her husband. Her husband had inherited the said property from his forefathers. Section 15(1)(b) of the Hindu Succession Act provides that the property of a female Hindu dying intestate shall devolve in the absence of sons and daughters (including children of any pre-deceased son or daughter) upon the heirs of the husband. Section 15(1)(2) further provided that any property inherited by a female Hindu from her husband or from her father-in-law shall devolve in the absence of any son or daughter of the deceased not upon other heirs referred in Sub-section (1) in the order specified therein but upon the heirs of the husband.

27. Plaintiffs admittedly are the heirs of the husband of the deceased Dromti. Therefore, in this view of the matter, in my considered view, the suit property after the death of deceased Dromti was to vest upon the plaintiffs and plaintiffs alone. Reliance being placed by the learned counsel for the appellant under the provisions of Section 6 of the Hindu Succession Act is totally misplaced. A perusal of the judgment passed by the learned trial Court will demonstrate that it has dwelled into all these aspects of the matter and concluded that the suit property was to devolve upon the plaintiffs in view of the provisions of Section 15 of the Hindu Succession Act.

28. Similarly, the learned Appellate Court has also decided this point in favour of the plaintiffs by relying upon the provisions in the revenue records as well as the pedigree table and after concluding that the suit property was inherited by Dromti Devi from the common ancestor of deceased husband and plaintiffs namely Shri Poushu.

29. In my considered view, there is no infirmity in the findings which have been returned in this regard by both the learned Courts below. The substantial questions of law are answered accordingly. Therefore, as there is no merit in the present appeal, the same is accordingly dismissed with costs. All the miscellaneous applications also stand disposed of.

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

M/s Devyani Food Industries Limited ....Petitioner

Versus

State of Himachal Pradesh and another ....Respondents

CrMMO No. 201/2016
Reserved on: July 5, 2016
Decided on: July 8, 2016

Prevention of Food Adulteration Act, 1954- Section 16(1)(a)(ii) read with Section 7(i)(iii)- **Code of Criminal Procedure, 1973-** Section 319- Food Inspector lifted sample of Pineapple ice-cream, which was found to be adulterated- an application for impleadment was filed, which was allowed- aggrieved from the order, present revision has been filed- held, that company has committed an

offence and is a necessary party – permission was granted to launch prosecution against Managing Director/all the directors/ partners but it was due to inadvertence on the part of Food Inspector that company was not arrayed as an accused - there was no delay in filing the application- purpose of Section 319 is that the real culprit should not escape – there was no perversity or illegality in the order- revision dismissed. (Para-8 to 10)

Cases referred:
Hardeep Singh v. State of Punjab (2014) 3 SCC 92
Ganeshmal Jashraj v. Govt. of Gujarat, AIR 1980 SC 264

For the petitioner : Mr. K.D. Sood, Senior Advocate with Mr. Sanjeev Sood, Advocate.
For the respondents : Mr. Neeraj K. Sharma, Deputy Advocate General.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge (oral**)**

This petition is directed against Order dated 25.6.2016 passed by the learned Additional Sessions Judge, Kullu, HP in Criminal Revision No. 15 of 2015.

2. "Key facts" necessary for the adjudication of the present petition are that a sample of Pineapple ice-cream was lifted by the Food Inspector on 27.3.2008 from Sh. Sanjeev Kumar of M/s Kullu Ice Cream Corner, Kullu. One part of the sampled commodity was forwarded to the public analyst, Kandaghat, who vide its report dated 6.5.2008 found the sample to be adulterated as the milk fat content was found to be 9.23% against the prescribed standard of 10% and total solids were found to be 34.19% against 36%. On the basis of the report of the public analyst, the then Food Inspector made a request to the Chief Medical Officer, Kullu on 26.5.2008 for written consent to launch prosecution against Sanjeev Kumar of M/s Kullu Ice Cream Corner and all the directors/partners of M/s Devyani Food Industries Private Limited, Plot No. 1-21 EPIP, Phase-II, Village Thana, Baddi, Nalagarh, District Solan, HP. Chief Medical Officer granted written consent to launch prosecution against Sh. Sanjeev Kumar of M/s Kullu Ice Cream Corner and against M/s Devyani Food Industries Private Limited, Plot No. 1-21 EPIP, Phase-II, Village Thana, Baddi, Nalagarh, District Solan, HP. Thereafter, Food Inspector filed a complaint under Sections 7 and 16 of the Prevention of Food Adulteration Act against Sanjeev Kumar of M/s Kullu Ice Cream Corner, Kullu and MD of M/s Devyani Food Industries Private Limited, Plot No. 1-21 EPIP, Phase-II, Village Thana, Baddi, Nalagarh, District Solan, HP under Section 16(1)(a)(ii) read with Section 7(i)(iii), Section 2(i-a)(m) of Prevention of Food Adulteration Act.

3. The Food Safety Officer moved an application under Section 319 CrPC before Chief Judicial Magistrate, Kullu for impleading the petitioner i.e. M/s Devyani Food Industries Private Limited, Plot No. 1-21 EPIP, Phase-II, Village Thana, Baddi, Nalagarh, District Solan, HP as necessary party through its partners/directors/responsible persons. According to the averments made in the application, proceedings were launched against Sanjeev Kumar as accused No.1 and Managing Director of M/s Devyani Food Industries Limited as accused No.2 whereas above company through its partners/directors being responsible persons, has inadvertently been left out from the list of accused persons. Application was allowed by the Chief Judicial Magistrate, Kullu on 14.10.2015

4. Petitioner feeling aggrieved by order dated 14.10.2015, filed a criminal revision before the learned Sessions Judge, Kullu bearing No. 15/2015. He dismissed the same on 25.6.2016. Hence, this petition.

5. Mr. K.D. Sood, learned Senior Advocate, has vehemently argued that the application annexure P-4 was preferred after more than five years of the launching of the

prosecution against the accused. He then argued that the inherent defect could not be cured under Section 319 CrPC.

6. Mr. Neeraj K. Sharma, Deputy Advocate General has supported the order dated 25.6.2016.

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

8. It is evident from the record that sample was lifted by the then Food Inspector on 27.3.2008. It was found to be adulterated. Chief Medical Officer was requested by Food Inspector to give written consent to launch prosecution against Sanjeev Kumar and all the Directors/ Managing Directors/partners of M/s Devyani Food Industries Private Limited, Plot No. 1-21 EPIP, Phase-II, Village Thana, Baddi, Nalagarh, District Solan, HP. It is in these circumstances, application under Section 319 CrPC was preferred by the Food Inspector. Trial was going on when application under Section 319 CrPC was filed for impleadment of the company through is Managing Director/partners. These persons were necessary parties for the full adjudication of the matter. Company, as per complaint, has committed an offence and was a necessary party. Chief Medical Officer has granted permission to launch proceedings against the Managing Director/all the directors/ partners but it was due to inadvertence on the part of Food Inspector that he did not array the company as party through its other Directors/ partners. Learned trial Court has rightly relied upon Section 17 of the Prevention of Food Adulteration Act while allowing application. Matter was tried by the Magistrate and thus, power under Section 319 CrPC could be exercised by him adding the company as accused through its Managing Director/all directors/ partners. There is no undue delay in filing application under Section 319 CrPC taking into consideration the chequered history of the case. Rather, this Court in CrMMO No. 4036 of 2013 decided on 20.8.2015 has directed the trial Court to decide the application preferred by the Food Inspector under Section 319 CrPC as expeditiously as possible. Copy of this order is annexure P-3. There is no merit in the contention of Mr. K.D. Sood, learned Senior Advocate that non-impleadment of company at the time of initiation of trial was an inherent infirmity.

9. Their Lordships of the Hon'ble Supreme Court in **Hardeep Singh v. State of Punjab** reported in (2014) 3 SCC 92, have held that object of Section 319 CrPC is that the real culprit should not get away unpunished. This is part of concept of 'fair trial' and provision is based on the doctrine of *judex damnatur cum nocens absolvitur.* Constructive and purposive interpretation should be adopted so as to advance the object and cause of justice. Courts should give full respect to the words used in the provision. Their lordships have further held that power under Section 319 CrPC can be exercised at any time after commencement of inquiry into an offence by court i.e. inquiry commences before court with filing of charge-sheet/ complaint before court and before conclusion of trial, except during stage of Sections 207 to 209 which is not a judicial step in the true sense. Their lordships have held as under:

> "12 Section 319 Cr.P.C. springs out of the doctrine judex damnatur cum nocens absolvitur (Judge is condemned when guilty is acquitted) and this doctrine must be used as a beacon light while explaining the ambit and the spirit underlying the enactment of Section 319 Cr.P.C.
>
> 13. It is the duty of the Court to do justice by punishing the real culprit. Where the investigating agency for any reason does not array one of the real culprits as an accused, the court is not powerless in calling the said accused to face trial. The question remains under what circumstances and at what stage should the court exercise its power as contemplated in Section 319 Cr.P.C.?
>
> 18. The legislature cannot be presumed to have imagined all the circumstances and, therefore, it is the duty of the court to give full effect to the words used by the legislature so as to encompass any situation which the court may have to tackle while proceeding to try an offence and not allow a

person who deserves to be tried to go scot free by being not arraigned in the trial in spite of possibility of his complicity which can be gathered from the documents presented by the prosecutio

19. The court is the sole repository of justice and a duty is cast upon it to uphold the rule of law and, therefore, it will be inappropriate to deny the existence of such powers with the courts in our criminal justice system where it is not uncommon that the real accused, at times, get away by manipulating the investigating and/or the prosecuting agency. The desire to avoid trial is so strong that an accused makes efforts at times to get himself absolved even at the stage of investigation or inquiry even though he may be connected with the commission of the offence.

27. The stage of inquiry commences, insofar as the court is concerned, with the filing of the charge-sheet and the consideration of the material collected by the prosecution, that is mentioned in the charge-sheet for the purpose of trying the accused. This has to be understood in terms ofSection 2(g) Cr.P.C., which defines an inquiry as follows:

"2(g) "inquiry" means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court."

39. Section 2(g) Cr.P.C. and the case laws referred to above, therefore, clearly envisage inquiry before the actual commencement of the trial, and is an act conducted under Cr.P.C. by the Magistrate or the court. The word 'inquiry' is, therefore, not any inquiry relating to the investigation of the case by the investigating agency but is an inquiry after the case is brought to the notice of the court on the filing of the charge-sheet. The court can thereafter proceed to make inquiries and it is for this reason that an inquiry has been given to mean something other than the actual trial.

40. Even the word "course" occurring in Section 319 Cr.P.C., clearly indicates that the power can be exercised only during the period when the inquiry has been commenced and is going on or the trial which has commenced and is going on. It covers the entire wide range of the process of the pre-trial and the trial stage. The word "course" therefore, allows the court to invoke this power to proceed against any person from the initial stage of inquiry upto the stage of the conclusion of the trial. The court does not become functus officio even if cognizance is taken so far as it is looking into the material qua any other person who is not an accused. The word "course" ordinarily conveys a meaning of a continuous progress from one point to the next in time and conveys the idea of a period of time; duration and not a fixed point of time. (See: Commissioner of Income-tax, New Delhi (Now Rajasthan) v. M/s. East West Import & Export (P) Ltd. (Now known as Asian Distributors Ltd.)

84. The word "evidence" therefore has to be understood in its wider sense both at the stage of trial and, as discussed earlier, even at the stage of inquiry, as used under Section 319 Cr.P.C. The court, therefore, should be understood to have the power to proceed against any person after summoning him on the basis of any such material as brought forth before it. The duty and obligation of the court becomes more onerous to invoke such powers cautiously on such material after evidence has been led during trial."

10. Their lordships of the Hon'ble Supreme Court in the case of **Ganeshmal Jashraj v. Govt. of Gujarat,** reported in AIR 1980 SC 264, have held that "*We would, therefore, strongly urge upon the Food Inspection Department not to remain content with paying homage to anti-adulteration law by catching small tradesmen but direct the full fury of their investigative machinery against the wholesalers and manufactures who are in a large majority of cases really*

responsible of adulteration of the food stuff which is being sold by the small retailers. Then only would the true purpose of the prevention of food adulteration law be fulfilled and the great gap between expectation and fulfillment in respect of welfare laws be bridged"

11. There is neither any perversity nor any illegality in Order dated 3.7.2015 rendered by the learned Additional Sessions Judge, Kullu.

12. Accordingly, there is no merit in the present petition and the same is dismissed. Pending applications, if any, are disposed of. Since, the trial has already been delayed considerably, learned trial Court is directed to conclude the trial itself within a period of six months from today, if necessary by recording evidence on day to day basis.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Narain Singh and others ....Appellants/Plaintiffs.
Versus
Jagadi Devi and others. ... Respondents/Defendants.

RSA No. 185 of 2003.
Reserved on 18.5.2016.
Decided on: 08.07.2016.

Code of Civil Procedure, 1908- Order 20 Rule 5- Trial Court had framed eight issues- issues No. 1 to 4 and 4-C were discussed together while issue No. 4-A and 4-B were discussed separately- it was contended that judgment of trial court is vitiated as the issues were discussed together - held, that there is no bar in clubbing issues together, if evidence is common- case cannot be remanded on the ground that issues had been clubbed together- trial Court had answered all the issues by returning findings duly supported by reasons- it cannot be said that there was non-compliance of order 20 Rule 5- appeal dismissed. (Para-12 to 18)

Cases referred:
State of Karnataka Vs. Registrar General, High Court of Karnataka, (2000)7 Supreme Court Cases 333
Jabbar Singh Vs. Shanti Swaroop, 2007 HLJ 192
Hiru Vs. Mansa Ram, 2003 (1) Cur.L.J. 133
Pawan Kumar and others Vs. Shri Tilak Raj and another 2010 (3) Shim. LC 91
Kamlesh Rani Vs. Balwant Singh 2010 (3) Shim. LC 141
S.R. Srinivasa and others Vs. S. Padmavathamma, (2010) 5 Supreme Court Cases 274
H. Venkatachala Iyengar V. B.N. Thimmajamma, AIR 1959 SC 443
M. Chandra Vs. M. Thangamuthu and another, (2010) 9 Supreme Court Cases 712
U. Sree Vs. U. Srinivas, (2013) 2 Supreme Court Cases 114
Prem Kumar Vs. Tek Singh, 2013 (2) Shim. LC 1153

For the appellants. : Mr. G.D. Verma, Sr. Advocate with Mr. B.C. Verma, Advocate.
For respondents No.1 to 4 : Mr. N.K. Thakur, Sr. Advocate with Ms. Jamuna Thakur, Advocate.
Remaining respondents. : *Ex parte.*

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.

This appeal has been filed against judgment and decree passed by the Court of learned Addl. District Judge, Mandi dated 17.1.2003 in Civil Appeal No. 29 of 1997, whereby the learned Appellate Court has upheld the judgment and decree passed by the Court of learned

Senior Sub Judge, Mandi dated 30.9.1996 in Civil Suit No. 124 of 1990 vide which the learned Trial Court had decreed the suit of the plaintiff partly.

2. This regular second appeal was admitted on 11.8.2004, on the following substantial questions of law:-

> *"1. Whether there has been non-compliance of provisions of Order 20, Rule 5, Code of Civil Procedure by the learned Trial Court? If so, to what effect?*
>
> *2. Whether the appellant can raise the question involved above having failed to raise such question before the first Appellate Court?*

3. Brief facts necessary for the purposes of adjudication are that appellant/plaintiff (hereinafter to be referred as 'the plaintiff') filed a suit for declaration and for confirmation of joint possession as consequential relief or in the alternative for joint possession of the suit land on the pleadings that late Doom Ram, father of the plaintiff and defendants No. 1 to 5 and predecessor-in-interest of the proforma defendants was owner in possession of the suit land. The said property was joint Hindu family property, ancestral in nature and after the death of Doom Ram said property was inherited by plaintiff and defendants as per order of succession. Defendants No.1 to 4 set up a 'Will' on the basis of which they got mutation of succession attested in their favour from the Revenue Officer to the exclusion of plaintiff and remaining defendants. Plaintiff was the eldest son and was living jointly with his father Doom Ram. He was under impression that the land would automatically devolve upon natural heirs as per provisions of Hindu Succession Act. Plaintiff was step brother of defendants No.1 to 4. Defendant No.1 being educated and shrewd, manipulated a 'Will' alleged to have been executed by Doom Ram on 14.3.1969 to exclude plaintiff and other heirs, though, the plaintiff being eldest son was never aware of any such 'Will' nor Doom Ram ever informed plaintiff of the execution of any 'Will' depriving plaintiff of his share over the suit land. According to the plaintiff, he had good relation with his father Doom Ram and he was serving his father till his death. There was no occasion for Doom Ram to deprive plaintiff from inheritance of his estate. It was further the case of plaintiff that defendant No.1 was Gram Sewak and was in service of Himachal Pradesh Government. He secretly manipulated attestation of mutation in respect of the suit land after the death of his father. Plaintiff was not informed of any such proceedings. Plaintiff never appeared in any such mutation proceedings nor did he give his consent to the attestation of mutation on the basis of impugned 'Will'. Plaintiff came to know of this fraud during the proceedings of a suit filed by defendant No.5 against defendants No.1 to 4 in the year 1980-81. During the course of abovementioned proceedings, application to bring on record remaining heirs of Doom Ram was made which was disallowed by the Court of learned Sub Judge (2), Mandi. Suit was decreed by learned Sub Judge (2), Mandi. As per the plaintiff, the 'Will' was declared null and void and decree for joint possession was passed in favour of all heirs of Doom Ram. Defendants No.1 to 4 went in appeal before learned District Judge, Mandi. In appeal, a compromise was entered into between defendants No.1 to 4 on one side and defendant No.5 on the other side allowing defendant No.5 1/7th share in the suit land. On the basis of said compromise recorded between defendant No.1 to 4 and defendant No.5, defendants No.1 to 4 denied the right of the plaintiff to have any share in the suit land. Further as per the plaintiff since 1.8.1990 defendants No.1 to 4 were obstructing him in exercising his right of ownership and possession over the suit land. It was further mentioned in the plaint that the suit property was joint Hindu family property, ancestral in nature and it came in the hands of Doom Ram grandfather of plaintiff and defendants No.1 to 5 and was not self acquired property of Doom Ram. Thus, according to the plaintiff the same could not have been disposed of by Doom Ram by way of a 'Will'. It was further averred that though it was not admitted that Doom Ram had executed any 'Will' and the 'Will' was a forged one, yet if at all execution of the 'Will' is proved in that event the same is outcome of undue influence exercised by Netar Singh. According to the plaintiff, Doom Ram was an old and ailing person and Netar Singh was occupying dominant and fiduciary position and taking advantage of his position as he was capable of exercising undue influence on Doom Ram, he got the said 'Will' executed. It was further averred that assuming

that the 'Will' is valid one, in that situation it does not affect the suit land which is not self acquired property of Doom Ram. It was on these bases that suit was filed by the plaintiff.

4. This suit was contested by defendants No.1 to 4, who denied the case as set up by the plaintiff. According to defendants No.1 to 4, the suit property was bequeathed by Doom Ram during his lifetime by way of a registered 'Will' in their favour and they were exclusive owner in possession of the suit land. It was denied by defendants that the plaintiff was not aware of the 'Will' or that it was plaintiff who was serving Doom Ram till his death. It was also denied that defendant No.1 had manipulated execution of the will, as was alleged by the plaintiff. It was further the case of defendants No. 1 to 4 that the suit property was self acquired property of Doom Ram and was not ancestral or joint Hindu family property. It was further mentioned in the written statement that plaintiff had knowledge of mutation proceedings and had never objected to the attestation of the same on the basis of 'Will'. It was further averred that after the mutation it was plaintiff who got the suit filed against defendants No.1 to 4 by defendant No.5. Accordingly, the claim as was put-forth in the plaint was denied in totality by the defendants.

5. On the basis of pleadings on record, the learned Trial Court framed the following issues:-

> *"1. Whether the property in dispute was ancestral in nature qua plaintiff and Doom Ram deceased as alleged ?...OPP.*
>
> *2. Whether the property in dispute was joint Hindu family property and plaintiff is class-I heir of deceased Doom Ram?....OPP.*
>
> *3. Whether the plaintiff is entitled to confirmation of joint possession of the property in dispute ? …OPP.*
>
> *4. Whether deceased Doom Ram executed a valid will in favour of the defendants No.1 to 4?...OPP*
>
> *4A. Whether the suit is barred by the principle of res-judicate?...OPD.*
>
> *4B, Whether the plaintiff is estopped by his act and conduct from filing the present suit?...OPD.*
>
> *4C. Whether the defendants No.1 to 4 have become owners of the shares of other co-sharers by way of adverse possession? …OPD.*
>
> *5. Relief.*

6. The following findings were returned on the issues so framed by the learned Trial Court.

"Issue No.1	*Yes partly.*
Issue No.2	*Yes partly.*
Issue No.3	*Yes partly.*
Issue No.4	*Yes.*
Issue No.4A	*No.*
Issue No.4B	*No.*
Issue No.4C	*No."*
Relief	*Suit of the plaintiff decreed partly as per operative portion of judgment."*

7. Accordingly, the suit was partly decreed by the learned Trial Court. Para 19 of the judgment is reproduced hereinabelow:-

> *"19. Thus, for the foregoing reasons recorded for deciding the aforesaid issues, the suit of the plaintiff succeeds partly, therefore, a decree for declaration that the plaintiff are co-owners in possession to the extent of 1/7th share in land measuring 12-17-12 bighas comprising khata khatauni No. 8/13, khasra Nos. 44, 51, 59, 64,*

287/90, 136,141, 144,150,154,160,165,175,176,178,191,204,212 and 213 situate in village Pargi, 1/21 share in khasra Nos. 211 and 210 measuring 0-6-19 bighas situate in village Pargi and 1/21 share in land measuring 63-2-0 bighas comprised in khata khatauni No. 9/17, khasra Nos. 373, 380, 392, 404, 407, 408, 409, 413, 418, 370, 374, 376, 378, 400, 401, 402, 403, 405, 406, 410, 372, 375, 381, 382, 383, 391, 393 to 397, 412, 414, 415, 417, 368, 369, 377, 398, 399, 416, 411 and 367 situate in village Nalwari alongwith decree for confirmation of the joint possession of the parties in respect of the aforesaid land is granted in favour of the plaintiff and against the defendants. Rest of the claim of the plaintiff is dismissed. No order as to costs. Decree sheet be prepared. File, after completion, be consigned to the record room."

8. Feeling aggrieved by the said judgment passed by learned Trial Court, the plaintiff filed an appeal which was dismissed by the court of learned Addl. District Judge, Mandi vide judgment dated 17.1.2003.

9. The learned Appellate Court upheld the judgment and decree passed by the learned Trial Court.

10. The learned Appellate Court held that statement recorded of the scribe of the 'Will' and the witnesses were on record as Ext. DA to Ext. DS and a perusal of the same made it manifestly clear that the 'Will' in issue was validly executed in accordance with law. The learned Appellate Court further held that the question of validity of the execution of the 'Will' was also subject matter of the trial before the learned Sub Judge 1st Class (Court No.2) Mandi in civil suit titled as Damodar Vs. Netar Singh, wherein the learned Trial Court on consideration of the entire evidence on record including the testimony of one of the marginal witness Parma Ram who testified that the 'Will' was scribed by Badri Dass and that he and Roop Singh were attesting witnesses to the execution of the 'Will' and Doom Ram put his signature in presence of Roop Singh held that the same adequately and conclusively established the valid and due execution of the 'Will' in accordance with the provisions of Indian Succession Act. The learned Appellate Court held that the question of sound disposing mind of deceased Doom Ram was also considered in the said proceedings and Parma Ram had stated that Doom Ram was mentally fit and sound at the time of execution of the 'Will'. The learned Appellate Court further held that the contention of the plaintiff that he being the eldest son has been excluded from inheritance from the estate of Doom Ram was also without merit in view of the fact that besides the 'Will' being valid having been executed in accordance with law, it stood established that deceased testator Doom Ram was not having cordial relation with Dhani Devi mother of the plaintiff which was proved vide Ext. DA-1 which was judgment in suit for maintenance which was instituted by mother of the plaintiff against Damodar Dass, wherein the learned Judge while dismissing the suit for maintenance had recorded findings that Dhani Devi, mother of the plaintiff/appellant was living an unchaste life and that was the reason for dismissing the suit for maintenance instituted by the mother of plaintiff/appellant against deceased testator Doom Ram. Therefore, the learned Appellate Court held that there was an explanation as to why the plaintiff was excluded from inherence by Doom Ram and the 'Will' being proved to be valid in accordance with law and having been registered, the disinheritance of the plaintiff was not all that material to doubt validity of the 'Will'. The learned Appellate Court further held that the contention of the plaintiff that the property situate in village Dahnoo was not ancestral property but self acquired property of deceased testator was also not proved by the plaintiff. Similar was the findings returned by the learned Appellate Court with regard to property at village Malthar. Accordingly, the Appellate Court upheld the judgment passed by the learned Trial Court and dismissed the appeal filed by the plaintiff.

11. I have heard learned counsel for the parties and also gone through the records of the case as well as judgments passed by learned Courts below.

12. Order XX Rule 5 of the Code of Civil Procedure (CPC) provides that Court has to state its finding or decision on each issue. As per the said provision, in a suit in which issues

have been framed, the Court has to state its findings and judgment with reasons upon each separate issue unless the findings upon any one or more of the issue is sufficient for the decision of the suit.

13. The learned Trial Court in the present case framed, in all, eight issues. A perusal of the judgment passed by the learned Trial Court demonstrates that issues No.1 to 4 and 4-C were discussed together by it, whereas issue No. 4-A and 4-B were discussed separately. A perusal of the judgment passed by the learned Trial Court further demonstrates that it has dwelled on all aspects of the matter in its judgment which were covered in issues No. 1 to 4 and 4-C in para 6 to 16 of the judgment.

14. It has been held by the Hon'ble Supreme Court in **State of Karnataka** Vs. **Registrar General, High Court of Karnataka,** (2000)7 Supreme Court Cases 333 that judicial disposition is definitely different from a paper presented for seminar discussion nor it can be equated with a dissertation. Judicial decorum requires that judgments and orders should confine to the facts and legal points involved in the particular cases which Judges deal with under Order XX Rule 5. It is mandatory that reasons upon each separate issue and all distinct issues have to be answered by the findings supported by reasons.

15. This Court has held in **Jabbar Singh** Vs. **Shanti Swaroop**, 2007 HLJ 192 that normally the Court should decide the issues together but if some common question of law and fact is involved, which would involve the repetition of evidence, the Court can decide such issues together. This Court has further held in **Hiru** Vs. **Mansa Ram,** 2003 (1) Cur.L.J. 133 that there is no bar in Code of Civil Procedure for clubbing the issues together, if the evidence related to them is common and the case cannot be remanded on the ground that the issue can be clubbed together.

16. When I judge the judgment passed by the learned Trial Court on the said basis, it is clear and evident from the findings returned by the learned Trial Court that though issues No. 1 to 4 and 4-C have been discussed together, however, the learned Trial Court has answered all the said issues by returning findings on the same which are duly supported by reasons. Issue No.1 whether the property in dispute was ancestral in nature qua plaintiff and Doom Ram deceased as alleged has been answered by the learned Trial Court by holding that part of the suit property was ancestral in nature qua the plaintiff and deceased Doom Ram. Similarly the second and third issue whether the property in dispute was joint Hindu family property and plaintiff is Class-I heir of deceased Doom Ram and whether the plaintiff is entitled to confirmation of joint possession of the property in dispute have also been answered with reasons by the learned Trial Court, as is evident from the findings returned in para 8 to 10 of the judgment passed by the learned Trial Court. The learned Trial Court has categorically held in para 12 of the judgment that the plaintiff has established that the land situated in village Pargi and Nalwari is joint Hindu family property and plaintiff has failed to prove that the land situated in village Dahnoo, Tanda, Galma and Malthar was joint Hindu family and co-parcenary property. Similarly, Issue No.4 whether deceased Doom Ram executed a valid will in favour of the defendants No.1 to 4 has also been dealt with in detail in para 13 to 15 of the judgment passed by the learned Trial Court and on the basis of discussions returned in these paras, the learned Trial Court has concluded that the 'Will' executed by Doom Ram was a valid 'Will' in respect of self acquired property of Doom Ram and further that the same was to take effect to the extent of his share in respect of the ancestral and co-parcenary property. Issue No. 4-C, whether the defendants No.1 to 4 have become owners of the shares of other co-sharers by way of adverse possession has also been dealt with in para 16 of the judgment passed by the learned Trial Court in detail. The learned Trial Court has held that it cannot be said that the defendants have acquired title to the suit property discussed therein by virtue of adverse possession.

17. In fact on the basis of the discussions held in these paras, the learned Trial Court held that the plaintiff was son of late Doom Ram and lands situated in Mauza Pargi and Nalwari were joint Hindu family and co-parcenary property and plaintiff had 1/7th share therein

and as such the plaintiff is joint owner of possession of the suit property and entitled to decree for confirmation of joint possession over the aforesaid land and rest of the land is self acquired property of Doom Ram and he had executed 'Will' in favour of defendants No.1 to 4 and as such the 'Will' is valid qua his 1/7th share in respect of the land situated in Mauza Pargi and Nalwari and is valid qua lands measuring 12-17-12 bighas and 63-2-0 bighas. Similarly, issue No. 4A and 4B were discussed and decided separately by the learned Trial Court and both these issues have been decided against the defendants and in favour of the plaintiff.

18. From what has been discussed above, it cannot be said that there has been non-compliance of provisions of under Order XX Rule 5 CPC by the learned Trial Court, keeping in view the fact that this Court has already dealt with the first substantial question of law on merit, therefore, the second substantial question of law needs no further adjudication. The substantial questions of law are answered accordingly.

19. During the course of arguments, it has been urged on behalf of the appellants that the judgments passed by both the learned Courts below were liable to be set aside because both the learned Courts below have erred in not appreciating that there was no valid 'Will' executed by deceased Doom Ram in favour of the defendants. It was contended on behalf of the appellants that the 'Will' was not proved in accordance with law by the defendants who were the beneficiaries of the same and keeping in view the fact that in the case of a 'Will' the onus is on the benefactor to prove the same, the learned Courts below erred in holding that the alleged 'Will' executed by late Doom Ram was a valid 'Will' in the absence of the same having been proved as per the provisions of Indian Succession Act.

20. On the other hand it was submitted on behalf of the respondents that the factum of deceased Doom Ram having executed a valid 'Will' in favour of the defendants has been upheld by both the learned Courts below, therefore, there being a concurrent finding of fact returned in this regard, the same did not warrant any interference in the second appeal especially and more so in view of the fact that there was no substantial question of law framed in this regard.

21. Mr. G.D. Verma, learned Senior Counsel appearing for the appellants has argued that a perusal of the record of the learned Trial Court will demonstrate that the 'Will' in issue was not proved in consonance with the provisions of Section 68 of the Indian Evidence Act. According to him, simply by tendering the documents which were exhibited in the previous case, i.e. in Civil Suit No. 137 of 1983 decided on 16.6.1986 the onus of proving the 'Will' cannot be said to have been discharged by the defendants. It was further argued by Mr. Verma that scribe of the 'Will' was not produced in the court by the defendants and because the best evidence was withheld by them, therefore, adverse inference should have been drawn against the defendants by the learned Trial Court. Mr. Verma has relied upon the following judgments:-

1. 2010 (3) Shim. LC 91 and 141;
2. (2010) 5 Supreme Court Cases 274;
3. (2010) 9 Supreme Court Cases 712;
4. (2013) 2 Supreme Court Cases 114; and
5. 2013 (2) Shim. LC 1153.

22. On the other hand, Mr. N.K. Thakur, learned Senior Counsel appearing for the defendants has argued that as per the records the present appellant/plaintiff himself was a party in Civil Suit No. 137/83 and he was impleaded as defendant No.7 in the same which suit in fact was initiated by none else but his real brother Damodar Dass, copy of which is on record as Ext. DA. Mr. Thakur has also argued that the present appellant moved an application under Order 1 Rule 10 CPC, Ext. DB, in the said case praying therein that he may be allowed to array as plaintiff in the above suit but the said application of his was rejected vide order Ext. DC. Mr. Thakur has also drawn the attention of this Court to Ext. DF which is a statement given by the present appellant as PW4 in the suit which was instituted by his brother Damodar Dass. Mr. Thakur has also stated that the judgment so passed by the learned Trial Court in the case

instituted by the brother of the present appellant was compromised in appeal. Mr. Thakur has accordingly argued that keeping in view the fact that the validity of the 'Will' already stood adjudicated upon by a competent Court of Law in civil proceedings in which the present appellant was also a party, he cannot be permitted to say that the validity of the said 'Will' has not been proved in accordance with law by the present respondents/defendants before the learned Trial Court in the present case. Mr. Thakur has further argued that a perusal of the averments made in the plaint filed by the present appellant/plaintiff will demonstrate that he has not approached with the court with clean hands. In para 5 of the plaint he has stated that when mutation was carried out on the basis of the 'Will' executed by Doom Ram, he did not appear in the mutation proceedings, whereas it stands established on record that he was not only aware of the mutation proceedings but was also present during the said proceedings. He has further argued that the appellant/plaintiff has stated further in para 5 of the plaint that in the suit instituted by his brother the 'Will' was declared null and void, whereas fact of the matter is that the learned Trial Court in that case had returned finding that Doom Ram had executed a valid 'Will' on 14.3.1969. Accordingly, he has submitted that there was neither any force nor any merit in the contention which had been raised in the present appeal by the appellant with regard to the 'Will' not having been proved in accordance with law by the defendants before the learned Trial Court.

23. This Court in **Shri Pawan Kumar and others** Vs. **Shri Tilak Raj and another** 2010 (3) Shim. LC 91 has held that a gift-deed is a document which requires the attestation of two or more witnesses. Section 3 of the Transfer of Property Act defines the essential conditions of a valid attestation which were found absent in that case.

24. Similarly, this Court in **Kamlesh Rani** Vs. **Balwant Singh** 2010 (3) Shim. LC 141 has held that document which requires formal proof cannot be tendered in evidence and no presumption of correctness is attached to it simply because other party has not objected to its tendering in evidence.

25. In my considered view the said judgments have no bearing on the facts of the present case because of the reason that here is a case in which the present appellant was himself a party in the suit in which all the documents were tendered and proved in accordance with law. The appellant herein had the opportunity to cross-examine the relevant witnesses in the said civil suit and also to assail the veracity of the documents. Fact of the matter remains that the 'Will' has been held to be a valid 'Will' in those proceedings and in view of this matter the judgments referred to above are of no assistance to the appellant.

26. The Hon'ble Supreme Court in **S.R. Srinivasa and others** Vs. **S. Padmavathamma**, (2010) 5 Supreme Court Cases 274 has reiterated the principles laid down by it in *H. Venkatachala Iyengar V. B.N. Thimmajamma,* AIR 1959 SC 443 in the matter of proof of 'Will'.

27. Similarly, the Hon'ble Supreme Court in **M. Chandra** Vs. **M. Thangamuthu and another**, (2010) 9 Supreme Court Cases 712 has held that a party who wishes to rely upon the contents of a document must adduce primary evidence of the contents, and only in exceptional cases will secondary evidence be admissible. It has further held that if secondary evidence is admissible, it may be adduced in any form in which it may be available whether by production of a copy, duplicate copy of a copy by oral evidence of the contents or in another form. It has further held that the secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. It should be emphasized that the exceptions to the rule requiring primary evidence are designed to provide relief in a case where a party is genuinely unable to produce the original through no fault of that party.

28. The Hon'ble Supreme Court in **U. Sree** Vs. **U. Srinivas**, (2013) 2 Supreme Court Cases 114 has held that mere admission of a document does not amount to its proof and it is the obligation of the Court to decide the question of admissibility of a document in secondary evidence before making endorsement thereon.

29. This Court in **Prem Kumar** Vs. **Tek Singh**, 2013 (2) Shim. LC 1153 has held as under:-

"13. It may be seen that subsequently the Apex Court in M.Chandra v. M.Thangamuthu, (2010) 9 SCC 712, has been held as follows:-

"47. … It is true that a party who wishes to reply upon the contents of a document must adduce primary evidence of the contents, and only in the exceptional cases will secondary evidence be admissible. However, if secondary evidence is admissible, it may be adduced in any form in which it may be available, whether by production of a copy, duplicate copy of a copy, by oral evidence of the contents or in another form. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. It

should be emphasized that the exceptions to the rule requiring primary evidence are designed to provide relief in a case where a party is genuinely unable to produce the original through no fault of that party".

14. The aforesaid view has been reiterated in U. Sree vs. U. Srinivas¸ (2013) 2 SCC 114.

15. As already noticed earlier, the plaintiff in support of the application has stepped into the witness box and has categorically deposed that the original Will was destroyed by the concerned Revenue office at the time when the record pertaining the mutation was weeded out in accordance with the procedure established by law.

16. Plaintiff has been able to show sufficient reasons for non-production of the original document. The said document is not in his possession, which fact stands corroborated by the testimony of another witness Shri Mohan Singh (AW-1), who has produced the record from the Revenue Office.

17. For the purpose of leading secondary evidence, the Court has to form an opinion about the loss of the document and not with regard to its existence. In the instant case, the Court below has come to this conclusion and hence rightly allowed the plaintiff to lead secondary evidence."

30. In my considered view, the above judgments relied upon by the learned counsel for the appellant do not have any bearing on the merits of the present case. It is not the case of the appellant that he was a stranger as far as the civil suit filed by his brother is concerned. It is not a case where the documents exhibited in that suit which have been relied upon by the present respondent before the learned Trial Court in the present case have taken the present appellant by surprise, as appellant was a party defendant in that civil suit and the proceedings therein took place in his presence. It is a matter of record that he has deposed as a witness in that case. His applications and statement made by him in that case have also been relied upon by the present respondent before the learned Trial Court in the present case. Therefore, keeping in view this aspect of the matter that the present appellant was a party in the previous case instituted by his brother, it cannot be said that the documents etc. tendered therein including the statements made by various witnesses could not have been relied upon by the learned Trial Court in the present case.

31. A perusal of the judgment passed by the learned Trial Court will demonstrate that it has dealt with the validity of 'Will' dated 5.3.1969 in para 13 and 14 of the said judgment. On the basis of the material on record, the learned Trial Court has held that the defendant while deposing as DW2 has stated that the 'Will' executed by Doom Ram dated 5.3.1969 was scribed by Badri Dass and witnesses by Roop Singh and Panna Ram and both of said witnesses were since dead. The learned Trial Court has further taken into consideration Ext. DD to DR which are copies of statements of Badri Dass the scribe of the 'Will' and Param Ram the witness of the execution of the said 'Will' which was recorded in the earlier suit filed by the brother of the

present appellant/plaintiff. The learned Trial Court has also dealt with the statement of the present appellant/plaintiff in which the plaintiff himself has admitted the execution of the will by Doom Ram. The learned Trial Court has also taken note of the fact that present appellant while appearing as PW4 in the previous suit filed by his brother has also admitted about the execution of the 'Will' by late Doom Ram. Taking into consideration all these aspects of the matter, the learned Trial Court concluded that there was a valid 'Will' executed by Doom Ram in favour of defendants No.1 to 4.

32. The learned Appellate Court has also minutely dealt with all these aspects of the matter and thereafter it has concluded that there was no infirmity with the findings returned by the learned Trial Court to the effect that there was a valid 'Will' executed by Doom Ram in favour of defendants No.1 to 4.

In my considered view, there is no merit in the contention of the appellant that the said 'Will' executed by Doom Ram has not been duly proved by the defendants in accordance with the provisions of Section 68 of the Indian Evidence Act before the learned Trial Court, in view of the fact that in previous legal proceedings instituted by the real brother of present appellant in which the appellant was also a party and which case was also pertaining to the same 'Will' and was filed against the defendants No.1 to 4, there was a finding returned that the said 'Will' executed by Doom Ram was a valid 'Will' and the learned Trial Court (in the present case) relying upon the documents produced by the defendants pertaining to the earlier suit has returned the findings that the 'Will' so executed by late Doom Ram in favour of defendants No.1 to 4 was a valid 'Will'. In my considered view as the present appellant was a party in the said civil proceedings, he cannot be permitted to agitate the findings returned by the learned Trial Court with regard to the validity of the 'Will', on the grounds which have been raised in the present appeal. Furthermore, when both the learned Courts below have concurrently held that the 'Will' executed by late Doom Ram was a valid 'Will', there is no reason as to why this concurrent finding should be interfered with by this Court when the appellant has not placed any material on record from which it can be inferred that the said findings returned by the learned Trial Court and confirmed by the Appellate Court are not borne out from the records of the case. As a result of the findings recorded hereinabove, I do not find any merit in the present appeal and the same is dismissed with cost.

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

Praduman Justa .....Petitioner.

Versus

State of Himachal Pradesh .....Respondent.

Cr.M.P.(M) No. 450 of 2016.
Reserved on: 29.6.2016
Date of decision : 8th July , 2016

Code of Criminal Procedure, 1973- Section 439- A car was checked and 20 bottles of Corex and 299 bottles of Nitrazepam Nitrosum-10 were recovered from it - it was contended that petitioner was not found in possession of any manufactured drugs- held, that Codeine has been declared a manufactured drug - its small and commercial quantity have also been prescribed - prohibition applies to the entire mixture or any solution or any one or more of narcotic drugs or psychotropic substances- mere fact that drugs are covered under Drugs and Cosmetic Act would not mean that the offender can be penalized only under the Drugs and Cosmetic Act and not under N.D.P.S. Act- petition dismissed. (Para-12 to 40)

Cases referred:

Rohit Chadha vs. State of Madhya Pradesh, 2016 Cr.L.J. 2025

Mohd. Sahabuddin and another vs. State of Assam (2012) 13 SCC 491
Union of India and another vs. Sanjeev V. Deshpande (2014) 13 SCC 1
Inderjeet Singh @ Laddi and others vs. State of Punjab, 2015 (1) Crimes 308

For the Petitioner : Mr. N. S. Chandel and Mr. Dinesh Thakur, Advocates.
For the Respondent : Ms. Meenakshi Sharma, Addl. Advocate General with Mr. J.S. Guleria, Assistant Advocate General.
SI Ashish Samuel, P.S. West, Shimla, present alongwith records.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The petitioner has filed this petition under Section 439 of the Code of Criminal Procedure (for short 'Code') for grant of regular bail in case FIR No. 95 of 2016 dated 15.4.2016, registered at Police Station, Boileauganj (Shimla West), under Sections 21, 22 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'Act').

2. The brief facts of the case are that the police party of Police Station, Boileauganj was on patrolling duty near Glen Moad (curve) and Annadale etc. and at about 3.30 when they reached at place Glen Moad (curve) and Annadale they found one white coloured car bearing No. CH-03Q-6259 was parked in the road in which two persons were there and seeing the police they tried to run away and one person fell down and was over powered and second person ran away. The person who was over powered disclosed his name Praduman Justa and the person who fled away from the spot was Kinchit Justa. The alleged maruti car was checked and one black and white coloured bag on which *"Attire Watch ones step"* was written was recovered. After checking the bag, some bottles and few medicines were recovered and after counting it was found to be containing 20 bottles of Chlorpheniramine maleate and codeine phosphate cough syrup mark Corex of 100 ml and 299 tablets of Nitrazepam in 15 strips of Nitrosum-10 and on the back seat of the car, one black coloured mobile of Nokia brand was found which was stated to be mobile phone of Kinchit Justa. The accused could not produce any licence/prescription slip of the Corex and Nitrosun 10 and the bag was thereafter sealed in which 15 stamps of 'Z' was marked and then after completing all the codal formalities as required under the law, the accused persons were found to have committed offence under Sections 21, 22 and 29 of the Narcotic Drugs and Psychotropic Substances Act (for short 'Act') and were arrested by the Investigating Officer and recovered contraband sent to the FSL, Junga. On receipt of the report, it was found that the codeine phosphate was found present in Corex Cough Syrup and Nitrazemam was found present in the tablets of Nitrosum-10.

3. The learned counsel for the petitioner has raised the following contentions:

(i) That there is no mention of any drug under the Act which may be considered as a 'manufactured drug'. It is only by virtue of Section 2 (xi) that powers have been conferred upon the Government to declare any drug as a manufactured drug having some concentration of coca derivatives or Medicinal cannabis or opium derivatives or poppy straw concentrate according to the requirement of the Indian Pharmacopoeia or any other pharmacopoeia notified by the Government. The Central Government while exercising the powers conferred under Section 2 (xi) (b) of NDPS, Act had issued notification dated 14th November, 1985 declaring certain Narcotic Substances and preparation of manufactured drug as manufactured drugs.

(ii). That in the notification dated 14.11.1985, codeine has been declared as 'manufactured drug' with certain restriction and figures at serial No. 35 and would only be considered to be a prohibited substance in case the preparations contains more than 100 milligrams of the drug per dosage unit with a concentration of not more than 2.5% in undivided

preparation which has been established in therapeutic practice and is exempted and cannot be considered as manufactured drug under Section 2 (xi) of the Act.

(iii). That from the perusal of the aforesaid entry No.35 of the notification dated 14.11.1985 it is clear that the preparation containing not more than 100 mg of codeine phosphate per dosage unit with the concentration of not more than 2.5% in undivided preparation which has been established in therapeutic practice is exempted from being a manufactured drug under Section 2 (xi) of NDPS, Act.

(iv). That as per the prosecution the corex cough syrup which was allegedly recovered from the petitioner contained 1.930 mg/ml codeine phosphate in 100 ml of bottle. The concentration of codeine in 100 ml bottle or dosage per unit is approximately less than .02% that is to say that the same is within the permissible limit of less than 2.5%. As such, Corex is not a manufactured drug as per Section 2 (xi) of NDPS, Act as the concentration of codeine phosphate is less than 2.5%. Hence, the cough syrup comes under Schedule H-1 of Drugs and Cosmetic Rule, 1945 and Rule 65A and Rule 66 of NDPS Act are not attracted in the facts and circumstances of the present case as such no offence under Section NDPS Act is made out.

(v) That Rule 52-A of the Narcotic Drugs and Psychotropic Substances Rules (for short 'Rules') was introduced in the year 2015 in order to bring codeine phosphate within the purview of the Act only if the concentration of codeine in 100 ml of bottle is more than 2.5% and below the said concentration, same would not fall under the said Act. Apart from this, learned counsel for the petitioner has also relied upon table No.2 wherein same language as contained in entry No.35 of 1985 notification is contained.

4. In reply, Mr. J.S. Guleria, learned Assistant Advocate General would argue that the arguments raised by learned counsel for the petitioner to the effect that cough syrup in which codeine phosphate was found should have been mentioned in the notification issued by the Government of India as stated in (b) (xi) of Section 2 of the Act and that codeine phosphate is not a manufactured Narcotic Drug and as per GOI Gazette Notification No. S.O.826 (E) dated 14.11.1985 and S.O. 40(E) dated 29.01.1993 is totally fallacious.

5. It is argued that codeine phosphate being opium derivative is covered under the definition (a) of sub section (xi) of Section 2 of the Act. In so far as the aforesaid notifications dated 14.11.1985 and 29.1.1993 are concerned, it is argued that the Codeine and its preparations is mentioned and holds good only for licensed pharmaceutical manufacturers as is evident from entry No. 35 wherein it is clearly mentioned at the end that such preparations have been established in Therapeutic practice and act as a rider for them not to manufacture the preparations of codeine phosphate beyond the limits defined in the said notification.

6. In rebuttal, learned counsel for the petitioner would argue that the arguments advanced by the prosecution are completely misplaced because as per prosecution, codeine is a derivative of opium and is a manufactured drug within the meaning of Section 2 (xi) and (xvi-c) and notification as envisaged under Section 2 (xi-b) would therefore be necessary for other drugs but not for coca derivates, medicinal cannabis, opium derivates and poppy straw concentrate. If the argument of the State is taken as it is then there was no need of notification of 1985 as all the drugs containing all coca derivates or medicinal cannabis or opium derivates or poppy straw concentrate would automatically fall in the category manufactured drug.

7. The learned counsel for the petitioner would further argue that codeine in isolation is not a manufactured drug. It is only when it undergoes the process of preparation as defined under Section 2 (xx) of the Act that it becomes a manufactured drug. After going through the process, salt is added to it and then concentration of codeine converts into codeine phosphate, which is found in the drug in question.

8. It is further submitted that the Act nowhere defines any drug, it is by virtue of notification dated 14.11.1985, 29.1.1993 and 21.6.2011 the manufactured narcotic drug has been notified.

9. The learned counsel for the petitioner would further argue that the crux of the prosecution argument is that the aforesaid notification is bad as there was no need of such notification in view of Section 2 (xi-a) which is completely misplaced. According to him, a bare perusal of the notification will indicate that majority of the drugs mentioned in the said notification are consisting of coca derivates, medicinal cannabis, opium derivates and poppy straw concentrate. Apart from this, in order to counter the argument of the State, the petitioner would submit that codeine has not been found in the drug in question, it is codeine phosphate, which has not been defined in Section 2 of the Act.

10. With regard to the notification dated 18.11.2009, the learned counsel for the petitioner would argue that the said notification would be applicable for codeine phosphate only if it exceeds the prescribe limit that is 2.5%. The said notification will not be applicable for the concentration of codeine phosphate which is less than 2.5% as the said drug does not fall within the meaning of manufactured drug and is not covered under the Act.

11. Notably, most of the contentions as raised by learned counsel for the petitioner have already been considered by me in detail in ***Cr.MP(M) No. 502 of 2014 titled Om Pal*** vs. ***State of Himachal Pradesh,*** decided on 6.5.2014, but the learned counsel for the petitioner would still contend that this judgment requires to be re-looked and re-visited and may possibly be required to be referred to a larger Bench as this Court has not considered the effect of the notification dated 14.11.1985 as the same was in fact not brought to its notice.

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

12. One of the question that arises for consideration is as to whether the petitioner can be tried for an offence under the NDPS Act in case he is found in possession of 'manufactured drugs' as defined under Section 2 (xi) of the Act and has been notified as such by notifications dated 14.11.1985 and 29.1.1993 as 'manufactured drugs', but contains an exception as regards the percentage of dosage in the drug. Therefore, in order to understand this issue, one is required to look into the relevant provisions of the Act, which are noted below:

> *"**2 (xi) "manufactured drug**" means –*
>
> *(a) all coca derivatives, medicinal cannabis, opium derivatives and poppy straw concentrate;*
>
> *(b) any other narcotic substance or preparation which the Central Government may, having regard to the available information as to its nature or to a decision, if any, under any International Convention, by notification in the Official Gazette, declare to be a manufactured drug ;*
>
> *but does not include any narcotic substance or preparation which the Central Government may, having regard to the available information as to its nature or to a decision, if any, under any International Convention, by notification in the Official Gazette, declare not to be a manufactured drug.*
>
> ***2.(xiv) "narcotic drug**" means coca leaf, cannabis (hemp), opium, poppy straw and includes all manufactured drugs.*
>
> ***Explanation,** - For the purposes of clauses (v), (vi), (xv) and (xvi) the percentages in the case of liquid preparations shall be calculated on the basis that a preparation containing one percent of a substance means a preparation in which one gram of substance, if solid, or one mililitre of substance, if liquid, is contained in every one hundred mililitre of the preparation and so on in proportion for any greater or less percentage:*

Provided that the Central Government may, having regard to the developments in the field of methods of calculating percentages in liquid preparations prescribed, by rules, any other basis which it may deem appropriate for such calculation."

13. In terms of clause (b) of Section 2 (xi) NDPS Act relating to 'manufactured drug', any narcotic substance or preparation which the Central Government may, having regard to the available information as to its nature or to a decision, if any, under any international convention, by notification in the official Gazette, declare to be a manufactured drug, are to be considered as such, that is, as manufactured drug. The Ministry of Finance, Department of Revenue, has published notification S.O. 826 (E) dated 14.11.1985 in the Gazette of India, Extraordinary, Part II, Section 3, sub-Section (ii). The said notification has been issued in exercise of power conferred by sub clause (b) of clause (xi) of Section 2 NDPS Act, in terms of which the Central Government has declared the narcotic substances and preparations mentioned therein to be "manufactured drug".

14. In terms of the notification dated 14.11.1985, as many as 88 drugs have been notified and 10 out of the same, have been provided with some kind of exceptions and relevant entry for our purpose is contained at serial No. 35 and the same reads thus:

*"35. Methyl morphine (commonly known as '**Codeine**') and Ethyl morphine and their salts (including **Dionin**e), all dilutions and preparations except those which are compounded with one or more other ingredients and containing not more than 100 milligrammes of the drug per dosage unit and with a concentration of not more than 2.5% in undivided preparations and which have been established in Therapeutic practice."*

15. Notably, Central Government vide notification dated 29.1.1993 notified 17 more drugs as "manufactured drugs" and, therefore, in all as many as 105 drugs have been notified as "manufactured drugs".

16. Section 21 of the Act, relates to punishment for contravention in relation to manufactured drugs and preparations and provided for different punishments in respect of contravention of any provision of the NDPS Act and the Rules etc.

17. Clause (viia) and Clause (xxiiia) of NDPS Act defines "commercial quantity" and "small quantity" which read as follows:

"(viia) "commercial quantity", *in relation to narcotic drugs and psychotropic substances, means any quantity greater than the quantity specified by the Central Government by notification in the Official Gazette."*

"(xxiiia) "small quantity", *in relation to narcotic drugs and psychotropic substances, means any quantity lesser than the quantity specified by the Central Government by notification in the Official Gazette."*

18. The Central Government vide notification dated 19.10.2001 has specified the 'small quantity' and commercial quantity' in a tabular form which contains horizontal columns from (1) to (6) mentioning the serial number, name of narcotic drug and psychotropic substance, other non-proprietary name, chemical name, small quantity (in grams) and commercial quantity (in grams/kilograms) respectively.

19. On 18.11.2009, the Central Government issued another notification so as to add Note 4 after Note 3 to the table specifying 'small quantity' and 'commercial quantity' of narcotic drugs and psychotropic substances in terms of notification dated 19.10.2001 and the same is reproduced as under:

"Notifications, New Delhi, the 18th November, 2009 S.O. 2941 (E).- In exercise of the powers conferred by clause (vii a) and (xxiii a) of Section 2 of the Narcotic Drugs and Psychotropic Substance Act, 1985 (61 of 1985) the Central Government,

hereby makes the following amendment in the Notification S.O. 1055 (E), dated 19th October, 2001 namely, in the Table at the end after Note 3, the following Note shall be inserted namely:-

> *"(4). The quantities shown in column 5 and column 6 of the Table relating to the respective drugs shown in column 2 shall apply to the entire mixture or any solution or any one or more narcotic drugs or psychotropic substances of that particular drug in dosage form or isomers, esters, ethers and salts of these drugs, including salts of esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content."*

20. Thus, the effect of the notification dated 19.10.2001 was that the quantity shown in column No.5 that relates to 'small quantity, and column No.6 that relates to 'commercial quantity' of the table relating to respective drugs shown in column No.2 that relates to the name of narcotic drug and psychotropic substance, is to apply to the entire mixture or any solution or any one or more of narcotic drugs or psychotropic substances of that particular drug in dosage form etc. wherever existence of such substance is possible and not just its pure drug content. This was so held by me in ***Om Pal's*** case (supra) and the relevant observations read as under:

"14. The sum and substance of the arguments raised by learned counsel for the petitioner is that in case of seizure of narcotic substance, the Court is to rely upon the report of the Chemical Examiner in order to find out the pure drug content per dosage and if it is found to be below the exempted limit, i.e. less than commercial quantity, then the petitioner is entitled to statutory bail under Section 167 (2) Cr.P.C. and since the prosecution had failed to file the final report within the statutory period of 90 days.

15. Learned Advocate General on the other hand contended that once the petitioner admits the applicability of Section 21, then in so far as the Narcotic Drugs and Psychotropic Substance is concerned, it is not pure drug content which will have to be seen but it would be the entire weight of the drugs recovered which will have to be taken into consideration for calculating its quantity in view of the notification No.S.O. 294 (E) dated 18.11.2009.

16. Notification No. S.O. 1055 (E) dated 19.10.2001 was issued in terms of clause (vii-a) and xxiii-a) of Section 2 of the Act, whereby and wherein the small quantity and commercial quantity of each of the substance had been stipulated as follows:

""Small quantity", in relation to narcotic drugs and psychotropic substances, means any quantity lesser than the quantity specified by the Central Government by notification in the Official Gazette."

""Commercial quantity", in relation to narcotic drugs and psychotropic substances, means any quantity greater than the quantity specified by the Central Government by notification in the Official Gazette."

The said notification did not introduce a new psychotropic substance other than those mentioned in the schedule of the Act. Since intention of the notification appears to be only to prescribe small and commercial quantity of psychotropic substance by maintaining its statutory definition. However, by notification No. S.O. 294 (E) dated 18.11.2009, the amendment was brought in the notification dated 19.10.2001 and in the table at the end after Note 3, the following Note was added:

"(4). The quantities shown in column 5 and 6 of the Table relating to the respective drugs shown in column 2 shall apply to the entire mixture or any solution or any one or more narcotic drugs or psychotropic substances of that particular drug in dosage form or isomers, esters, ethers and salts of these drugs, including salts of esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content."

17. Thus, what is established from the perusal of notification of 2009 is that the pure content test to ascertain the exact quantity of narcotic drugs and psychotropic substance or manufactured drugs is not required nor can it be used for any advantage especially by the accused. Because now the whole contraband seized is required to be considered and not the quantity of drug or contraband reflected in the report of the Chemical Analyst.

18. In so far as the reliance placed by learned counsel for the petitioner on the judgment of the Full Bench in State of H.P. vs. Mehboon Khan, decided on 24.9.2013 is concerned, the same cannot be read and interpreted in a manner as is sought by the petitioner. In fact the reference to the Larger Bench was only to consider the correctness of the Division Bench Judgment which had held that it was the percentage of tetrahydrocannabinol (THC) which alone would determine the quantity of resin and not the entire stuff. In this background, the question has been answered and reference to the judgment in ***E. Micheal Raj vs. Intelligence Officer, Narcotic Control Bureau (2008) 5 SCC 161*** *has been made. The question of applicability of the amendment carried out in the notification No. S.O. 294 (E) dated 18.11.2009 was neither raised nor its applicability considered. Thus, no reliance whatsoever can be made upon reading stray paragraph of the judgment.*

20. It cannot be disputed that prior to the issuance of the notification there was a controversy regarding what would constitute small, intermediate or commercial quantity which was set at rest by the Hon'ble Supreme Court in ***E. Micheal Raj*** *case (supra). The Hon'ble Supreme Court after analyzing the provisions of the Act and also the relevant entries made in the notification dated 19.10.2001 had held "when any narcotic drugs or psychotropic substance is found mixed with one or more neutral substance for the purpose of imposition of punishment, it is the content of the narcotic drug or psychotropic substance which shall be taken into consideration."*

21. Probably it was this view of the Hon'ble Supreme Court which resulted in the issuance of notification dated 18.11.2009. Though, this Court is not going into the constitutional validity of this notification since it has not been raised, however, suffice is to say that it cannot be denied that the Central Government had the legislative mandate to issue such a notification as it has been given the power to specify by a notification in the Official Gazette the quantity representing the small quantity or commercial quantity in relation to each narcotic drugs and psychotropic substance.

22. The constitutional validity of the notification as observed earlier is not in question before this Court. However, to straighten the record, it may be observed that the same has already been upheld by the Delhi High Court in Abdul Mateen vs. Union of India, WP(Crl.) 1552 of 2010 decided on 6.11.2012.

23. As observed above, while determining whether the quantity small or commercial, the weight of the entire bulk contraband has to be taken into consideration and the pure content test cannot be applied.

28. Since the petitioner admittedly has been found to be in possession of 229 vials of Rexcof (cough syrup) of 100 ml quantity and the entire quantity is now required to be taken into consideration to determine the quantity i.e. small, intermediate or commercial, therefore, the case of the petitioner admittedly does not fall within the purview of Section 167 (2) of the Code and is covered by Section 36A (4) of the Act. Therefore, the present petition being pre-mature is accordingly dismissed. "

21. Thus, it is clear that 'manufactured drugs' of which there has been a contravention in the instant case is possessed without proper licence or authorization and in case the drugs which are carried in bulk form, the notification dated 18.11.2009 would apply and the question that these drugs contain an exception would not be applicable as the exceptions would only apply when the drugs are for medicinal or therapeutic use. Besides this, the quantity of manufactured drugs is not to be determined on the pure drug content, but the entire quantity is

required to be taken into consideration to determine the quantity i.e. small, intermediate or commercial.

22. Therefore, the question of exceptions being provided in respect of drugs at serial No. 35 of the notification dated 14.11.1985 is inconsequential when these drugs are being carried in a bulk form because then the entire quantity of the bulk is to be taken into consideration and not the pure drug content as canvassed by the petitioner particularly when these are sold, purchased, distributed, stored, transported, carried etc. without a valid licence or kept without a valid authorization.

23. At this stage, learned counsel for the petitioner would rely upon the judgment rendered by the learned Single Judge of Madhya Pradesh High Court in ***Rohit Chadha vs. State of Madhya Pradesh, 2016 Cr.L.J. 2025,*** to contend that the theory of entire quantity would only apply in case the recovered substance is a 'manufactured drug' and would particularly rely upon the following observations from judgment, which are as under:

> *"3. The learned counsel for the applicant has submitted that the police had sent some bottles of the seized syrup as samples for chemical analysis to the ITL Labs Pvt. Ltd., Indore, which is recognized by the Government of Madhya Pradesh. According to the report of aforesaid laboratory, each bottle contains 100 ml. syrup and each 5 ml. syrup contains 9.825 mg. codeine phosphate, whereas a label pasted on each of the bottles claims 10 mgs. Having referred to the circular letters Nos. X-11029/27-D, dated 26.10.2005 and X-11029/09-D, dated 01.03.2009 issued by the Drugs Controller General India to all the State Drugs Controllers and notifications No. G.S.R. 588 (E), dated 30.08.2013, the learned counsel for the applicant submitted that the syrup is not a manufactured drug as per Section 2(11) of the Act as the concentration of codeine phosphate in it is mere 0.20% as compare to permissible limit 2.5%. Hence, the syrup comes under the Schedule H-1 of the Drugs and Cosmetics Rules, 1940. Consequently, the acts of purchase, stocking, transportation and sale of the syrup do not attract the provisions of the Act and the Rules 1985 made thereunder. He further submitted that the syrup is used in therapeutic practice for the treatment of cough. Therefore, no offence is made out against the applicant under Section 8(C) read with 21(B) of the Act. Consequently, the learned trial judge has committed gross errors of law and facts by framing the aforesaid charges against the applicant. Therefore, the impugned order of framing of charge insofar as it relates to the applicant deserves to be quashed. In support of the submissions, he placed reliance upon the decisions rendered in the matters of Amrik Singh Vs. State of Punjab [1996 Cr.L.J. 3329 (P&H High Court)] Ashok Kumar Vs. Union of India, 2015 2 All L.J. 193 (date of order 15.10.2014 passed in Criminal Appeal No.2976/2014 by Hon'ble Shri Justice Ajay Lamba of the Allahabad High Court) and Deep Kumar Vs. State of Punjab [1997 Cr.L.J. 3104 (P&H High Court)].*
>
> *4 . Per contra, learned Panel Lawyer for the respondent/State has supported the impugned order of framing of the charge. He argued that the syrup is widely consumed by the drug addicts for getting intoxication and the applicant is found in possession of huge quantity of syrup for which he has not offered any proper explanation let alone valid licence or permit, meaning thereby the seized quantity of syrup was meant for sale to the drug addicts on premium and not for therapeutic benefits. Hence, the learned judge has rightly framed the charges against the applicant.*
>
> *5 . A seminal question that arises for consideration is whether the syrup comes under the category of the manufactured drugs, as defined and made punishable under the Act?*

6. Needless to say that no charge can be framed under the Act if the syrup does not fall within the sweep of the manufactured drug as defined in Section 2(11) of the Act or is exempted from the penal provisions of the Act by framing rules or issuing notifications or orders by the concerned Authority.

7. Section 21 of the Act provides for punishment for contravention in relation to the manufactured drugs and preparations. The term manufactured drug has been defined in Section 2(11) of the Act. It means inter alia any narcotic substances or preparation which the Central Government may declare by notification in the official gazette to be a manufactured drug.

8. In exercise of powers conferred by clause (xi) of sub clause (b) of Section 2 of the Act, the Central Government has issued Notification No.S.O.826 (E), dated 14th November, 1985, which declares certain narcotics substances to be manufactured drugs. The relevant Entry No.35 of the notification reads as follows:-

> *"Methyl morphine (commonly known as 'Codeine') and Ethyl morphine and their salts (including Dionine), all dilutions and preparations except those which are compounded with one or more other ingredients and containing not more than 100 milligrams of the drug per dosage unit and with a concentration of not more than 2.5 percent in undivided preparations and which have been established in therapeutic practice."*

9. From the perusal of the aforesaid entry, it is clear that a preparation containing not more than 100 mgs. of codeine phosphate per dosage unit with the concentration of not more than 2.5% in undivided preparations and which have been established in therapeutic practice is exempted from the application of Section 21 of the Act.

10. According to the aforestated report of the laboratory, each 5 ml. syrup contains 9.825 mg. codeine phosphate, which is permissible in view of aforesaid entry of the notification. Thus, it is held that the syrup is not a manufactured drug.

11. The learned panel lawyer has justified the prosecution of the applicant on the ground that he had been found in possession of huge quantity of the syrup for which he has not offered any convincing explanation, meaning thereby he wanted to sell the syrup on premium to the drug addicts as they use it for intoxication, whereas the syrup is meant for allopathic treatment of cough. This argument is not tenable for want of any express penal provision in the Act which prescribes the possession of the syrup beyond certain quantity is an offence. This view of mine is fortified by the observations made in the matters of Amrik Singh Vs. State of Punjab (Supra) and Rajiv Kumar Vs. State of Punjab and another [1998 Cr.L.J. 1460 P&H High Court]

12. It is pertinent to mention here that in Criminal Revision No.200/2015 Shiv Kumar Gupta Vs. State of M.P., decided by the order dated 16.02.2015, the applicant has been charged under Section 8(B) read with 21 of the Act on the ground that he and his associates were found in possession of 32 bottles of Cosome LCD Syrup and 38 bottles of Codex Syrup, which are cough syrups. In this case, Hon'ble Justice C.V. Sirpurkar has discharged the applicant of the aforesaid charge on the ground that 5 ml. dosage of the syrup contains 10 mg. codeine phosphate which is less than permissible limit of 2.5%. Hence, the aforesaid seized syrups are not manufactured drugs as defined under the Act. The view taken by his Lordship further strengthens the view which I have taken in the present case."

With due respect, deference and humility, I express my inability to agree with the proposition laid down in the aforesaid case for detailed reasons as already set out above and for other reasons which are contained in the latter part of the judgment.

24. The arguments raised by learned counsel for the petitioner is that cough syrup in which codeine phosphate was found should have been mentioned in the notification issued by the Government of India as stated in (b) (xi) of Section 2 of the Act and that codeine phosphate is not a manufactured Narcotic Drug and as per GOI Gazette Notification No. S.O.826 (E) dated 14.11.1985 and S.O. 40(E) dated 29.1.1993. The aforesaid argument is fallacious because in the notifications dated 14.11.1985 and 29.1.1993, respectively, 'Codeine' has been mentioned at serial No. 35 and this is only relevant for licensed pharmaceutical manufacturers in which it is clearly mentioned at the end that such preparations have been established in therapeutic practice and act as a rider for them not to manufacture the preparations of codeine phosphate beyond the limits defined in the said notification.

25. In ***Baldev Singh vs. State of H.P. Cr.MP(M) No. 517 of 2013,*** decided on 19.7.2013**,** this Court was dealing with a bail petition wherein the investigating agency had recovered the following quantity of drugs from the accused as under:

Sr.No.	2.	3.	4
	Name/quantity of drug recovered.	Narcotics/psychotropic substance found on analysis.	Item No. in notification/ Schedule of the NDPS Act.
1.	SPASMOIS-1 PROXYVON 8640 CAPSULES Batch No. JN10154 MFD FEB 13.	**Dextropropoxyphene** **Napsylate**	Manufactured narcotic drug at sr. No. 33 of Notification specifying small quantity and commercial quantity.
2.	Two boxes of microlit 100 packet total 10,000 tablets.	**Diphenoxylate** **Hydrochloride** 2.5 mg per tab.	At Sr. No. 44 of Notification specifying small quantity and commercial quantity.
3.	49 bottles Lomotil containing 100 tablets each total 4900 tablets.	**Diphenoxylate** **Hydrochloride 2.5 mg per tab and atropine sulphate 0.025 mg.**	-do-
4.	15 packets 10 in each of Equilibrium total 150 tablets.	**Chlordiazepoxide 10 mg per tab.**	Psychotropic at Sr. No. 187 in Notification at Sr. No. 36 in Schedule attached to this Act.

26. The petitioner therein had sought bail on the plea that recovered substance fell within the category of small quantity and this Court repelled this contention and held as under:

" 9. The perusal of record shows that the 15 packets (150 tablets) of quilibrium contained chlordiazepoxide 10 mg per tablet. It is a psychotropic substance mentioned in Sr. No. 187 of Notification at Sr. No. 36 in the schedule. The total recovered quantity comes to 1500 mg. which is punishable under Section 22 of the NDPS Act. The other drugs recovered are the "Manufactured drugs" which are also narcotic drugs, possession of which is prohibited under Section 8 of the Act; except for medical or scientific purposes and in the manner and to the extent provided by the provisions of the NDPS Act or the Rules or orders made thereunder and in case where any such provision, imposes any requirement by way of license, permit or

authorization also in accordance with the terms and conditions of such license, permit or authorization. The petitioners herein were illegally transporting these drugs in the area of Himachal Pradesh.

10. The import, export and transhipment of Narcotic Drugs and Psychotropic Substances are prohibited into and out of India which are specified in schedule-I of the NDPS Act as per Chapter VI of the 1985 Rules. Even as per Rules 66 and 67 Chapter VII of the Rules aforesaid, the possession and inter-State transportation of psychotropic substances is prohibited unless accompanied by consignment note in (Form 6) appended to Rules in the manner provided therein.

11. Chapter VII-A of 1985 Rules introduced by notification dated 25.6.1997 w.e.f. 27.6.1997 provides for special provision regarding manufacture, possession, transport, import, export, purchase and consumption of narcotic drugs and psychotropic substances for medical and scientific purposes; which prevents use of Narcotics drugs and psychotropic substances for the purposes mentioned therein and the case of the petitioners is not covered under any of the rules contained therein.

12. The recovered capsules of spasmois-1 proxyvon mentioned in para 3 ante at Sr. NO. 1 contained 'Dextropropoxyphene', whereas microlit and lomotil contained 'Diphenoxylate' and its salt. These recovered drugs at Sr. Nos. 1 to 3 above are prescription drugs as per schedule 'H' of the rules framed under the Drugs and Cosmetic Act, 1940. The petitioners did not have any permit/license to deal with or transport the said drugs in Baddi area of Himachal Pradesh; nor any prescription which, prima facie besides commission of offence under the Drugs and Cosmetic Act, 1940, attracts the provisions of NDPS Act, as Section 80 of the NDPS Act also provides that the provisions of this Act or the Rules made thereunder shall be in addition to, and not in derogation of the Drugs and Cosmetics Act, 1940 or the Rules made thereunder. Therefore, the accused can be prosecuted under the relevant provisions of both the Acts.

13. Now, the manufacture for sale, and distribution and formation of Dextropropoxyphene for human use has also been suspended by the Central Government, vide notification dated 25.5.2013 published in the Gazette of India (Extra Ordinary) as being used by addicts.

14. Since these manufactured drugs aforesaid contain the preparation of offensive substance which falls within the definition of 'Narcotic drug' the plea that it fell within the permissive dose as per the notification thus excepted is also belabouring under the interpretational misconception as 'dosage' or 'dose' does not mean per capsule but it relates to the dosage/dose prescribed by the doctor according to weight of the patient, disease and the time taken for recovery."

27. In ***Mohd. Sahabuddin and another vs. State of Assam (2012) 13 SCC 491,*** the Hon'ble Supreme Court was dealing with a case where the bail had been refused by the Gauhati High Court and thereafter the petitioner had sought regular bail from the Hon'ble Supreme Court after being apprehended with 347 cartons each carton containing 100 bottles of 100 ml phensedyl cough syrup and 102 cartons, each carton containing 100 bottles of 100 ml Recodex cough syrup which had been concealed alongwith the other articles. The recovered substance contained codeine phosphate which was beyond the prescribed quantity. It was argued by learned counsel for the petitioner that the bail petitioner was only transporting cough syrup in which the content of condeine phosphate was less than 10 mg (per dose) namely 5 ml and therefore by virtue of notification bearing No. 826(E) dated 14.11.1985 and S.O. 40 (E) dated 29.1.1993, no offence was made out under the provisions of Narcotic Drugs and Psychotropic Substances Act and, therefore, in such circumstances rejection of the bail application by the Sessions Judge and Gauhati High Court was not justified.

28. Four fold arguments were raised on behalf of the bail petitioner before the Hon'ble Supreme Court which dealt with in the following manner:

> "*8. The contentions of the appellants were fourfold. In the first place, it was contended that the cough syrup Phensedyl and Recodex are pharmaceutical products covered under the provisions of the Drugs & Cosmetics Act, that the Rules prescribe the measure of dosage as 5 ml. and that under Rules 65 and 97 of the Drugs & Cosmetics Rules, it is lawfully permissible to sell such cough syrups in the open market, which can also be transported, kept in stock and sold in the pharmaceutical shops as a prescribed drug under Schedule 'H' at Serial No.132. According to the appellants, such prescribed drugs under the Rules can contain codeine to the extent permissible. While referring to Rule 97, it was contended that Schedule H Drugs containing permissible extent of narcotic substance could be sold in retail on the prescription of Registered Medical Practitioner. The learned counsel, therefore, contended that each of the 100 ml. bottle, seized from the appellants, satisfy the requirement prescribed under the above referred to two Rules 65 and 97 and in the circumstances there was no question of proceeding against the appellants under the N.D.P.S. Act.*
>
> *9. By referring to Rules 61(1) and 61(2) of the Drugs & Cosmetics Rules, it was contended that the prescribed licence which is required for sale, stock, exhibit, offer for sale or distribution as a mandatory requirement under Section 27 of the Drugs & Cosmetics Act providing for imposition of penalty would be applicable only to manufacturers or those who sell, stock, exhibit or offer for sale or distribution of drugs and that a transporter, in particular, the driver and a khalasi was under no obligation to hold a licence under the Drugs & Cosmetics Act.*
>
> *10. At the very outset, the abovesaid submission of the learned counsel is liable to be rejected, inasmuch as, the conduct of the appellants in having transported huge quantity of 347 cartons containing 100 bottles in each carton of 100 ml. Phensedyl cough syrup and 102 cartons, each carton containing 100 bottles of 100 ml. Recodex cough syrup without valid documents for such transportation cannot be heard to state that he was not expected to fulfill any of the statutory requirements either under the provisions of Drugs & Cosmetics Act or under the provisions of the N.D.P.S. Act.*
>
> *11. It is not in dispute that each 100 ml. bottle of Phensedyl cough syrup contained 183.15 to 189.85 mg. of codeine phosphate and the each 100 ml. bottle of Recodex cough syrup contained 182.73 mg. of codeine phosphate. When the appellants were not in a position to explain as to whom the supply was meant either for distribution or for any licensed dealer dealing with pharmaceutical products and in the absence of any other valid explanation for effecting the transportation of such a huge quantity of the cough syrup which contained the narcotic substance of codeine phosphate beyond the prescribed limit, the application for grant of bail cannot be considered based on the above submissions made on behalf of the appellants.*
>
> *12. The submission of the learned counsel for the appellants was that the content of the codeine phosphate in each 100 ml. bottle if related to the permissible dosage, namely, 5 ml. would only result in less than 10 mg. of codeine phosphate thereby would fall within the permissible limit as stipulated in the Notifications dated 14.11.1985 and 29.1.1993. As rightly held by the High Court, the said contention should have satisfied the twin conditions, namely, that the contents of the narcotic substance should not be more than 100 mg. of codeine, per dose unit and with a concentration of not more than 2.5% in undivided preparation apart from the other condition, namely, that it should be only for therapeutic practice. Therapeutic practice as per dictionary meaning means 'contributing to cure of disease'. In other words, the assessment of codeine content on dosage basis can only be made only when the*

cough syrup is definitely kept or transported which is exclusively meant for its usage for curing a disease and as an action of remedial agent."

29. It would be noticed that the contention of the petitioner before the Hon'ble Supreme Court that the content of codeine phosphate in each 100 ml bottle if related to the permissible dosage, namely, 5 ml would only result in less than 10 mg of codeine phosphate thereby would fall within the permissible limit as stipulated in the notifications dated 14.11.1985 and 29.1.1993 was negated by observing that the said contention should have satisfied the twin conditions, namely that the contents of the narcotic substance should not be more than 100 mg of codeine, per dose unit and with a concentration of not more than 2.5% in undivided preparation apart from the other condition, namely, that it should be only for therapeutic practice which means for contributing to cure of disease. It was made absolutely clear that the assessment of codeine content on dosage basis can be made only when the cough syrup is definitely kept or transported which is exclusively meant for curing a disease and as an action of remedial agent.

30. That apart, the Hon'ble Supreme Court in ***Union of India and another*** vs. ***Sanjeev V. Deshpande (2014) 13 SCC 1*** considered the controversy as to whether the content of psychotropic salt in the tablet could be separately counted for calculating the weight/volume of psychotropic substance in a medicinal preparation as had been canvassed before it by the petitioner. This contention was repelled and it was held that the gross weight of the drug is to be counted and not merely the net percentage/content of the salt in the medicinal preparation for finding out the actual weight of the drugs in reference to the Schedule under the NDPS Act.

31. Now, insofar as the contention of the petitioner that the violation, if any, falls within the ambit of Drugs and Cosmetic Act and the Rules framed thereunder and, therefore, the petitioner cannot be punished or even tried under the Narcotic Drugs and Psychotropic Substances Act, the same is equally without any force in view of the detailed judgment rendered by a learned Division Bench of the Punjab & Haryana High Court in ***Inderjeet Singh @ Laddi and others vs. State of Punjab, 2015 (1) Crimes 308,*** wherein it was categorically held that the mere fact that the drugs which are covered under 'manufactured drugs' under the NDPS Act and the NDPS Rules as mentioned in the Schedule of the NDPS Act and Schedule I of the NDPS Rules and are also covered by the Drugs and Cosmetic Act and the Rules framed thereunder would not mean that the offender can be penalized only under the Drugs and Cosmetic Act and the Rules and not proceeded against the NDPS Act and the NDPS Rules, the stringent provisions of the latter can be resorted to. The relevant observations read thus:

> *"[11] A perusal of the order dated 6.9.2012 passed in the case of Inderjeet Singh @ Laddi shows that it was contended by the learned counsel for the petitioner in the said case that "manufactured drugs" do not come within the purview of the NDPS Act and the petitioner can at the most be prosecuted only under the Drugs and Cosmetics Act and not under the NDPS Act. In any case he can be prosecuted only under Section 21 and not under Section 22 of the NDPS Act.*
>
> *[12] Learned Counsel appearing for the petitioners have inter alia primarily contended that in respect of recoveries from an accused in respect of 'manufactured drugs', an accused is not liable to be prosecuted under the NDPS Act. This is more so for the reason that certain 'manufactured drugs' were declared as 'narcotic drugs' by notification of the Central Government vide notification dated 14.11.1985 in which 88 drugs were declared as 'narcotic drugs', besides, vide notification dated 29.1.1993, 17 more drugs were notified as 'manufactured drugs'. However, these notifications contain various exceptions and in case the 'manufactured drug' in respect of which contravention is alleged but which falls within the exceptions then the case would not come within the purview of the NDPS Act.*
>
> *[13] Therefore, it is submitted that the drugs in respect of which exceptions have been made in the notifications afore-stated, a prosecution cannot be launched*

under the NDPS Act. It is submitted that in terms of Rule 97 of the Drugs and Cosmetics Rules 1945 ("1945 Rules" - for short), labelling of medicines is to be done according to the contents of the medicine and the Schedule under which it falls as is mentioned therein. If any drug for example mentioned in Schedule 'H' of the 1945 Rules is found without labelling, then the same is at the most liable to be tried only under the D&C Act and the 1945 Rules. Besides, if a person is found in possession of any of the drugs mentioned in Schedule 'H' of 1945 Rules, as well as in the notifications dated 4.11.1985 and 29.1.1993, which fall within any of the exceptions mentioned therein then these are also liable to be tried under the D&C Act only. This, it is submitted, is the combined effect of reading Sections 16, 17, 17-A, 17-B and 18 of the D&C Act and Rules 97, 104, 104-A and 105 of the 1945 Rules, which provide for standards to be maintained under the D&C Act and violation thereof is an offence under Section 18 of the D&C Act. There is no provision under the NDPS Act which prescribes for such an offence to be tried under the said Act. It is submitted that if any drug/psychotropic substance recovered from any unauthorized person and is covered by Schedule I of the Narcotic Drugs and Psychotropic Substances Rules 1985 (as amended) ("NDPS Rules" - for short), then it is to be tried under the NDPS Act and if such drug and psychotropic substance is not covered by Schedule I of the NDPS Rules as provided under Rule 64 of the NDPS Rules then it is liable to be tried under the D&C Act.

[14] In response, learned State counsel have submitted that the menace of drugs is so rampant in this part of the country that it is to be curbed with a heavy hand. It is submitted that the provision of the NDPS Act and the NDPS Rules, besides, the D&C Act and the 1945 Rules have only provided the procedure for trying the offences. It is submitted that there may be overlapping of certain drugs under the D&C Act and the 1945 Rules as also the NDPS Act and the NDPS Rules, however, the same is inconsequential as it is for the State to prosecute the offender in accordance with law and if a harsher provision under the NDPS Act and NDPS Rules is resorted to in respect of drugs which fall under the NDPS Act, the same is not to be nullified or the trial declared illegal merely because a harsher provision has been followed. In any case it is submitted that the quantity of the manufactured drugs of which there has been a contravention is to be taken in bulk and not on the basis of the dosage of the drugs per capsule. Even if the contents of the offending drug fall within the exception then the same is to be taken in respect of the entire contraband of which there has been a contravention or has been recovered being carried unauthorizedly.

[15] We have given our thoughtful considerations to the matter.

[16] The question that arises for consideration is whether an accused can be tried for an offence under the NDPS Act in case he is found in possession of 'manufactured drugs' which fall in the definition of 'manufactured drug' in terms of Section 2 (xi) of the NDPS Act and has been notified as such by notifications dated 14.11.1985 and 29.1.1993 as 'manufactured drugs', but contain an exception as regards the percentage of dosage in the drug.

[17] In order to consider the said issue, the definitions of 'narcotic drug, 'manufactured drug' and 'psychotropic substances' as defined in Section 2 (xiv), (xi) and (xxiii) of the NDPS Act may be noticed which read as under:-

> *(xiv) "narcotic drug" means coca leaf, cannabis (hemp), opium, poppy straw and includes all manufactured goods;*

A perusal of the above shows that coca leaf, cannabis (hemp), opium, poppy straw and including manufactured goods are included in the definition of 'narcotic drug'.

> *(xi) "manufactured drug" means -*

(a) all coca derivatives, medicinal cannabis, opium derivatives and poppy straw concentrate;

(b) any other narcotic substance or preparation which the Central Government may, having regard to the available information as to its nature or to a decision, if any, under any International Convention, by notification in the Official Gazette, declare to be a manufactured drug;" .

[18] Therefore, the Central Government may by notification in the official Gazette, declare any other narcotic substance or preparation to be a 'manufactured drug'.

(xxiii)"psychotropic substance" means any substance, natural or synthetic, or any natural material or any salt or preparation of such substance or material included in the list of psychotropic substances specified in the Schedule;"

[19] Psychotropic substance has been defined to mean any substance, natural or synthetic, or any natural material or any salt or preparation of such substance or material included in the list of psychotropic substances specified in the Schedule to the NDPS Act.

[20] In terms of clause (b) of Section 2 (xi) NDPS Act relating to 'manufactured drug', any narcotic substance or preparation which the Central Government may, having regard to the available information as to its nature or to a decision, if any, under any international convention, by notification in the official Gazette, declare to be a manufactured drug, are to be considered as such, that is, as manufactured drug. The Ministry of Finance, Department of Revenue, has published notification S.O. 826 (E) dated 14.11.1985 in the Gazette of India, Extraordinary, Part II, Section 3, Sub-Section (ii).

[21] The said notification has been issued in exercise of power conferred by sub clause (b) of clause (xi) of Section 2 NDPS Act, in terms of which the Central Government has declared the narcotic substances and preparations mentioned therein to be "manufactured drug". Insofar as the drugs mentioned in the present cases are concerned, it may be noticed that in the case of Inderjeet Singh @ Laddi (CRM No. M-13140 of 2012), 30 Rexcof bottles containing 5.88 gms of codeine; 1500 Momolit of tablets containing 3.45 gms of Diphenoxylate; 500 Phenotil tablets containing 1.1 gms Diphenoxylate and 150 Parvon Spas capsules containing 9.70 gms of Dextropropoxyphene were recovered.

[22] The various drugs that are provided for under the D&C Act and the 1945 Rules are also provided in the NDPS Act and therefore, there is a somewhat overlapping of the same. The D&C Act was enacted in 1940. The Second Schedule of the D&C Act prescribes the standards to be complied with by imported drugs and by drugs manufactured for sale, sold, stocked or exhibited for sale or distributed. Chapter III of the D&C Act relates to 'Import of Drugs and Cosmetics'. Section 8 thereof relates to 'Standards of Quality.' It is provided in terms of Section 8 (1) (a) of the D&C Act that for the purposes of Chapter III, the expression 'standard quality' means in relation to a drug, that the drug complies with the standard set out in the Second Schedule.

[23] Besides, Chapter IV of the D&C Act relates to 'Manufacture, Sale and Distribution of Drugs and Cosmetics.' In terms of Section 16 (1) (a) of the D&C Act that for the purposes of Chapter IV, the expression 'standard quality' means in relation to a drug, that the drug complies with the standard set out in the Second Schedule. The object of the said D&C Act is to regulate the import, manufacture, distribution and sale of drugs and cosmetics. The basic object is of a regulatory nature for the regulation of import, manufacture, distribution and sale of drugs and cosmetics. The D&C Act provides for penal consequences in respect of certain violations of the said Act and the 1945 Rules. Section 27 of the D&C Act provides

for penalty for manufacture, sale etc. of drugs in contravention of Chapter IV. Section 27A provides for penalty for manufacture, sale etc. of cosmetics in contravention of Chapter IV. Section 28 provides for penalty for non-disclosure of the name of the manufacturer etc. Section 28A provides for penalty for not keeping documents etc. and for non-disclosure of information. Section 28B provides penalty for manufacture etc. of drugs or cosmetics in contravention of Section 26A which relates to the power of Central Government to prohibit manufacture etc. of drugs in public interest. Section 29 provides for penalty for use of Government Analyst's Report for advertising. Section 30 relates to penalty for subsequent offences. Section 32 deals with cognizance of offences. Section 32B relates to compounding of certain offences. The violation of the 1945 Rules, therefore, entails penalty in terms of aforesaid provisions. As against this, the NDPS Act is an act to consolidate and amend the law relating to narcotic drugs to make it comprehensive, besides, provide for stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances, to provide for the forfeiture of property derived from, or used in, illicit traffic in narcotic drugs and psychotropic substances, to implement the provisions of the International Convention on Narcotic Drugs and Psychotropic Substances and for matters connected therewith. The NDPS Act provides for stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances. The Schedule with reference to clause (xxiii) of Section 2 NDPS Act mentions various psychotropic substance which include alprazolam at serial No.30, chlordiazepoxide at serial No.36, delorazepam at serial No.42 and various others, besides, salts and preparations of the drugs mentioned therein. In the NDPS Rules, Chapter VII relates to psychotropic substances.

[24] Rules 64, 65 and 65A of the NDPS Rules read as under:-

> *"64. General prohibition - No person shall manufacture, possess, transport, import inter-State, export inter-State, sell, purchase, consume or use any of the psychotropic substances specified in Schedule I.*
>
> *65. Manufacture of psychotropic substances (1) Subject to the provisions of sub-rule (2), the manufacture of any of the psychotropic substances other than those specified in Schedule I shall be in accordance with the conditions of a licence granted under the Drugs and Cosmetics Rules, 1945 (hereinafter referred to as the 1945 Rules) framed under the Drugs and Cosmetics Act, 1940 (23 of 1940), by an authority in charge of Drugs Control in a State appointed by the State Government in this behalf: Provided that the authority in charge of drug control in a State referred to above may issue a licence to manufacture a psychotropic substance specified in Schedule III for the purpose of export only;*
>
> *(2) The authority in charge of drugs control in a State (hereinafter referred to as the Licensing Authority) shall consult the Drugs Controller (India) in regard to the assessed annual requirements of each of the psychotropic substances in bulk form referred to in sub-rule (1) in the country and taking into account the requirement of such psychotropic substances in the State, the quantity of such substance required for supply to other manufacturers outside the State and the quantity of such substance required for reasonable inventory to be held by a manufacturer, shall specify, by order, the limit of the quantity of such substance which may be manufactured by the manufacturer in the State.*
>
> *(3) The quantity of the said psychotropic substance which may be manufactured by a licensee in an year shall be intimated by the Licencing Authority to the licensee at the time of issuing the licence:*

Provided that nothing contained in this rule shall apply in case the psychotropic substances specified in Schedule I are manufactured, possessed, transported, imported inter-State, exported inter-State, sold, purchased, consumed or used subject to other provisions of this Chapter which applies to psychotropic substances which are not included in Schedule I and for the purposes mentioned in Chapter VII A:

Provided further that the authority in charge of the drug control in a State referred to in sub-Rule (2) of Rule 65 shall consult the Narcotics Commissioner before issuing a licence under Rule 65 in respect of psychotropic substances included in Schedule I [and Schedule III]

65A. Sale, purchase, consumption or use of psychotropic substances No person shall sell, purchase, consume or use any psychotropic substance except in accordance with the Drugs and Cosmetics Rules, 1945.

[25] In terms of Rule 64 of the NDPS Rules, no person is to manufacture, possess, transport, import inter-State, export inter State, sell, purchase, consume or use any of the psychotropic substances specified in Schedule I of the NDPS Rules. Rule 65 relates to manufacture of psychotropic substances and it is provided in subRule (1) that manufacture of any of the psychotropic substances other than those specified in Schedule I of the NDPS Rules shall be in accordance with the conditions of a licence granted under the 1945 Rules, by an authority in charge of Drugs Control in a State appointed by the State Government in this behalf. In terms of sub-Rule (2) of Rule 65 of the NDPS Rules, the authority in charge of drugs control in a State that is the Licensing Authority is to consult the Drugs Controller (India) in regard to the assessed annual requirements of each of the psychotropic substances in bulk form referred to in subRule (1) in the country and taking into account the requirement of such psychotropic substances in the State, the quantity of such substance required for supply to other manufacturers outside the State and the quantity of such substance required for reasonable inventory to be held by a manufacturer, shall specify, by order, the limit of the quantity of such substance which may be manufactured by the manufacturer in the State. In terms of Rule 65A of the NDPS Rules, no person is to sell, purchase, consume or use of psychotropic substance except in accordance with the 1945 Rules. Schedule I of the NDPS Rules referred to in Rule 64 provides for various narcotic drugs and psychotropic substances. The provisions of the NDPS Act and the NDPS Rules as also the D&C Act and the 1945 Rules show that there is overlapping of drugs of various types.

[26] In terms of the afore-referred notification dated 14.11.1985, 88 drugs have been notified and 10 of the drugs provide for some kind of exceptions which are mentioned at serial No.16, 35, 36, 37, 48, 58, 70, 76, 83 and 87 which read as under:-

"(16) Preparations made from the extract or tincture of Indian Hemp, except those which are capable only of external use.

(35) Methyl morphine (commonly known as 'Codeine') and Ethyl morphine and their salts (including Dionine), all dilutions and preparations, except those which are compounded with one or more other ingredients and containing not more than 100 milligrams of the drug/per dosage unit and with concentration of not more than 2.5 per cent in undivided preparations and which have been established in therapeutic practice.

(36) Dihydrocodine and Acetyldihydrocodeine, other derivatives of Dihydrocodeine and their salts such as, Paracodine and Acetyl Codone and the like, all dilutions and preparations, except those which are compounded with one or more other ingredients and containing not more than 100 miligrames of the drug per dosage unit and with a concentration

of not more than 2.5 per cent in undivided preparations and which have been established in therapeutic practice.

(37) Beta-4 Merphylinylethylmorphine (also known as Homocodeine, Hybernil, Pholcodine and the like) and its salts; and dilutions and preparations, except those which are compounded with one or more other ingredients and containing not more then 100 milligrams of the drug per dosage unit and with a concentration of not more than 2.5 per cent in undivided preparations and which have been established in therapeutic practice.

(48) Norcodeine and its salts; all dilutions and preparations, except those which are compounded with one or more other ingredients and containing not more than 100 milligrams of the drug per dosage unit and a concentration of not more than 2.5 per cent in undivided preparations and which have been established in therapeutic practice.

(58) Ethyl 1-(3.Cyano-3, 3-diphenylpropyl)-4- phenylpiperidine -4- carboxylic acid ethyl ester (the international non-proprietary name of which is Diphenoxylate), and its salts, preparations, admixtures, extracts and other substances containing any of these drugs, except preparations of diphenoxylate containing, per dosage unit, not more than 25 mg. of diphenoxylate calculated as base, and a quantity of atrophine sulphate equivalent to at least one per cent of the dose of disphenoxylate.

(70) 6- nicotinylcodeine (the international nonproprietary name of which is Nicocodine) and its salts, all dilutions and preparations, except those which are compounded with one or more other ingredients and containing not more than 100 milligrams of the drug per dosage unit and with a concentration of not more than 2.5 per cent in undivided preparation and which have been established in therapeutic practice.

(76) 6- nicotinylcodeine (the international nonproprietary name of which is Nicocodine) and its salts, all dilutions and preparations, except those which are compounded with one or more than ingredients and containing not more than 100 milligrams of the drug per dosage unit and with a concentration of not more than 2.5 per cent in undivided preparation and which have been established in therapeutic practice.

(83) 1-(3-cyano-3, 3-diphenylpropyl) 4-phenylisonin pecotic acid (otherwise known as Defenoxine or Diphenoxylic acid) and its salts, preparations, admixtures, extracts and other substances containing any of these drugs, except any preparation of Difenoxine containing, perdosage unit, a maximum of 0.5 milligrams of difenoxine calculated as base and a quantity of atropine sulphate equal to at least 5 per cent of the quantity of difenoxine, calculated as base, which is present in the mixture.

(87) (+)- 4 dimethylamino -1, 2-diphenyl-3- methyl-2-butanol propionate, (the international nonproprietary name of which is Dextropropoxyphene), and its salts, preparations, admixturtes, extracts and other substances containing any of these drugs, except preparations for oral use containing not more than 135 milligrams of Dextropropoxyphene base per dosage unit or with a concentration of not more than 2.5 per cent in undivided unit or with a concentration of not more than 2.5 per cent in undivided preparations, provided that such preparations do not contain any substances controlled under the Convention on Psychotropic Substances, 1971.

[27] Thereafter, the Central Government vide notification dated 29.1.1993 has notified 17 more drugs as "manufactured drugs". In all 105 drugs have been

notified as "manufactured drugs" by the Central Government. Most of the drugs that have been notified by the Central Government as "manufactured drugs" are covered under Scheduled 'H' of the 1945 Rules. Section 3 (b) of the Drugs and Cosmetics Act defines 'drug' as follows:-

"(b) "drug" includes-

> *(i) all medicines for internal or external use of human beings or animals and all substances intended to be used for or in the diagnosis, treatment, mitigation or prevention of any disease or disorder in human beings or animals, including preparations applied on human body for the purpose of repelling insects like mosquitoes;]*
>
> *(ii) such substances (other than food) intended to affect the structure of any function of the human body or intended to be used for the destruction of [vermin] or insects which cause disease in human beings or animals, as may be specified from time to time by the Central Government by notification in the Official Gazette;]*
>
> *[(iii) all substances intended for use as components of a drug including empty gelatin capsules; and*
>
> *(iv) such devices intended for internal or external use in the diagnosis, treatment, mitigation or prevention of disease or disorder in human beings or animals, as may be specified from time to time by the Central Government by notification in the Official Gazette, after consultation with the Board;]*

[28] The Central Government in terms of the 1945 Rules has conferred powers on the State Government to grant licences. Part VI of the 1945 Rules provides for sale of drugs other than homeopathic medicines. Rule 59 (1) of the 1945 Rules envisages that the State Government shall appoint licensing authorities for the purpose of this part for such areas as may be specified. Sub-Rule (2) of Rule 59 provides for grant or renewal of a licence to sell, stock, exhibit or offer for sale or distribute drugs, other than those included in Schedule 'X' of the 1945 Rules, which relates to special drugs for import licenses, shall be made in Form 19 or Form 19A, as the case may be, or in the case of drugs included in Schedule 'X' shall be made in Form 19 C to the licensing authority. Rule 60 of the 1945 Rules envisages that a licensing authority may with the approval of the State Government by an order in writing delegate the power to sign licences and such other powers as may be specified in the order to any other person under his control. Rule 61 of the 1945 Rules provides for forms of licences to sell drugs. Rule 62 relates to sale at more than one place. Rule 62A relates to restricted licences in Forms 20A and 21A. Rule 62B relates to conditions to be satisfied before a licence in Form 20A or Form 21A is granted. Rule 62C relates to application for licence to sell drugs by wholesale or to distribute the same from a motor vehicle. Rule 62D relates to Form of licences to sell drugs by wholesale or distribute drugs from a motor vehicle. Rule 63 relates to duration of licence. Rule 63A relates to certificate of renewal of a sale licence and Rule 63B relates to certificate of renewal of licence. Rule 64 relates to conditions to be satisfied before a licence in Form 20, 20B, 20F, 20G 21 and 21B is granted or renewed. Rule 65 relates to condition of licences. Rule 65A deals with additional information to be furnished by an applicant for licence or a licensee to the licensing authority. Rule 66 deals with cancellation and suspension of licences. Rule 66A deals with procedure for disposal of drugs in the event of cancellation of licence. The said Rules fall under Part VI of the 1945 Rules, the powers in respect of which are conferred on the State Government.

[29] In terms of Section 26A of the D&C Act, the Central Government has power to prohibit manufacture etc. of drug and cosmetic in public interest. It is provided

therein that without prejudice to any other provision contained in this Chapter i.e. Chapter IV, if the Central Government is satisfied, that the use of any drug or cosmetic is likely to involve any risk to human beings or animals or that any drug does not have the therapeutic value claimed or purported to be claimed for it or contains ingredients and in such quantity for which there is no therapeutic justification and that in the public interest it is necessary or expedient so to do, then, that Government may, by notification in the Official Gazette, prohibit the manufacture, sale or distribution of such drug or cosmetic. In terms of Section 26B of the D&C Act, the Central Government has the power to regulate or restrict, manufacture etc. of drugs in public interest. It is provided that without prejudice to any other provision contained in this Chapter i.e. Chapter IV, if the Central Government is satisfied that a drug is essential to meet the requirements of an emergency arising due to epidemic or natural calamities and that in the public interest, it is necessary or expedient so to do, then, that Government may, by notification in the official gazette, regulate or restrict the manufacture, sale or distribution of such drug.

[30] The licences that are issued to the manufacturers and to other various persons to sell, stock, exhibit, offer for sale or distribute the drugs other than the drugs mentioned in Scheduled 'C', 'C (1)' and 'X', which are issued in Forms 20, 20A and 20B of the 1945 Rules. Rule 97 falls under Part IX of the 1945 Rules which deals with labelling and packing of drugs other than homeopathic medicines. In terms of said Rule 97, the container of a medicine for internal use shall contain the particulars as mentioned therein. Rule 97 (1) of the 1945 Rules reads as under:-

> *"97. Labelling of medicines. (1) The container of a medicine for internal use shall -*
>
> *(a) if it contains a substance specified in Schedule G, be labelled with the words 'Caution: it is dangerous to take this preparation except under medical supervision' conspicuously printed and surrounded by a line within which there shall be no other words;*
>
> *(b) if it contains a substance specified in Schedule H be labelled with the symbol Rx and conspicuously displayed on the left top corner of the label and be also labelled with the following words:-*
>
> *'Schedule H drug Warning : To be sold by retail on the prescription of a Registered Medical Practitioner only';*
>
> *(c) if it contains a substance specified in Schedule H and comes within the purview of the Narcotic Drugs and Psychotropic substance Act, 1985 (61 of 1985) be labelled with the symbols NRx which shall be in red and conspicuously displayed on the left top corner of the label, and be also labelled with the following words:-*
>
> *'Schedule H drug Warning : To be sold by retail on the prescription of a Registered Medical Practitioner only';*
>
> *(d) if it contains a substance specified in Schedule X, be labelled with the symbol XRx which shall be in red conspicuously displayed on the left top corner of the label, and be also labelled with the following words:-*
>
> *'Schedule X drug Warning : To be sold by retail on the prescription of a Registered Medical Practitioner only';"*

[31] The 1945 Rules, therefore, provide for various drugs which are included in Schedules 'C', 'C (1)', 'H' and 'X'. Schedule 'C' relates to biological and special products. Schedule 'C (1)' relates to other special products which includes vitamins and preparations containing vitamins not in a form to be administered parenterally.

Liver extract and preparations containing liver extract not in a form to be administered parenterally. Vaccine not in a form to be administered parenterally. Antibiotics and preparations thereof not in a form to be administered parenterally etc. Schedule 'H' relates to the prescription of drugs and is referable to Rule 65 and 97 of the 1945 Rules which have been reproduced above i.e. 'condition of licence' and 'labelling of medicines.'

[32] As already noticed some psychotropic substances and Schedule 'H' drugs are overlapping. The following psychotropic substances at serial numbers in the Schedule of NDPS Act have also been mentioned in Schedule 'H' of the 1945 Rules:-

Sr.No. of Phychotropic Substance	*Sr.No. of Drug in Schedule H*
30. Alprazolam	*15 Alprazolam*
36. Chlordiazepoxide	*105 Chlordiazepoxide*
43 Diazepam	*147 Diazepam*
50 Flurazepam	*207 Flurazepam*
56 Lorazepam	*294 Lorazepam*
64 Nitrazepam	*360 Nitrazepam*
66 Oxazepam	*371 Oxazepam*
69 Phenobarbital	*396 Phenobarbital*

[33] In Schedule 'H' of the 1945 Rules, the drugs in respect of which there has been misuse by bulk sale for purposes other than medicinal or therapeutic use are mostly, codeine at serial No.132, Dextropropoxyphene at serial No.146 and Diphenoxylate its salt at serial No. 156 are included.

[34] The drug Dextropropoxyphene Hcl was found in the case of Ravinder Singh alias Rinku v. State of Punjab (CRM No.M-1379 of 2013). At serial No. 87 of the notification dated 14.11.1985,the drug(+)-4-dimethylamino-1,2-diphenyl-3-methyl-2-butanon propionate (the international non-proprietary name of which is Dextropropoxyphene), and its salts, preparations, admixtures, extracts and other substances containing any of these drugs, except preparations for oral use containing not more than 135 milligrammes of Dextropropoxyphene base per dosage unit or with a concentration of not more than 2.5 per cent in undivided preparations, provided that such preparations do not contain any substances controlled under the Convention of Psychotropic Substances, 1971. Therefore, in terms of notification dated 14.11.1985, Dextropropoxyphene is a drug, which has been notified as a manufactured drug though with a certain exception in terms of Section 2 (xi) (b) of the NDPS Act and is also a drug in Schedule 'H' of the 1945 Rules.

[35] Similarly, in the case of Rani v. State of Punjab (CRM No. M-14461 of 2012) 2170 Parvon Spas capsules and 900 other capsules having mark of Subhimol were recovered. As per the Chemical Examiner's Report, the Parvon Spas capsules contained salt Dextropropoxyphene Hcl 74.90 mg and capsules Subhimol contained salt of Dextropropoxyphene Hcl 74.96 mg. In Mohd. Shamshad v. State of Punjab (CRM No. M-20282 of 2012), 500 capsules of Parvon Spas were recovered which as per the Chemical Examiner's report contained Dextropropoxyphene Hcl. Mostly the manufactured drugs in respect of which there is a contravention contain Dextropropoxyphene, Codeine and these according to the learned counsel for the petitioners are not 'manufactured drugs' so as to come within the purview of the NDPS Act. However, in terms of notification dated 14.11.1985 these are specifically mentioned as 'manufactured drugs' and

contravention of these would be an offence under Section 21 of the NDPS Act, which relates to punishment for contravention in relation to manufactured drugs and preparations; though these may also be an offence under the D&C Act and the 1945 Rules. The question that these provide for exception would not be of much consequence as these are carried in a bulk form and in such a manner that they are not intended to be used for medicinal purposes but are intended to be used for intoxication and getting a stimulating effect.

[36] These are mostly used as sedatives to go into a trance. Besides, when these are carried in a bulk form without proper authorization or licence, then these would fall within the violations provided for under the NDPS Act and the NDPS Rules. The questions of these being within the exception provided for per dose usage would be inapplicable especially when there is no proper authorization or licence. It may be noticed that Section 21 NDPS Act which relates to punishment for contravention in relation to manufactured drugs and preparations provides for different punishments in respect of contravention of any provisions of the NDPS Act or any Rule or order made or conditions of licence granted thereunder, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses any manufactured drug or any preparation containing any manufactured drug depending upon the quantity of which there has been a contravention, that is, small quantity, involving quantity lesser than commercial quantity but greater than small quantity and involving commercial quantity. Section 21 of the NDPS Act reads as under:-

> *"21. Punishment for contravention in relation to manufactured drugs and preparation Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses any manufactured drug or any preparation containing any manufactured drug shall be punishable,-*
>
> *(a) where the contravention involves small quantity, with rigorous imprisonment for a term which may extend to six months, or with fine which may extend to ten thousand rupees, or with both;*
>
> *(b) Where the contravention involves quantity, lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years and with fine which may extend to one lakh rupees;*
>
> *(c) where the contravention involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees.*
>
> *Provided that the Court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees."*

[37] The Central Government has specified 'small quantity' and 'commercial quantity' of drugs which is with reference to clause (viia) and (xxiiia) of Section 2 of the NDPS Act in a tabulated form vide notification dated 19.10.2001. Clause (viia) and (xxiiia) of the NDPS Act define; 'commercial quantity' and 'small quantity' as follows:-

> *"(vii a) "commercial quantity", in relation to narcotic drugs and psychotropic substances, means any quantity greater than the quantity specified by the Central Government by notification in the Official Gazette;*

(xxiii a) "small quantity", in relation to narcotic drugs and psychotropic substances, means any quantity lesser than the quantity specified by the Central Government by notification in the Official Gazette."

[38] The table specifying 'small quantity' and 'commercial quantity' of narcotic drugs and psychotropic substances vide notification dated 19.10.2001 contains horizontal columns from (1) to (6) mentioning the serial number, name of narcotic drug and psychotropic substance, other non-proprietary name, chemical name, small quantity (in grams) and commercial quantity (in grams/kilograms) respectively. The Central Government has thereafter issued notification dated 18.11.2009 so as to add Note 4 after Note 3 to the table specifying 'small quantity' and 'commercial quantity' of narcotic drugs and psychotropic substances in terms of notification dated 19.10.2001. The said notification dated 18.11.2009 reads as under :-

Notifications, New Delhi, the 18th November, 2009 S.O. 2941 (E).- In exercise of the powers conferred by clause (vii a) and (xxiii a) of Section 2 of the Narcotic Drugs and Psychotropic Substance Act, 1985 (61 of 1985) the Central Government, hereby makes the following amendment in the Notification S.O. 1055 (E), dated 19th October, 2001 namely:-

In the Table at the end after Note 3, the following Note shall be inserted, namely:-

"(4) The quantities shown in column 5 and column 6 of the Table relating to the respective drugs shown in column 2 shall apply to the entire mixture or any solution or any one or more narcotic drugs or psychotropic substances of that particular drug in dosage form or isomers, esters, ethers and salts of these drugs, including salts of esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content."

[39] The Central Government, therefore, by notification dated 19.10.2001 has specified 'small quantity' and 'commercial quantity' of various narcotic drugs and psychotropic substances by a table. Notification dated 18.11.2009 has been issued by the Central Government, which mentions that quantities shown in column 5 that relates to 'small quantity' and column 6 that relates to 'commercial quantity' of the table relating to respective drugs shown in column 2 that relates to the name of narcotic drug and psychotropic substance, is to apply to the entire mixture or any solution or any one or more of narcotic drugs or psychotropic substances of that particular drug in dosage form etc. wherever existence of such substance is possible and not just its pure drug content. The intention of the said notification is to prevent and prohibit the use of narcotic drugs and psychotropic substances wherever there is a misuse of the said drugs for other than medicinal or therapeutic use. As has already been noticed various 'manufactured drugs' have been notified vide notifications dated 14.11.1985 and 29.1.1993. Section 21 of the NDPS Act provides for punishment for contravention in relation to manufactured drugs and preparations. The punishment prescribed is with reference to the quantity possessed. Therefore, the punishment which an offender is liable to be inflicted with in case he contravenes the provisions of Section 21 of the NDPS Act is dependent on the contravention of the quantity of drug that is involved. For purpose of determining the quantity as to whether it is small quantity, lesser than commercial quantity but greater than small quantity or commercial quantity is to be determined with reference to the notification providing a table as afore-mentioned specifying small quantity and commercial quantity to which Note 4 has been added vide notification dated 18.11.2009 mentioning therein that the quantity whether it is small quantity or commercial quantity relating to the drugs shown in column 2 is to apply to the entire mixture or any solution or any one or more narcotic drug or psychotropic substance of that particular drug in dosage form etc. wherever existence of such substance is possible and not just its pure content.

[40] The manufactured drugs of which there has been a contravention in the present cases have been sold, purchased, distributed, stored, transported, carried etc. in a bulk form and mostly these are without proper licences or authorizations. In respect of such drugs which are carried in bulk form, the notification dated 18.11.2009 would apply and the question that these drugs contain an exception would not be applicable as the exceptions would apply when the drugs are for medicinal or therapeutic use. Besides, the quantity of manufactured drugs is not to be determined on per capsule basis when these are carried without proper licence or authorization. In other words, the mere dosage of the manufactured drug in one capsule is not to be considered but the dosage in the number of capsules together is to be considered for the purpose of determining as to whether the exceptions provided in the notification dated 14.11.1985 declaring the narcotic substances and preparations as mentioned therein to be manufactured drugs. Moreover, in case of contravention of Section 21 NDPS Act relating to manufactured drugs, Note 4 of the notification 18.11.2009 would apply that is to say that the quantity in respect of which there is a contravention is 'small quantity', 'lesser than commercial quantity but greater than small quantity' or 'commercial quantity' is to apply to the entire mixture or any solution or any one or more narcotic drugs or psychotropic substances of that particular drug in dosage form etc. wherever existence of such substance is possible and not just its pure drug content. Therefore, the question of exceptions being provided in respect of drugs at serial No.16, 35, 36, 37, 48, 58, 70, 76, 83 and 87 of the notification dated 14.11.1985 is inconsequential when these drugs are carried in a bulk form and the entire quantity of the bulk is to be taken into consideration and not per dosage specially when these are carried in violation of the D&C Act and the 1945 Rules that is to say are sold, purchased, distributed, stored, transported, carried etc. without a valid licence or kept without a valid authorization.

[41] Similarly there are certain 'psychotropic substances' which have been mentioned in the Schedule of the NDPS Act and which are used for medicinal purposes also. The said 'psychotropic substances' can be manufactured in accordance with the conditions of a licence granted under the 1945 Rules. Except those substances which are not mentioned in the Schedule 'I' of the 1945 Rules for which purpose a licence can be granted under the said 1945 Rules, the others that is without licence or authorization would entail the violation of the NDPS Act and the NDPS Rules which would make out an offence under the said latter provisions. Therefore, the possession of a 'manufactured drug' which has been notified in terms of notifications dated 14.11.1985 and 29.1.1993 or 'psychotropic substances' and which are mentioned in Schedule 1 of the NDPS Act would entail prosecution either under the NDPS Act or the D&C Act. The fact that the prosecution has enforced a harsher provision of the NDPS Act than the normal provision of the D&C Act would not be of any consequence or significance.

[42] In Maganlal Chhagganlal (P) Ltd. v. Municipal Corporation of Greater Bombay and Others, 1974 AIR(SC) 2009(Seven Judges Bench), the Hon'ble Supreme Court considered the case relating to the legality of the certain provisions of Chapter V-A of the Bombay Municipal Corporation Act and the Bombay Government Premises (Eviction) Act 1955. Chapter V-A was introduced in the Bombay Municipal Act 1888 by Maharashtra Act 14 of 1961. The said Chapter V-A contained Sections 105-A and 105-B. According to the provisions of those Sections, the Commissioner in relation to premises belonging to or vesting in, or taken on lease by the Corporation and the General Manager of the Bombay Electric Supply and Transport Undertaking in relation to premises of the Corporation which vest in it for the purposes of that undertaking were granted certain powers of eviction in respect of unauthorized occupation of any Corporation premises. According to Section 105-B,

the Commissioner by notice served on the person in unauthorized occupation, could ask him to vacate if he had not paid for a period of more than two months the rent or taxes lawfully due from him in respect of such premises, or sub-let, contrary to the terms or conditions of his occupation, the whole or any part of such premises; or committed, or is committing, such acts of waste as are likely to diminish materially the value, or impair substantially the utility, of the premises; or otherwise acted in contravention of any of the terms, express or implied, under which he is authorized to occupy such premises; or if any person is in unauthorized occupation of any corporation premises; or any corporation premises in the occupation of any person are required by the corporation in the public interest. Before making such an order, the Commissioner is required to issue a notice calling upon the person concerned to show cause why an order of eviction should not be made and specify the grounds on which the order of eviction is proposed to be made. The person concerned could file a written statement and produce documents and was entitled to appear before the Commissioner by advocate, attorney or pleader. The Commissioner, therefore, had the power to evict those in unauthorized occupation in relation to premises belonging to or vesting in, or taken on lease by the corporation. The Commissioner for the purpose of holding an enquiry had the same powers as are vested in a civil Court under the Code of Civil Procedure, when trying a suit, in respect of summoning and enforcing the presence of any person and examining him on oath; besides, requiring the discovery and production of documents as also any other matter which may be prescribed by regulations. The provisions of the Bombay Government Premises (Eviction Act) were also more or less similar except that they related to Government premises and the power to order of eviction is given to competent authority not lower in rank than that of a Deputy Collector or an Executive Engineer appointed by the State Government. The only other matter in respect of which the provisions of the Government Premises (Eviction) Act differed from the provisions of the Bombay Municipal Corporation Act was that Section 8-A of the former Act provided that no Civil Court shall have jurisdiction to entertain any suit or proceedings in respect of the eviction of any person from any government premises on any of the grounds specified in Section 4 for the recovery of the arrears of rent or damages payable for use and occupation of such premises. It was submitted that there were two procedures available to the Corporation and the State Government, one by way of a suit under the ordinary law and the other under either of the two Acts, which is harsher and more onerous than the procedure under the ordinary law, therefore, the latter was hit by Article 14 of the Constitution in the absence of any guidelines as to which procedure may be adopted. After detailed discussion, it was held that where a statue providing for a more drastic procedure different from the ordinary procedure covers the whole fields covered by the ordinary procedure without any guidelines as to the class of cases in which either procedure is to be resorted to, the statute will be hit by Article 14. Even there, a provision for appeal may cure the defect. Further, if from the preamble and surrounding circumstances, as well as the provisions of the statute themselves explained and amplified by affidavits, necessary guidelines could be inferred, the statute will not be hit by Article 14. Besides, where the statute itself covers only a class of cases, the statute will not be bad.

[43] The fact that in such cases the Executive will choose which cases are to be tried under the special procedure will not affect the validity of the statute. Therefore, the contention that mere availability of two procedures will vitiate one of them, that is, the special procedure, it was held, was not supported by reason of authority. It was further held that the statute itself in the two classes of cases clearly laid down the purpose behind them, that is, that the premises belonging to the Corporation and the Government should be subject to speedy procedure in the matter of evicting unauthorized persons occupying them. It was, therefore, held

that merely because one procedure provides the forum of a civil court while the other provides the forum of an administrative tribunal, it cannot be said that the latter is necessarily more drastic and onerous. To attract the inhibition of Article 14, it was held there must be substantial and qualitative differences between the two procedures so that one is really and substantially more drastic and prejudicial. Superfine differences are bound to exist when two procedures are prescribed.

[44] Therefore, it follows that merely because the prosecution for a violation of the provisions of D&C Act and the 1945 Rules framed thereunder entails some kind of penalty would not be a bar to trial of cases in respect of which there has been a contravention of Section 21 of the NDPS Act a reference to which has been made above. A detailed procedure has been provided for trial of cases under the NDPS Act. Section 36A of the NDPS Act relates to offences triable by the Special Court. Section 36B relates to appeal and revision. Section 36C relates to application of the Code of Criminal Procedure to proceedings before a Special Court and Section 36D relates to transitional provision. In terms of Section 36C, the provisions of the Code of Criminal Procedure (including the provisions as to bail and bail bonds), are to apply to proceedings before a Special Court and for the purposes of the said provision, the Special Court is deemed to be a Court of Session and the person conducting a prosecution before a Special Court is deemed to be a Public Prosecutor. Section 4 of the Criminal Procedure Code relates to trial of offences under the Indian Penal Code and other laws. Sub Section (2) thereof envisages that all offences under any other law that is law other than the Indian Penal Code which would include cases under the NDPS Act, shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, that is, the provisions contained after Section 4 but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. For the trial of offences under the NDPS Act proper procedure and guidelines have been provided.

[45] Therefore, the procedure provided for trial and prosecution of offences under the NDPS Act would not in any manner be hit by Article 14 of the Constitution; besides, even if it covers only a class of cases which are mentioned in the NDPS it would not be bad and the fact that in such cases the prosecution chooses as to which cases are to be tried under the special procedure would not affect the validity of the NDPS Act and the mere availability of two procedure does not vitiate one of them that is the special procedure under the NDPS Act. Besides, it is for the State to decide as to in which of the two enactments that is, the NDPS Act or the D&C Act is the prosecution to be launched. It may also appropriately be noticed that the provisions of Section 80 of the NDPS Act envisage that application of the D&C Act is not barred. Section 80 NDPS Act reads as under:-

> *"Application of the Drugs and Cosmetics Act, 1940 not barred.---- The provisions of this Act or the rules made thereunder shall be in additional to, and not in derogation of, the Drugs and Cosmetics Act, 1940 (23 of 1940) or the rules made thereunder."*

[46] This Court in the case of Vinod Kumar v. State of Punjab, 2013 1 RCR(Cri) 428 considered the question as to whether a wholesale drug dealer, a retailer and their employees possessing proper and valid licence for dealing in drugs specified in Schedule C and Schedule C1 as well as drugs not specified in those Schedules of the D&C Act and the 1945 Rules can be held liable for an offence punishable under the NDPS Act. After making a reference to Section 80 NDPS Act, it was held that a person can very well be prosecuted both under the NDPS Act as well as under the D&C Act simultaneously for violation of the provisions of the said Acts. It was held that merely because a person is prosecuted for violation of D&C Act that would not operate as a bar to prosecute him under the provisions of the NDPS Act.

Rather if the offences made out under the D&C Act also comes within the scope of the provisions of the NDPS Act such person shall be prosecuted for possession of the contrabands violating the provisions of the NDPS Act. Both the Acts, it was held are independent and violation of one Act does not mean no violation of the other. Therefore, merely, because prosecution is launched and trial is conducted under the NDPS Act, which is considered a harsher and an onerous provision, the initiation of the proceedings cannot be said to be improper or bad. In case it is done for any extraneous reasons or circumstances or with a mala fide intention, the same would of course be subject to judicial scrutiny and review. In the circumstances, when there has been a contravention of a certain manufactured drug or a psychotropic substance and which falls within the purview of NDPS Act and the NDPS Rules, the possession, sale and transportation of which is prohibited, or is being done without proper licence or with no proper authorization, the prosecution under the provisions of the NDPS Act would not be prohibited and it cannot be said to be in any manner illegal.

[47] The contention of the learned counsel for the petitioners is that the police authorities being unmindful of the actual provisions of the NDPS Act and the NDPS Rules have harassed even the bona fide chemists in the State holding a valid and legal licence in accordance with the provisions of the D&C Act and the 1945 Rules. In this regard it needs to be mentioned that the instance of unnecessary harassment are indeed unfortunate and these need to be seriously viewed by the Courts. The provisions of the NDPS Act including providing for prosecution in respect of manufactured drugs are stringent and harsh.

[48] These have been enacted to curb menace of drug trafficking. In Nirnajan Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijja, 1990 AIR(SC) 1962, the Hon'ble Supreme Court considered a case with regard to stringent provisions of the Terrorists and Disruptive Activities (Prevention) Act, 1987. It was observed that the said Act is a penal statute. Its provisions are drafted in that they provide minimum punishments and in certain cases enhanced punishments also. The provisions of the said Act were a departure from the ordinary law since the ordinary law was found to be inadequate and not sufficiently effective to deal with the special class of offences relating to terrorists and disruptive activities. The legislature, therefore, made special provisions which can in certain respects be said to be harsh, created a special forum for the speedy disposal of such cases, provided for raising a presumption of guilt, placed extra restrictions in regard to release of the offender on bail, and made suitable changes in the procedure with a view to achieving its objects.

[49] It was held that it is well settled that statutes which impose a term of imprisonment for what is a criminal offence under the law must be strictly construed. It was further held that while invoking a criminal statute such as the aforesaid Terrorists and Disruptive Activities (Prevention) Act, the prosecution is duty bound to show from the record of the case and the documents collected in the course of investigation that facts emerging therefrom prima facie constitute an offence within the letter of the law. When a statute provides special or enhanced punishment as compared to the punishment prescribed for similar offences under the ordinary penal laws of the country, a higher responsibility and duties are cast on the Judge to make sure there exists prima facie evidence for supporting the charge levelled by the prosecution. Therefore, when a law visits a person with serious penal consequences extra care is to be taken that those whom the legislature did not intend to be covered by the express language of the statute are not roped in by stretching the language of the law. The said observations in the case of Niranjan Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijiaya were affirmed by a Five Judges Bench of the Hon'ble Supreme Court in Sanjay Dutt v.

The State through CBI Bombay, 1994 5 JT 540. Therefore, when a law visits a person with serious penal consequences extra care is indeed to be taken that those whom the legislature did not intend to be covered by the express language of the statute are not roped in by stretching the language of the law. However, on that account to say that the offenders who have contravened and indulged in clandestine sale of narcotic drugs and manufactured drugs that have been notified by the Central Government in the official gazette, besides, psychotropic substances are to be penalized only under the D&C Act and the 1945 Rules would not be the correct position in law. It is for the State to prosecute the offenders wherever the provisions of the NDPS Act and the NDPS Rules have been violated in accordance with the said provisions rather than to say that such offenders can only be penalized under the D&C Act and the 1945 Rules. In other words, wherever there is a violation of the provisions of the NDPS Act and the NDPS Rules, then the offence comes within the ambit of the said Act and the Rules. The prosecution against the offenders can, therefore, be validly launched under the NDPS Act.

[50] The Delhi High Court in Rajinder Gupta v. State, 2006 CrLJ 674referred to Rule 97 (1) of the D&C Rules and observed as follows:-

> *"Rule 65 (1), inter alia, provides that the manufacture of any psychotropic substance other than those specified in schedule I shall be in accordance with the conditions of license granted under the D and C Rules and D and C Act. In other words, in so far as the psychotropic substances not mentioned in Schedule I to the NDPS Rules but mentioned in the Schedule to the NDPS Act are concerned, their manufacture shall be governed by the D and C Act and Rules and not by the NDPS Act or NDPS Rules. Rule 66 relates to possession etc. of psychotropic substances. Sub-Rule (1) thereof provides that no person shall possess "any psychotropic substance" for any of the purposes covered by the D and C Rules, unless he is lawfully authorized to possess such substance for any of the said purposes under the NDPS Rules. The expression"any psychotropic substance" obviously has reference to those listed in Schedule I to the NDPS Rules. Rule 64 is the governing rule in Chapter VII of the NDPS Rules. When a psychotropic substance does not find mention in Schedule I to the NDPS Rules, the prohibition qua possession contained in Rule 64 does not apply; That being the case, in respect of such a psychotropic substance, Rule 66 would also not apply as it has reference to only those psychotropic substance which are included in Schedule I to the NDPS Rules. Rule 67 of the NDPS Rules relates to transport of psychotropic substances. It is expressly subject to the provisions of Rule 64 and clearly has reference to the transport, import inter-state or export inter-state of those psychotropic substances which are included in Schedule I to the NDPS Rules. The rule would have no applicability in respect of those psychotropic substances which are not to be found in Schedule I to the NDPS Rules. Clearly, then, inasmuch as Buprenorphine Hydrochloride is not included in Schedule I to the NDPS Rules, its manufacture, possession, sale, transport would neither be prohibited nor regulated by the NDPS Rules and consequently by the NDPS Act. It being Schedule H drug would fall within the rigorous of the D&C Act and Rules."*

[51] The above observations show that the psychotropic substances which are mentioned in Schedule I of the NDPS Rules do entail prosecution under the NDPS Act. To this it may be added that those drugs which are notified as 'manufactured drug' by the Central Government particularly in terms of notification dated 14.11.1985 and subsequent notification dated 29.1.1993 would entail prosecution under Section 21 of the NDPS Act. Therefore, in each case it would be required to

be seen whether the drug in respect of which there is alleged to be a contravention by an offender is indeed in violation of the NDPS Act and this is to be determined and examined with reference to the notified manufactured drugs as mentioned in the notification dated 14.11.1985 and 29.1.1993. The contravention of psychotropic substances mentioned in the Schedule to the NDPS Act and the Schedule 'I' to the NDPS Rules in violation of the same may also entail prosecution under the NDPS Act. Besides, it would be also required to be examined whether the percentage of the drug is within the permissible limit as has been provided for. However, the bulk quantity, in respect of which there is a contravention or is recovered from an unauthorized person would be indicative of the fact that it was not being used for medicinal or therapeutic purposes but as a drug to sedate or for intoxication or to give a sharp stimulating effect to get an unhealthy thrill so as to get a 'kick'. It is to be kept in mind that drugs which are classified as narcotic drugs or psychotropic substances not used for medicinal or therapeutic purposes but are rather misused by drug addicts or drug traffickers would warrant prosecution under the NDPS Act.

[52] The common drugs that are mostly misused for purposes other than medicinal and therapeutic use are drugs like Codeine, Dextropropoxyphene and Diphenoxylate. These are mentioned at serial Nos.132, 146 and 156 respectively in Schedule 'H' of the 1945 Rules, and are also mentioned at serial Nos.28, 33 and 44 respectively in the notification specifying small quantity and commercial quantity of drugs by making a reference to clause (vii a) and (xxiii a) of Section 2 of the NDPS Act. Besides, these are also mentioned at serial Nos.35, 87 and 58 respectively of the notification dated 14.11.1985. Other drugs which are commonly misused are 'Alprazolam, Chlordiazepoxide, Delorazepam, Diazepam and Buprenorphine' which are 'psychotropic substance' and are mentioned at serial Nos.30, 36, 42, 43 and 92 of the Schedule to the NDPS Act with reference to clause (xxiii) of Section 2 of the NDPS Act. These are commonly and widely misused by drug traffickers for clandestinely indulging in drug trafficking to give an intoxicating or stimulating effect and not for medicinal or therapeutic use. Drug addicts are known to take huge discharge of these drugs at a time and even drug manufacturers are packing 100 tablets of pouch/ bottles packing of some such drugs though some of them even fall under Schedule 'H' drug of the 1945 Rules and are to be sold in retail on a prescription by a registered medical practitioner only or are to be supplied to registered medical practitioners, hospitals, dispensaries and nursing homes against signed order in writing which are to be preserved by the licencee for a period of two years in terms of Rule 65 (9) (a) and (b) of the 1945 Rules which reads as under:-

> *"(9) (a) Substances specified in Schedule H or Schedule X shall not be sold by retail except on and in accordance with the prescription of a Registered Medical Practitioner and in the case of substances specified in Schedule X, the prescriptions shall be in duplicate, one copy of which shall be retained by the licensee for a period of two years.*
>
> *(b) the supply of drugs specified in Schedule H or Schedule X to Registered Medical Practitioners, Hospitals, Dispensaries and Nursing Homes shall be made only against the signed order in writing which shall be preserved by the licensee for a period of two years."*

[53] A perusal of the above Rule 65 (9) (a) and (b) mandates that the substances specified in Schedule 'H' or Schedule 'X' are to be sold in accordance with the prescription of a registered medical practitioner and in case of substances in Schedule 'X' the prescription is to be in duplicate and one copy of the same is to be retained by the licensee for two years. Insofar as the supply of drugs specified in the said Schedule 'H' or Schedule 'X' to registered medical practitioners,

hospitals, dispensaries and nursing homes are concerned, the same are to be made only against the signed order in writing which are to be preserved by the licensee for two years. Therefore, it is not as if the drugs mentioned in Schedule 'X' can be carried by any licensee in any manner that he likes or can be received by him without adherence to the D&C Act and the 1945 Rules. The drugs which are mostly misused in Schedule 'H' as already noticed are Codenie, Dextropropoxyphene, Diphenoxylate, its salts at serial Nos.132, 146 and 156 of Schedule 'H'. These drugs fall within the ambit of 'manufactured drugs' as have been notified by the Central Government in terms of notification dated 14.11.1985 at serial Nos.35, 87 and 58 respectively and contravention of the same is punishable under Section 21 NDPS Act which envisages that whoever, in contravention of any provisions of this Act i.e. the NDPS Act or any Rule or order made or condition of licence granted thereunder, manufactures, possesses, sells, purchases, transports, imports interState, exports inter-State or uses any manufactured drug or any preparation containing any manufactured drug shall be punishable according to the quantity of the manufactured drug of which there has been a contravention and is specified therein.

[66] As a consequence of the above, it may be noticed that:-

(i) Manufactured drugs are those drugs which are defined in Section 2 (xi) of the NDPS Act and have been notified by the Central Government vide notification dated 14.11.1985 and subsequent notification dated 29.1.1993. The possession of such drugs in contravention of the NDPS Act and the NDPS Rules would entail criminal prosecution of the offender under Section 21 of the NDPS Act.

(ii) The mere fact that the drugs which are covered under 'manufactured drugs' under the NDPS Act and the NDPS Rules and psychotropic substances as mentioned in Schedule of the NDPS Act and Schedule I of the NDPS Rules and are also covered by the D&C Act and the 1945 Rules thereunder would not mean that the offender can be penalised only under the D&C Act and the 1945 Rules and not proceeded against the NDPS Act and the NDPS Rules. In case there is a contravention of the NDPS Act and the NDPS Rules, the stringent provisions of the latter can be resorted to.

(iii) A person possessing manufactured drugs in terms of the NDPS Act and the NDPS Rules is to strictly adhere to the provisions relating to sale, purchase, transport, carrying, storage, distribution etc. in accordance with the provisions of the D&C Act and the 1945 Rules as also the provisions of the Punjab NDPS Rules 2012.

(iv) For transportation of the 'manufactured drugs' a pass or permit in terms of Rule 18 of the Punjab NDPS Rules 2012 is to be possessed.

(v) It is to be ascertained in each case whether the manufactured drug, the contravention of which is alleged by a person falls within the permissible limits of the percentage of dosage provided for the drug by the notification dated 14.11.1985 and subsequent notification dated 29.01.1993 issued in exercise of power conferred by Section 2 (xi) (b) NDPS Act. However, the contravention of manufactured drug or possession of quantity in bulk is to be taken into consideration and not per dosage specially when there is a violation of the D&C Act and the 1945 Rules that is to say they are sold, purchased, distributed, stored, transported, carried etc. without a valid licence or kept without a valid authorization. The possession of quantity in bulk would be an indication that it is not for medicinal or therapeutic use but is sought to be misused by drug addicts and drug traffickers and would be treated as applicable to the entire quantity recovered of anyone

or more narcotic drug or psychotropic substance of that particular drug in dosage forms and not just its pure drug content.

(vi) When a manufactured drugs are sold, purchased, distributed, stored, transported, carried etc. in bulk form, the notification dated 18.11.2009 issued by the Central Government in exercise of powers under Section 2 (viia) and (xxiiia) NDPS Act would apply and the question that these drugs contain an exception in terms of notification dated 14.11.1985 would not apply as the exceptions would apply when the manufactured drugs are for medicinal or therapeutic use.

(vii) The quantity of manufactured drugs is not to be determined on per capsule basis when these are carried without proper licence or authorization. In other words the mere dosage of the manufactured drug in one capsule is not to be considered but the dosage in the number of capsule together is to be considered for determining as to whether the exceptions provided in the notification dated 14.11.1985 declaring the narcotic substance and preparations as mentioned therein to be manufactured drugs.

(viii) It is suggested that the State authorities should get the drugs in respect of which there is a contravention and that are recovered examined by the Chemical Analysts at the earliest and a report provided to the offender at the earliest so that the position can be ascertained as to whether the alleged offender was in possession of permissible quantity of the drug or otherwise. In case there is delay this would entitle the offender to at least interim bail till the report is finally received.

(ix) In relation to the search and seizure, the provisions of the Code of Criminal Procedure are to be followed. The instruction issued by the NCB should be circulated so these are followed as guidelines. The violation of the guidelines would not per se entail illegality or an irregularity unless it is shown the same has occasioned a failure of justice or resulted in prejudice.

(x) The guidelines laid down and directions issued by the Hon'ble Supreme Court in the case of Thana Singh v. Central Bureau of Narcotics should be meticulously and strictly followed and steps should be taken to ensure their due compliance.

(xi) For the sale, purchase, storage, carriage, transportation and use etc. of manufactured drugs, the provisions of the NDPS Act, the D&C Act, the 1945 Rules and the Punjab NDPS Rules, 2012 should be strictly adhered to and followed and violation of the same would necessarily entail its consequences including penal consequences."

32. To be fair to the learned counsel for the petitioner, he would vehemently contend that the ratio of the judgment in the aforesaid case is not at all applicable to the facts of the instant case as the Court therein was primarily dealing with the Punjab Narcotic Drugs and Psychotropic Substances Rules, 2012 (for short 'Rules 2012') which had been issued vide notification dated 13.12.2012 in exercise of the powers conferred by Section 78 read with Sections 10 and 71 of the NDPS Act and other powers enabling it in this behalf.

33. Even this contention of the petitioner cannot be accepted for the simple reason that the same is based upon or complete misreading of the judgment (relevant portion whereof has been quoted above), which clearly demonstrates that the main thrust of the judgment was on the interpretation of the NDPS Act and Rules and Drugs and Cosmetics Act and the Rules and only ancillary findings, that too, wherever necessary were given with respect to the Rules 2012.

34. That apart, it is more than settled that the Rules cannot override the Act and once the relevant provisions of the Act are interpreted, then the State Rules would hardly be of any avail. The Rules otherwise would only follow the statute.

35. In addition to above, the Rules of 2012 mainly contemplate what is otherwise already provided in the Central Rules, apart from making certain changes making the provisions more stringent after taking into consideration the rampant and wide spread drug abuse and trade in the State of Punjab.

36. Learned counsel for the petitioner would then place reliance upon Rule 52-A which has recently been inserted vide G.S.R. No. 359 (E) dated 5th May, 2015 to contend that the intention of the legislation was to bring codeine phosphate within the purview of NDPS Act only where the concentration of codeine was more than 2.5% in 100 ml of bottle and in case it is found below the said concentration, same would not fall under the said Act.

37. Rule 52A of the Act, reads as under:

> ***52A. Possession of essential narcotic drug****.(1) No person shall possess any essential narcotic drug otherwise than in accordance with the provisions of these rules.*
>
> *(2) Any person may possess an essential narcotic drug in such quantity as has been at one time sold or dispensed for his use in accordance with the provisions of these rules.*
>
> *(3) A registered medical practitioner may possess essential narcotic drug, for use in his practice but not for sale or distribution, not more than the quantity mentioned in the Table below, namely:*

TABLE

Sl.No.	*Name of the essential Narcotic Drug*	*Quantity*
(1)	*(2)*	*(3)*
1.	*Morphine and .its salts and all preparations containing more than 0.2 per cent of Morphine.*	*500 Milligrammes*
2.	*Methyl morphine (commonly known as 'Codeine') and Ethyl morphine and their salts (including Dionine), all dilutions and preparations except those which are compounded with one or more other ingredients and containing not more than 100 milligrammes of the drug per dosage unit and with a concentration of not more than 2.5% in undivided preparations and which have been established in therapeutic practice.*	*2000 Milligrammes*
3.	*Dihydroxy Codein one (commonly known as Oxy- codone and Dihydroxycodeinone), its salts (such as Eucodal Boncodal Dinarcon Hydrolaudin, Nucodan, Percodan, Scophedal, Tebodol and the like), its esters and the salts of its ester and preparation, admixture, extracts or other substances containing any of these drugs.*	*250 Milligrammes.*
4.	*Dihydrocodeinone (commonly known as Hydrocodone), its salts (such as Dicodide, Codinovo, Diconone, Hycodan, Multacodin, Nyodide, Ydroced and the like) and its esters and salts of its ester, and preparation, admixture, extracts or other substances containing any of these*	*320 Milligrammes.*

	drugs.	
5.	*1-phenethyl-4-N- propionylanilino–piperidine (the international-non-proprietary name of which is Fentanyl) and its salts and preparations, admixture, extracts or other substances containing any of these drugs.*	*Two transdermal patches one each of 12.5 microgram per hour and 25 microgram per hour.*

Provided that the Controller of Drugs or any other officer authorised in this behalf by him may by special order authorise, in Form 3B, any such practitioner to possess the aforesaid drugs in quantity larger than as specified in the above Table:

Provided further that such authorisation may be granted or renewed, for a period not xceeding three years at a time.

***Explanation.**-The expression "for use in his practice" covers only the actual direct administration of the drugs to a patient under the care of the registered medical practitioner in accordance with established medical standards and practices.*

(4) For renewal of the authorisation referred to in the second proviso to sub -rule (3), application shall be made to the Controller of Drugs atleast thirty days before the expiry of the previous authorisation.

(5) (a) The Controller of Drugs may, by order, prohibit any registered medical practitioner from possessing for use in his practice under sub-rule (3) any essential narcotic drug, where such practitioner-

(i) has violated any provision of these rules; or

(ii) has been convicted of any offence under the Act; or

(iii) has, in the opinion of the Controller of Drugs, abused such possession or otherwise been rendered unfit to possess such drug.

(b) When any order is passed under clause (a) of this sub-rule, the registered medical practitioner concerned shall forthwith deliver to the Controller of Drugs the essential narcotic drug then in his possession and the Controller of Drugs shall issue orders for the disposal of such drugs.

(6) The Controller of Drugs may, by a general or special order, authorize any person to possess essential narcotic drug as may be specified in that order.

(7) A recognised medical institution may possess essential narcotic drug in such quantity and in such manner as specified in these rules.

[(8) A manufacturer may possess essential narcotic drug in such quantity as may be specified in the licence issued under rule 36, rule 36-A, or rule 37 of these rules or the licence issued for manufacturing the preparations of essential narcotic drugs under the rules made by the State Government under section 10 of the Act.

Provided that there shall be no limit to the possession of essential narcotic drug by the Government Opium Factories.].'

(9) A licenced dealer or a licenced chemist may possess essential narcotic drug in such quantity and in such manner as may be specified in the licence issued under these rules."

38. Even this contention is without any substance because it is clear that Rule 52A would apply only to the medical practitioner and therefore, the drug in his possession is essentially for the use in his practice and as per explanation, it covers only the actual direct administration of the drugs to a patient under the care of the registered medical practitioner in accordance with established medical standards and practices and cannot be used to determine

the pure drug content and in no manner exempts codeine even on percentage basis from the ambit of manufactured drug as is contended by the petitioner.

39. Having said so and having had a complete re-look on the various provisions of the NDPS Act and Rules as also Drugs and Cosmetic Act and Rules, I find no reason to take a different view to the one taken by me in ***Om Pal's*** case and since I have rejected all the contentions as put forth by the petitioner, there is no occasion or reason for referring the matter to a larger Bench.

40. In view of the ratio already laid down by me in ***Om Pal's*** case and in view of what has been said above, no case for bail is made out and the petition is accordingly dismissed.

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

Shamsher Singh Thakur .....Petitioner/plaintiff.

Versus

Baba Jagtar Dass (deceased) through LRS Bibi Karam Dass Chelli

.....Respondent/Defendant.

Civil Revision No.180 of 2004.
Judgment reserved on: 01.07.2016.
Date of decision: July 8th, 2016.

Specific Relief Act, 1963- Section 6- Plaintiff filed a civil suit pleading that defendant had created a lease for 99 years in favour of the plaintiff and possession was delivered to him - defendant forcibly took possession in absence of the plaintiff- suit was opposed by the defendant – counter-claim was also filed by the defendant- trial Court dismissed the suit and partly allowed the counter-claim- held, in revision that remedy of revision is available in suit under Section 6 of Specific Relief Act by way of an exception- Court will not interfere with the order except where a case for interference has been made for the exercise of revisional jurisdiction- witnesses of the plaintiff were not able to prove the possession of the plaintiff- name of the person who had delivered the possession to the plaintiff was not mentioned- neighbours were not examined- an adverse inference is to be drawn- suit was rightly dismissed by the trial Court- revision dismissed. (Para-9 to 23)

Cases referred:

Sanjay Kumar Pandey and others versus Gulbahar Sheikh and others (2004) 4 SCC 664
ITC Limited versus Adarsh Cooperative Housing Society Limited (2013) 10 SCC 169

For the Petitioner/ Plaintiff : Mr.R.K.Bawa, Senior Advocatewith Mr.Jeevesh Sharma, Advocate.
For the Respondent/ Defendant : Mr.K.B.Khajuria, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

This revision is directed against the judgment and decree passed by the learned Civil Judge (Senior Division), Shimla, on 13.08.2004 whereby the summary suit filed by the plaintiff/petitioner (hereinafter referred to as the plaintiff) under Section 6 of the Specific Relief Act (for short the 'Act') came to be dismissed and has now approached this Court by invoking its jurisdiction under Section 115 of the Code of Civil Procedure (for short 'Code') readwith Section 227 of the Constitution of India.

2. The brief facts leading to the filing of the present petition are that the plaintiff filed a suit as aforesaid wherein it was averred that respondent/defendant (hereinafter referred to as the defendant) was the owner of the building known as 'Baba Shri Chand Mandir', standing on Khasra No.541/2, Station Ward, Bara Shimla. The defendant had appointed Shri Niranjan Dass as his attorney vide General Power of Attorney dated 05.07.1993 duly registered in the Office of Sub-Registrar (Urban), Shimla at serial No.187 dated 06.07.1993. The defendant through his duly constituted General Power of Attorney created a lease for 99 years in favour of the plaintiff vide lease deed dated 23.04.1996 and even the possession was handed over to the plaintiff in respect of one room/shop measuring 1.96 metres x 1.69 metres (Shop No.4). This lease deed has been executed after the duly constituted General Power of Attorney had already received a sum of Rs.2,60,640/- being advance rent for 38 years i.e. upto the year 2033 from the plaintiff. However, on 02.06.1996 when the plaintiff had gone to Basantpur in connection with marriage of Shri Mohan Singh son of Shri Ajit Singh, the defendant got removed the brick wall that separated the suit property from the store of the building and illegally and forcibly took possession of the premises and dispossessed the plaintiff from the same.

3. The defendant contested the suit by filing written statement as also a counter-claim wherein the defendant inter alia raised preliminary objections regarding cause of action, valuation, misjoinder of parties on the ground that the alleged General Power of Attorney had not been arrayed as a party and estoppel etc. It was also averred that the plaintiff had got executed the sale deed by misrepresentation, fraud and coercion, besides the agreement being against the public policy and immoral. On merits, the averments contained in the plaint were denied and it was submitted that the suit property was a temple and had been constructed by the general public by way of donations and contributions and thus was a public property for the purpose of performing 'pooja' of 'Chand God' and the founder of the temple was one Baba Kumbh Dass, who had executed a will in favour of 'Baba Shri Chand Mandir' whereby the defendant was authorized to manage the property and had no right to transfer the same. After the death of Baba Kumbh Dass, the Court granted succession certificate in favour of the defendant and thereafter the defendant was stated to be managing the suit property. It was denied that Niranjan Dass was 'Chela' of the defendant and it was submitted that defendant infact had signed certain papers in respect of the power of attorney for the conduct of the proceedings in the Civil Court and had not authorized anyone to do away with the property of the temple as the defendant was himself not authorized to do so. The alleged General Power of Attorney was stated to be a result of misrepresentation of facts, fraud and it was alleged that Niranjan Dass and some other interested persons had taken undue benefit of the illiteracy of the defendant and got executed alleged Power of Attorney in active connivance with the concerned agency so as to get benefit out of it illegally to the detriment of the temple property. It was further denied that the defendant had executed any lease deed of the suit property in favour of the plaintiff. It was further denied that the defendant received a sum Rs.2,60,640/- as advance of 38 years from the plaintiff.

4. In the counter-claim the defendant assailed the lease deed executed in favour of the plaintiff by Shri Niranjan Dass and receipt of sale consideration.

5. The plaintiff filed written statement to the counter claim denying the averments contained therein and reiterated the averments already made in the plaint.

6. On 15.06.1998, the learned trial Court framed the following issues:-

"1. Whether the plaintiff is entitled for the possession of the suit property? OPP.

2. Whether the plaintiff has no cause of action? OPD.

3. Whether the suit is bad for non-joinder of parties? OPD.

4. Whether the plaintiff is estopped by his act, conduct, etc. as alleged? OPD.

5. Whether the agreement of lease in favour of plaintiff is void as alleged, if so its effect? OPD.

6. Relief."

7. The learned trial Court after recording evidence and evaluating the same dismissed the suit filed by the plaintiff and partly allowed the counter-claim preferred by the defendant to the extent that the lease deed Ex.PW-1/B and Power of Attorney Ex.PW-1/A were both declared to be void documents. It is against the aforesaid judgment and decree that the present revision has been filed on the ground that the findings recorded by the learned Court below are absolutely perverse and contrary to the records and, therefore, deserve to be set aside.

8. Before adverting to the relative merits of the case, it would be noticed that the suit in the instant case was instituted more than two decades back on 11.06.1996. It is indeed sad if not unfortunate that what was intended by the Legislature to be a summary proceeding to enable a person to illegally dispossessed to effect quick recovery of possession of the immovable property has in the present case erupted into an over two decades old litigation.

9. The first and foremost question which requires determination is the nature and scope of remedy of a person unsuccessful in a suit under Section 6 of the Act.

10. In ***Sanjay Kumar Pandey and others*** *versus* ***Gulbahar Sheikh and others (2004) 4 SCC 664***, the Hon'ble Supreme court held that the remedy of a person unsuccessful under Section 6 of the Act is to file a regular suit establishing his title to the suit property and in the event of his succeeding, he will be entitled to recover the possession of the property notwithstanding the adverse decision under Section 6 of the Act. It was further clarified that the remedy of filing a revision is available but that is only by way of an exception; for the High Court would not interfere with a decree or order under Section 6 of the Act except in a case for interference being made out within the well settled parameters of the exercise of revisional jurisdiction under Section 115 of the Code. It is apt to reproduce para-4 of the judgment which reads thus:-

> "4. *A suit under Section 6 of the Act is often called a summary suit inasmuch as the enquiry in the suit under Section 6 is confined to finding out the possession and dispossession within a period of six months from the date of the institution of the suit ignoring the question of title. Sub-section (3) of Section 6 provides that no appeal shall lie from any order or decree passed in any suit instituted under this Section. No review of any such order or decree is permitted. The remedy of a person unsuccessful in a suit under Section 6 of the Act is to file a regular suit establishing his title to the suit property and in the event of his succeeding he will be entitled to recover possession of the property notwithstanding the adverse decision under Section 6 of the Act. Thus, as against a decision under Section 6 of the Act, the remedy of unsuccessful party is to file a suit based on title. The remedy of filing a revision is available but that is only by way of an exception; for the High Court would not interfere with a decree or order under Section 6 of the Act except on a case for interference being made out within the well settled parameters of the exercise of revisional jurisdiction under Section 115 of the Code."*

11. In ***ITC Limited*** *versus* ***Adarsh Cooperative Housing Society Limited (2013) 10 SCC 169***, the Hon'ble Supreme Court reiterated that the suit under Section 6 of the Act was summary in nature for recovery of possession of property from which one claims to have been illegally dispossessed. It was held that in a suit under Section 6 of the Act the entitlement of the plaintiff to recover possession of property from which he claims to have been illegally dispossessed has to be adjudicated independently of the question of title that may be set up by the defendant in such a suit. Infact in a suit under Section 6 of the Act, the only question that has to be determined by the Court is: whether the plaintiff was in possession of the disputed property and he had been illegally dispossessed therefrom on any date within six months prior to the filing of the suit? It was further held that the decision of the Court under Section 6 is not open for appeal or review but a small window by way of revision has been kept open by the Legislature possibly to enable the High Court to have a second look in the matter in an exceptional situation, though the High Court would not interfere with a decree or order under

Section 6 of the Act except on a case for interference having been made out within the well settled parameters of the exercise of revisional jurisdiction under Section 115 of the Code. It is apt to reproduce the following observations:-

> "9. *Section 6 of the Specific Relief Act 1963 under which provision of law the suit in question was filed by the respondent-plaintiff is in pari materia with Section 9 of the 1877 Act. A bare reading of the provisions contained in Section 6 of the 1963 Act would go to show that a person who has been illegally dispossessed of his immovable property may himself or through any person claiming through him recover such possession by filing a suit. In such a suit, the entitlement of the plaintiff to recover possession of property from which he claims to have been illegally dispossessed has to be adjudicated independently of the question of title that may be set up by the defendant in such a suit. In fact, in a suit under Section 6, the only question that has to be determined by the Court is: whether the plaintiff was in possession of the disputed property and he had been illegally dispossessed therefrom on any date within six months prior to the filing of the suit? This is because Section 6 (2) prescribes a period of six months from the date of dispossession as the outer limit for filing of a suit. As the question of possession and illegal dispossession therefrom is the only issue germane to a suit under Section 6, a proceeding thereunder, naturally, would partake the character of a summary proceeding against which the remedy by way of appeal or review has been specifically excluded by sub-section (3) of Section 6. Sub-Section (4) also makes it clear that an unsuccessful litigant in a suit under Section 6 would have the option of filing a fresh suit for recovery of possession on the basis of title, if any.*
>
> *10. In fact, the above view has found expression in several pronouncements of this Court of which reference may be made to the decisions in Lallu Yashwant Singh v. Rao Jagdish Singh AIR 1968 SC 620, Krishna Ram Mahale v. Shobha Venkat Rao (1989) 4 SCC 131 and Sanjay Kumar Pandey v. Gulabahar Sheikh (2004) 4 SCC 464. In fact, para 4 of this Court's judgment passed in Sanjay Kumar Pandey (supra) may be a useful reiteration of the law in this regard. The same is, therefore, extracted hereinbelow: (SCC p. 665)*
>
>> *"4. A suit under Section 6 of the Act is often called a summary suit inasmuch as the enquiry in the suit under Section 6 is confined to finding out the possession and dispossession within a period of six months from the date of the institution of the suit ignoring the question of title. Sub-section (3) of Section 6 provides that no appeal shall lie from any order or decree passed in any suit instituted under this section. No review of any such order or decree is permitted. The remedy of a person unsuccessful in a suit under Section 6 of the Act is to file a regular suit establishing his title to the suit property and in the event of his succeeding he will be entitled to recover possession of the property notwithstanding the adverse decision under Section 6 of the Act. Thus, as against a decision under Section 6 of the Act, the remedy of unsuccessful party is to file a suit based on title. The remedy of filing a revision is available but that is only by way of an exception; for the High Court would not interfere with a decree or order under Section 6 of the Act except on a case for interference being made out within the well-settled parameters of the exercise of revisional jurisdiction under Section 115 of the Code."*
>
> *11…………………*
>
> *12. Though Section 6 (3) of the 1963 Act bars the remedy of appeal and review, a small window, by way of a revision, was kept open by the legislature possibly to enable the High Court to have a second look in the matter in an exceptional situation……"*

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

12. The only question that has to be determined by this Court is whether the plaintiff was in possession of the disputed property and has been illegally dispossessed therefrom on any date within six months prior to filing of the suit.

13. It is vehemently argued by Shri R.K.Bawa, Senior Advocate, assisted by Shri Jeevesh Sharma, Advocate, that the findings recorded by the learned Court below are perverse inasmuch as it has failed to take into consideration the pleadings as also oral and documentary evidence led before it. It is argued that once the plaintiff has placed and proved on record Power of Attorney Ex.PW-1/A, lease deed dated 23.04.1996 Ex.PW-1/B, then there was no option available with the learned Court below but to have decreed the suit, as prayed for. On the other hand, Shri Kulbhushan Khajuria, Advocate, has argued that the findings recorded by the learned Court below are in tune with the facts and law and, therefore, should be upheld as it is.

14. The plaintiff in support of his claim had examined five witnesses, but none of these witnesses, has really been able to prove the possession of the plaintiff. Though, the plaintiff would heavily rely upon the Power of Attorney and the lease deed executed in his favour but those at best can only establish some sort of title which he may have or may have been conferred with. Even, the plaintiff while examining himself as PW-2 has not specifically named the person who had given possession of the suit property and has further led no evidence as to when and in whose presence the possession had infact been delivered. Even, the lease deed Ex.PW-2/A which has been heavily relied upon by the plaintiff does not reflect the exact date of delivery of possession.

15. Moreover, it is the specific case of the plaintiff that he had paid a sum of Rs.2,60,640/- to the Attorney of the defendant, who in turn, had issued the receipt qua the same, but wherefrom such huge amount of money has come is a mystery as the plaintiff has led no evidence whatsoever to prove this fact.

16. Though, the plaintiff would rely upon the testimony of PW-3 Ram Krishan but even his statement does not in any manner improve the case of the plaintiff for the simple reason that this witness had only carried out some repair and renovation of the premises at the time when the possession of the same was admittedly that of the defendant. This witness nowhere states about the plaintiff ever being in possession or having been put in possession of the suit property.

17. Another factor which makes me wonder is that in case the plaintiff was actually in possession of the suit property and had infact been dispossessed therefrom, then what prevented him from lodging a complaint to this effect with the local police.

18. Even otherwise, the neighbours, more particularly, the shopkeepers of the adjoining premises who could have been the best witnesses qua the possession of the plaintiff have also not been examined constraining this Court to draw an adverse inference as the best evidence has been deliberately withheld from the Court.

19. Moreover, even the documents upon which heavy reliance is being placed by the plaintiff like Power of Attorney, lease deed etc. do not in any way prove or establish the possession of the plaintiff.

20. This Court has already observed that it is only concerned with the question of possession in which the title, at this stage, is not of much relevance. The learned Court below while dismissing the suit has not only discussed the pleadings, but has also correctly evaluated the evidence led by the respective parties which findings cannot in any manner be termed to be perverse, based on misreading and misappreciation of evidence on record.

21. In view of the aforesaid discussion, I find no merit in this petition and the same is accordingly dismissed. However, this will not prevent the aggrieved party i.e. plaintiff from filing a regular suit establishing his title to the suit property, notwithstanding the decision in the instant petition.

22. Needless to say that the suit if and when filed by the plaintiff shall be considered strictly in accordance with the pleadings and evidence therein and the trial Court shall not be influenced by the findings rendered either by the trial Court or this Court in these proceedings.

23. The petition is accordingly disposed of alongwith all pending application(s), if any, leaving the parties to bear their own costs.

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

Sheela Devi & ors …Appellants
Versus
Harbhajan Lal …Respondent

RSA No.340 of 2004
Decided on: 8.7.2016

Specific Relief Act, 1963- Section 24- Plaintiff filed a civil suit for declaration pleading that he is exclusive owner in possession of the suit land- defendants had moved an application for correction of dimension, which was allowed without affording any opportunity of being heard to the plaintiff - defendants pleaded that dimensions were changed at the instance of the plaintiff – order was passed after affording an opportunity to the plaintiff- suit was decreed by the trial Court- an appeal was preferred, which was allowed- it was held that Civil Court had no jurisdiction to try the suit- held, in appeal that once court had come to the conclusion that it lacked inherent jurisdiction, it should have passed an order of return of the plaint for presentation before appropriate forum- appeal allowed and plaint ordered to be returned for presentation before appropriate Court. (Para- 7 to 13)

Case referred:

Kanwar Singh Saini Vs. High Court of Delhi (2012) 4 SCC 307

For the Appellants	:	Mr.Sanjeev Kuthiala, Advocate.
For the Respondent	:	Mr.N.K.Thakur,Senior Advocate With Mr. Surinder Sharma, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J.(Oral)

Plaintiff is the appellant who is aggrieved by the judgment and decree passed by learned District Judge, Una, whereby he reversed the findings rendered by the learned trial court and dismissed the suit filed by the plaintiff.

2. Brief facts leading to filing of the appeal are that the plaintiff (hereinafter referred to as 'Appellant') filed suit for declaration on the ground that the suit land was jointly owned by him along with respondents-defendants No.2 and 3. He claimed to be in exclusive possession of the same and had averred that defendant No.1 had no right, title and interest over the suit land, who otherwise was owner of the adjoining land. He had moved an application before the Settlement Collector seeking corrections of 'Karukans' of Aks Shajra which was carried out by the Settlement Officer, but without affording any opportunity of being heard to the plaintiff. This

order was questioned as being not tenable in the eyes of law and declaration to this effect was sought along with prayer for permanent injunction.

3. The defendant/respondent contested the suit by filing written statement in which preliminary objections regarding maintainability, cause of action, estoppel, jurisdiction etc. were raised. On merits, it was denied that the suit land was owned by the plaintiff and defendants 2 and 3 and even the exclusive possession of the plaintiff was disputed. It was contended that it was the plaintiff who changed the 'Karukans' in connivance with the settlement staff, resultantly area of the land of defendant in khasra No. 626 was decreased. When this fact came to his notice, he moved an application for correction of 'Karukans' and after affording an opportunity of being heard to the affected parties, Settlement Officer passed the aforesaid order.

4. The following issues came to be framed by the learned trial court:

"*1. Whether the plaintiff and proforma defendants No.2 and 3 are joint owners and plaintiff is in exclusive possession of suit land as alleged ? OPP.*

2. Whether mutation No.198 dated 26.8.97 on the basis of order passed by S.O. Settlement Circle Kangra at Dharamshala dated 27.6.1997 is illegal, null and void as alleged? OPP.

3. If issue No.1 & 2 are proved in affirmative whether plaintiff is entitled for relief of permanent injunction as alleged? OPP.

4. Whether plaintiff is estopped by his act and conduct to file present suit? OPD.

5. Whether suit of plaintiff is not maintainable in present form as alleged? OPD.

6. Whether plaintiff has no enforceable cause of action against defendant as alleged? OPD.

7. Whether this court has no jurisdiction to try the present suit as alleged? OPD.

8. Relief."

5. After recording the evidence and evaluating the same, suit of the plaintiff was decreed, constraining the defendant to file appeal before the learned first appellate court, who vide his judgment and decree dated 6.5.2014 reversed the findings of the learned trial court by concluding that the civil court had no jurisdiction to try the suit of the present nature.

6. It is against this judgment and decree that the appellant has filed the present appeal by invoking Section 100 of the CPC.

7. On 20.4.2005, the appeal came to be admitted, but without framing any substantial questions of law. However, today, with the consent of the parties, appeal is admitted on the following substantial question of law.

"*4. Whether upon returning the findings that the court has no jurisdiction, it is right and proper that such court should order the return of plaint to be presented before proper Forum in accordance with provisions of order 7 Rule 10 CPC instead of rejecting the plaint and dismissing the suit and where such procedure has not been followed, whether such orders can stand judicial scrutiny?"*

I have heard the learned counsel for the parties and have gone through material available on record.

8. I really wonder why learned first appellate court ventured to record findings on merits of the case, after it had come to the conclusion that the civil court lacked inherent jurisdiction to entertain much less decide the case.

9. The position of law regarding conferment of jurisdiction has been dealt with by the Hon'ble Supreme Court in ***Kanwar Singh Saini*** *Vs.* ***High Court of Delhi (2012) 4 SCC 307*** and the same was summed up in the following manner:

> *"22. There can be no dispute regarding the settled legal proposition that conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the parties nor by a superior court, and if the court passes order/decree having no jurisdiction over the matter, it would amount to a nullity as the matter goes to the roots of the cause. Such an issue can be raised at any belated stage of the proceedings including in appeal or execution. The finding of a court or tribunal becomes irrelevant and unenforceable/inexecutable once the forum is found to have no jurisdiction. Acquiescence of a party equally should not be permitted to defeat the legislative animation. The court cannot derive jurisdiction apart from the statute. (Vide: The United Commercial Bank Ltd. v. Their Workmen AIR 1951 SC 230; Smt. Nai Bahu v. Lal Ramnarayan & Ors., AIR 1978 SC 22; Natraj Studios Pvt. Ltd. v. Navrang Studio & Anr., AIR 1981 SC 537; Sardar Hasan Siddiqui & Ors. v. State Transport Appellate Tribunal, U.P., Lucknow & Ors. AIR 1986 All. 132; A.R. Antulay v. R.S. Nayak & Anr., AIR 1988 SC 1531; Union of India & Anr. v. Deoki Nandan Aggarwal, AIR 1992 SC 96; Karnal Improvement Trust, Karnal v. Prakash Wanti (Smt.) (Dead) & Anr., (1995) 5 SCC 159; U.P. Rajkiya Nirman Nigam Ltd. v. Indure Pvt. Ltd. & Ors., AIR 1996 SC 1373; State of Gujarat v. Rajesh Kumar Chimanlal Barot & Anr., AIR 1996 SC 2664; Kesar Singh & Ors. v. Sadhu, (1996) 7 SCC 711; Kondiba Dagadu Kadam v. Savitribai Sopan Gujar & Ors., AIR 1999 SC 2213; and Collector of Central Excise, Kanpur v. Flock (India) (P) Ltd., Kanpur, AIR 2000 SC 2484).*
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> *23 When a statute gives a right and provides a forum for adjudication of rights, remedy has to be sought only under the provisions of that Act. When an Act creates a right or obligation and enforces the performance thereof in a specified manner, "that performance cannot be enforced in any other manner". Thus for enforcement of a right/obligation under a statute, the only remedy available to the person aggrieved is to get adjudication of rights under the said Act. (See: Doe d. Rochester (BP) v. Bridges, 109 ER 1001; Barraclough v. Brown, 1897 AC 615; The Premier Automobiles Ltd. v. K.S.Wadke & Ors., AIR 1975 SC 2238; and Sushil Kumar Mehta v. Gobind Ram Bohra (Dead) thr. L.Rs., (1990) 1 SCC 193).*

10. In pure legal theory, ' jurisdiction, as meaning 'power to decide' or 'competence to decide' a cause or subjects can be conferred on a court, tribunal or an authority as is the case only by the Constitution of the country or by a law made by a competent legislature and not by the act or consent of parties. When a court, tribunal or an authority has not been invested with jurisdiction, meaning 'the power to decide' or 'competence to decide' but still decides a matter, it is outside its jurisdiction or in excess of its jurisdiction and that cannot be cured by the Act or consent of parties.

11. Rubinstein clearly explains this principle neatly in his Treatise 'jurisdiction and illegality' in these word:

> *'Want of jurisdiction denotes action taken beyond the sphere allotted to the Tribunal by law and, therefore, outside the area within which the law recognizes a privilege to err. Furthermore, want of jurisdiction is regarded as usurpation of power unwarranted by law. Consequently, it is considered so radical a defect that it cannot be cured by the acquiescence or consent of the parties concerned. Jurisdiction does not originate in the consent of the parties and cannot be re-established, where it is absent, by such consent or acquiescence. Being independent of the parties' behaviour, want of jurisdiction can be raised by any person wherever the resulting act is relied upon.*
>
> *These symptoms are generally accepted as characterizing want of jurisdiction. Accordingly, as will be seen later, bias cannot be considered as going to jurisdiction*

since it is a defect which can be waived and which cannot be raised by the person who 'benefited' by the alleged bias.

Nevertheless, as one would suspect, this rule is not without its exceptions. In certain circumstances, a party may be precluded by his behaviour, from raising an objection to jurisdiction, though, admittedly, such an objection would have nullified the disputed proceedings. The courts have not evolved, with regard to this matter, a general guiding principle. A distinction is sometimes made between total or general want of jurisdiction, which cannot be cured by consent and acquiescence and other jurisdiction defects which can be thus cured. General want of jurisdiction is taken to relate to the subject-matter over which the tribunal has jurisdiction, but, this distinction has never been clearly formulated."

12. A case of inherent want of jurisdiction can be set up at any stage of the proceedings. But, an irregularity in the exercise of jurisdiction cannot be set up at any and every stage of the proceedings.

13. Therefore, once the learned lower appellate court had come to the conclusion that it lacked inherent jurisdiction, then the only course open to it was to have returned the plaint to be presented before the proper Forum in accordance with the provisions of order 7 Rule 10 CPC and in no event could the suit have been dismissed for want of jurisdiction that too after venturing to go into the merits of the same.

14. In view of the aforesaid discussion, I find merit in this appeal and the same is accordingly allowed. Learned Trial court is directed to return the plaint to be presented before proper Forum. It is made clear that in case the plaint is presented before the proper Forum-Authority within a period of 30 days, then the entire period spent in this litigation will not come in the way of the appellant and the same would be set off and condoned by the authority by exercising its powers under Section 14 of the Limitation Act.

With these observations, appeal is allowed, as aforesaid, leaving the parties to bear their 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

Ramesh & ors. …….Respondents.

Cr. Appeal No. 268 of 2011.
Reserved on: July 07, 2016.
Decided on: July 08, 2016.

N.D.P.S. Act, 1985- Section 18, 20, 29 and 60- The accused were the occupants of the Indica car which was found parked – the car was searched during which 2.1 kg of charas and 1.5 kg opium were recovered – the accused were tried and acquitted by the Trial Court – held in appeal, the Trial Court had acquitted the accused on the ground that driver was not examined and independent witnesses were not associated – there are contradictions in the testimonies of prosecution witnesses- it was specifically stated by the police officials that place was isolated- one police official was sent to bring the independent witnesses- he met two witnesses but they refused to join - police officials deposed consistently - the accused were apprised of their legal right to be searched- charas and opium were sealed in different parcels- there is no requirement of law that the case property is to be seized vide one memo- the prosecution witnesses are not

supposed to make statements in a parrot like manner and there are bound to be some contradictions with the passage of time- Statements of official witnesses inspire confidence –the prosecution case was proved beyond reasonable doubt – appeal accepted - accused convicted of the commission of offences punishable under Section 18 Sections 18(c), 20(b)(ii)(C) read with Section 29 of the NDPS Act and the vehicle ordered to be confiscated to the State of H.P

(Para-16 to 26)

For the appellant: Mr. Neeraj K. Sharma, Dy. AG.

For the respondents: Mr. Lakshay Thakur, Advocate, for respondents No. 1 & 2.
Mr. Ashish Verma, Legal Aid Counsel for respondent No. 3.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

The State has come in appeal against the judgment dated 30.4.2011, rendered by the learned Special Judge (II), Kinnaur at Rampur, H.P., in RBT No. 17-AR/3 of 2009/2010, whereby the respondents-accused (hereinafter referred to as the accused), who were charged with and tried for offences punishable under Sections 18, 20, 29 and 60 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 22.6.2009, police party comprising of Dy. S.P. Pankaj Sharma (Probationer), PW-1 HHC Kashmi Ram, PW-2 HHC Roshan Lal, PW-9 HC Pushap Dev, Const. Bhoop Singh, Const. Mukesh Kumar and HHG Om Parkash left PS Anni in taxi No. HP-01K-0810. It was driven by Const. Hem Raj towards Kothi in connection with routine patrolling. At about 3:00 PM, when they reached at Riun Gaad, they found Indica Car No. HR-55-CT-0914 standing. The accused were the occupants of the Car. The accused were apprised by PW-9 HC Pushap Dev that the police intended to search their person as well as car and they have the legal right to be searched either in the presence of a Magistrate or a Gazetted Officer. The accused persons opted to be searched by the police on the spot. Efforts were made to join independent witnesses but no independent witness was available. PW-9 HC Pushap Dev joined HHC Kashmi Ram and PW-2 HHC Roshan Lal as witnesses. The personal search of the accused persons was conducted but nothing incriminating was recovered from their possession. Thereafter, search of the car was conducted and one polythene bag containing 7 transparent polythene envelopes was recovered. Out of the seven polythene envelopes five contained charas in shape of sticks and balls weighing 2 kg 100 grams and the remaining two packets contained opium weighing 1 kg 500 grams. The charas and opium were separately packed and sealed with seal impression "X". NCB form in triplicate was filled in and after drawing the specimen of seal the same was handed over to HHC Roshan Lal. The case property was taken into possession vide seizure memo Ext. PW-1/J. Rukka Ext. PW-1/C was scribed by PW-9 HC Pushap Dev and sent to PS Anni through HHC Kashmi Ram on the basis of which FIR Ext. PW-1/P was registered. Indica Car No. HR-55-CT-0914 along with its documents was taken into possession vide seizure memo Ext. PW-1/L. Site plan Ext. PW-9/A was prepared. The case property was produced before PW-5 MHC Anup Kumar who resealed the same with seal bearing impression "H" and thereafter, he deposited the same in the malkhana. On 23.6.2009 MHC sent the case property to FSL Junga through Const. Mukesh Kumar and the report is Ext. PW-8/A. 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 were also examined under Section 313 Cr.P.C. According to them, they were falsely implicated. They also examined six witnesses in defence. The learned trial Court acquitted the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. Neeraj K. Sharma, Dy. AG has vehemently argued that the prosecution has proved its case against the accused. On the other hand, M/S Lakshay Thakur and Ashish Verma, Advocates for the respective accused have supported the judgment of the learned trial Court dated 30.4.2011.

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 HHC Kashmi Ram deposed that on 22.6.2009 he along with other police officials was on patrolling under the supervision of Dy. S.P. Pankaj Sharma (Probationer) in vehicle No. HP-01K-0810 from Anni towarks Kothi. At about 3:00 PM, when they reached at Riun Gaad, Indica Car No. HR-55-CT-0914 was found standing there. The accused were the occupants of the car. HC Pushap Dev suspected that the same might be containing any contraband article and he asked the accused as to why they had stopped their vehicle. Accused replied that their vehicle had developed some snag. Thereafter, HC Pushap Dev apprised the accused of their legal right to be searched either in the presence of a Magistrate or a Gazetted Officer. The accused persons opted to be searched by the police officer. Consent memos Ext. PW-1/A, PW-1/B and PW-1/C, respectively were prepared which were witnessed by him and HHC Roshan Lal. HC Pushap Dev sent HHC Roshan Lal to bring independent witnesses but he came back after 10-15 minutes and told that he met two persons who were passing but they refused to be associated as witnesses. HC Pushap Dev joined him and HHC Roshan Lal as witnesses. Personal search of the accused persons was carried out. Nothing incriminating was found. Search memos Ext. PW-1/E, PW-1/F and PW-1/G were signed by the accused and witnesses. The vehicle in which the accused were travelling was also searched. One polythene envelope containing seven packets comprising of transparent polythene was found. Out of these seven packets, 5 packets contained charas in the shape of balls and sticks. The remaining two packets contained opium. Charas was found to be 2 kg. 100 grams and opium weighed 1 kg. 500 grams. Thereafter, charas and opium, so recovered was packed in two packets which were sealed with seal bearing “X”. NCB form in triplicate was filled up by HC Pushap Dev. Specimen of seal Ext. PW-1/H was also obtained. The case property was taken into possession vide memo Ext. PW-1/J. HC Pushap Dev scribed rukka Ext. PW-1/K. The same was handed over to him. Before scribing rukka, HC Pushap Dev took Indica Car No. HR-55-CT-0914 along with its documents and key into possession. He handed over rukka to MHC Anoop Kumar on the basis of which FIR Ext. PW-1/P was registered. In his cross-examination, he deposed that they were on patrolling to Kothi. He specifically deposed that HC Roshan Lal had gone to look for independent witnesses towards Kandaghar side. They had no prior information about the accused persons. He denied the suggestion that Kandaghar was situated at a distance of 100 meters away from the spot. He denied the suggestion that tea shop of Maghu Ram and Krishna was situated at Riun Gaad. He admitted that village Didi was situated at a distance of 2 km. from the spot. He was not sure whether Nallah was at a distance of about 100 feet ahead of village Didi. He also denied the suggestion that the vehicle of the accused persons had broken down at Didi nallah. He denied the suggestion that accused Kuldeep and Sat Pal were brought by the police party from the shop of Veer Singh at village Didi where they were sitting outside the shop. He denied that no charas was recovered from the vehicle. He had come from the spot to the Police Station along with rukka in a taxi. He has admitted that the distance from Riun Gaad to village Didi was about 6 kms.

7. PW-2 HHC Roshan Lal has also corroborated the statement of PW-1 HHC Kashmi Ram, the manner in which the vehicle was intercepted, the accused were apprised of their legal right to be searched either in the presence of a Magistrate or a Gazetted Officer and the contraband was recovered. The charas weighed 2 kg. 100 grams and opium weighed 1 kg. 500 grams. All the codal formalities were completed on the spot. He identified his signatures on Ext. P-1 and P-8. The vehicle was also taken into possession. In his cross-examination, he admitted that two persons met him at a distance of about 50 meters from the spot. He did not ask their names nor brought them to the I.O. Village Kandaghar was situated at a distance of about ½ to ¾ kms from the spot. He denied the suggestion that tea stall of Maghu Ram and his wife Krishna

was situated at Riun Gaad and the same was in existence for the last about 5 years. He admitted that there was Nulla at a distance of 100 feet from village Didi. He denied the suggestion specifically that on 22.6.2009 the vehicle of the accused persons had broken down at Didi Nalla and its front suspension had come out. The seal which was handed over to him was lost but he did not lodge any report.

8. PW-3 Const. Mukesh deposed that on 23.6.2009 MHC Anoop Kumar handed over to him two sealed parcels sealed with seal bearing impressions "X" and "H" vide RC No. 29/09 along with NCB from and specimen of seal. He delivered the same at FSL Junga on 24.6.2009.

9. PW-4 Const. Beli Ram deposed that on 25.6.2009, he was joined in the investigation. The accused persons demarcated the place from where they had purchased opium and charas. The place was situated below Kothi Batot road. Identification memo Ext. PW-4/A was prepared. In his cross-examination, he denied that Rajesh Mistri was not present with them. He also denied that the vehicle of the accused has broken down in Didi Nullah and the same was standing there on 25.6.2009.

10. PW-5 HC Anoop Kumar testified that on 22.6.2009, HHC Kashmi Ram handed over rukka Ext. PW-1/K to him which was sent from the spot by HC Pushap Dev. FIR Ext. PW-1/P was recorded. HC Pushap Dev presented the case property sealed with impression "X" before him. He being the officiating SHO, resealed the same with impression "H", facsimile of which was fixed by him on NCB form at column No. 9. He also filled in column No. 10 of the NCB form. He deposited the same in the malkhana at Sr. No. 209 vide Ext. PW-5/C. He sent the case property along with the specimen of seal and NCB form to FSL Junga through Const. Mukesh Kumar vide RC No. 29/09.

11. PW-9 HC Pushap Dev testified the manner in which the accused were apprehended while traveling in taxi No. HP-01K-0810. The accused were apprised of their legal right to be searched either in the presence of a Magistrate or a Gazetted Officer. Consent memos were prepared, however, the accused opted to be searched before the police. Thereafter, HHC Roshan Lal was sent in search of independent witnesses who came back after 15 minutes and told that he had met two persons but they refused to join as witnesses. He joined HHC Roshan and HHC Kashmi Ram as witnesses. Nothing incriminating was recovered from the personal search of the accused. Thereafter search of the vehicle was conducted. Charas was recovered which weighed 2 kg. 100 grams. The weight of the opium was 1 kg. 500 grams. All the codal formalities were completed on the spot. Rukka was scribed and sent to PS Anni through HHC Kashmi Ram. Indica Car No. HR-55-CT-0914 was taken into possession vide seizure memo Ext. PW-1/L. In his cross-examination, he deposed that they have not taken the driver of the taxi along with them and left him at Anni and the vehicle was driven by their own driver. They did not take the driver of the taxi because the driver of their official vehicle was free. He was told by his superior officer that driver of the taxi may not be taken along with them for the purpose of patrolling. He denied the suggestion that at 3:00 PM on 22.6.2009 he was present in the Court of SDJM, Rampur. The distance from Rampur to Village Didi is about 66 kms. He denied the suggestion that the distance between Rampur and village Didi was 85 kms. He also denied the suggestion that the vehicle of the accused was standing at Didi Nulla near village Didi. The vehicle of the accused was got repaired by their driver by taking mechanic from Anni on the next day. He denied the suggestion that the vehicle was repaired by Ramesh mechanic and brought to the Police Station on 25.6.2009.

12. DW-1 Vir Singh deposed that he was running a shop of Karyana at Village Didi since 1998. On 22.6.2009 at about 6:30 AM, when the was going to his shop, he found one vehicle parked at a distance of 35-40 meters away from his shop. On inquiry made from the occupants of the vehicle, he came to know that the vehicle had broken down. The vehicle was bearing No. HR-55-CT-0914. All the accused persons were present in the vehicle. The accused asked him about the availability of the spare parts of the vehicle to which he told them that the

same would be available at Sainj or Nogli. Thereafter, he arranged a vehicle bearing No. HP-2A-0305 belonging to Bhupinder Negi.

13. DW-2 Krishna Devi deposed that she was staying at Riun Nulla where she has also constructed a residential house. During the month of June, 2009, no vehicle went out of order at Riun Nulla nor the police had visited there during that period. The police did not seize any charas at Riun Nulla. In her cross-examination, she admitted that she was running a tea stall on government land. There was no residential house or shops near her tea stall.

14. DW-3 Rajesh Kumar deposed that on 25 or 26th June, 2009, SHO PS Anni and his driver Hem Raj came to him and took him to Didi nulla for repair of vehicle. When he reached at the spot along with the police, Indica Car No. HR-55-CT-0914 was found there. He got that vehicle repaired and thereafter Hem Raj brought that vehicle to PS Ani.

15. DW-6 Ramesh Chand testified that he along with accused Kuldeep and Sat Pal was going to Kullu-Manali in Tata Indica Car No. HR-55-CT-0914 via Banjar. They went on wrong track from Nagan as the topography of the area was not known to them and they went up to village Didi where they came to know that they had taken the wrong track. They turned back their vehicle at village Didi but the same was broken down on 22.6.2009 at 6:30 AM. The front right side suspension arm was broken and axel boot had also come out as a result of which the vehicle did not move. In the meantime Vir Singh Shopkeeper came there and on inquiry made by them from him they came to know that the spare parts of the vehicle were available either at Sainj or at Rampur. Thereafter, Vir Singh shopkeeper arranged a Taxi for him to visit Rampur for purchasing spare parts. He purchased front suspension arm for a sum of Rs. 1950/- vide bill Ext. DW-4/A at Khaneri from one shop and axel boot vide challan Ext. DW-5/A from another shop against payment of Rs. 477/-.

16. The learned trial Court has acquitted the accused on the ground that driver Hem Raj, the material witness, who has driven the taxi No. HP-01K-0810 from Anni towards Kothi, was not examined and independent witnesses, though available were also not associated. The contraband and the Indica car were to be seized by common seizure memo. The vehicle in question was got repaired at Didi as per the version of DW-2 Krishna Devi. There is variance in the timings given by the witness who has taken the rukka to the Police Station and came back and also there is variance in the statement of PW-9 HC Pushap Dev.

17. PW-1 HHC Kashmi Ram deposed that HC Pushap Dev sent HHC Roshan Lal to bring independent witnesses but he came back after 10-15 minutes and told that he met two persons who were passing but they refused to be associated as witnesses. The place was isolated. HC Pushap Dev joined him and HHC Roshan Lal as witnesses. PW-2 HHC Roshan Lal has admitted in his cross-examination that two persons met him at a distance of about 50 meters from the spot. He did not ask their names nor brought them to the I.O. Village Kandaghar was situated at a distance of about ½ to ¾ kms from the spot. PW-9 HC Pushap Dev deposed that HHC Roshan Lal was sent in search of independent witnesses who came back after 15 minutes and told that he had met two persons but they refused to join as witnesses. Thus, it cannot be said that the police has not tried to join independent witnesses. PW-2 HHC Roshan Lal was specifically sent to bring independent witnesses. Though he met two passersby but they refused to be associated as witnesses.

18. The police has gone on patrolling duty in taxi No. HP-01K-0810 from Anni towards Kothi. The police has not taken the taxi driver on patrolling duty to maintain the secrecy. The police has taken their own driver, namely, Hem Raj. The learned trial Court has come to the wrong conclusion that Hem Raj driver was required to be examined as a witness. The fact of the matter is that all the official witnesses have deposed in unison without there being any contradiction that they had gone in taxi No. HP-01K-0810 at Riun Gaad where Indica Car No. HR-55-CT-0914 was intercepted. The accused were also apprised of their legal right to be searched either in the presence of a Magistrate or a Gazetted Officer. The contraband was

recovered. Hem Raj driver was not a material witness. It is the quality of the witnesses and not a number which should be taken into consideration by the Courts.

19. The learned trial Court has given undue weightage to the statement of DW-3 Rajesh Kumar that he has repaired the vehicle of the accused. The fact of the matter is that the vehicle was found stranded at Riun Gaad near Didi nulla on 22.6.2009. The vehicle of the accused persons, as per the statement of PW-9 HC Pushap Dev, was got repaired by their driver by taking mechanic from Anni on the next day.

20. The vehicle was taken into possession vide memo Ext. PW-1/L. It is not the requirement of law that the entire case property was to be taken into possession vide one seizure memo. The charas and opium were put in separate parcels and sealed in accordance with law vide separate seizure memos. There was no illegality in preparing separate seizure memos while taking charas, opium and car into possession. NCB form was filled in triplicate on the spot. The case property was produced before the competent officer. He resealed the same. It was deposited with MHC Anoop Kumar who sent the same to FSL Junga. The rukka was taken to the Police Station by PW-1 HHC Kashmi Ram. MHC Anoop Kumar has admitted that rukka was brought to him by PW-1 HHC Kashmi Ram on 22.6.2009.

21. The learned Advocates appearing on behalf of respondents have argued that the presence of PW-9 HC Pushap Dev on the spot is doubtful, however, there is no conclusive evidence to this effect. The rukka was taken by PW-1 HHC Kashmi Ram and he has handed over the same to MHC Anoop Kumar. The distance between the Police Station and the spot where accused were apprehended could be covered by PW-1 HHC Kashmi Ram within the time as stated by him. The prosecution witnesses are not supposed to make statements in parrot like manner. There is bound to be some contradiction with the passage of time.

22. The learned trial Court has relied upon the statement of DW-6 Ramesh Chand that he was driving the car and not accused Kuldeep. The statement of DW-6 Ramesh Chand does not inspire confidence. The version given by him that they had lost the way cannot be believed. The statements made by the official witnesses are trustworthy and inspire confidence. The Indica car was owned by accused Ramesh Chand as per Exts. PW-9/A and PW-9/C.

23. Mr. Lakshay Thakur, Advocate has also argued that there is non-compliance of Section 50 of the ND & PS Act. The Court has gone through Exts. PW-1/A, PW-1/B and PW-1/C. The accused were apprised of their legal right to be searched either in the presence of a Magistrate or a Gazetted Officer. They have consented to be searched by the police. Thus, there is no violation of Section 50 of the ND & PS Act as well.

24. Accordingly, the prosecution has conclusively proved beyond reasonable doubt the case against the accused persons under Section 18(c) of the ND & PS Act for possession of 1 kg. 500 grams of opium and under Section 20 (b) (ii)(C) of the ND & PS Act for possessing 2 kg 100 grams of charas read with Section 29 of the ND & PS Act for transporting the same.

25. The accused persons were travelling in the same Indica Car No. HR-55-CT-0914 from which the contraband was recovered. The vehicle was used for transporting opium weighing 1 kg. 500 grams and 2 kg. 100 grams of charas. They had purchased the contraband from the area they were travelling and were found in conscious possession of the same on the date when they were apprehended with Indica Car No. HR-55-CT-0914.

26. Consequently, the appeal is allowed. The judgment of the learned trial Court dated 30.4.2011 is set aside. The accused are convicted under Sections 18(c), 20(b)(ii)(C) read with Section 29 of the ND & PS Act and the Indica Car bearing registration No. HR-55-CT-0914 is liable to be confiscated under Section 60 of the Act being used for transporting opium and charas on 22.6.2009. The accused be heard on quantum of sentence on 18.7.2016. The Registry is directed to prepare and sent the production warrants to the quarter concerned. Bail bonds are cancelled.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

State of Himachal Pradesh and others .....Appellants.

Vs.

Devender Singh ......Respondent.

RSA No.: 189 of 2007
Reserved on: 16.06.2016
Date of Decision: 08.07.2016

Constitution of India, 1950- Article 299- Plaintiff was a registered potato grower- he supplied 55 bags of certified seed potato @ of Rs. 950/- per bag to defendant No. 3- potato was supplied to the growers under subsidy scheme of the Government- plaintiff is entitled to Rs. 52,250/- but this amount was not paid to him- hence, suit was filed for recovery of the amount- defendants denied the case of the plaintiff- it was asserted that potato was unloaded without any supply order- growers were requested to take back the potato but these were not taken and got rotten- 532 bags were sold and 470 bags got rotten- suit was dismissed by the trial Court- an appeal was preferred, which was allowed- held, in second appeal that receipt of 55 bags of potato seed was not disputed by the defendants- it was also not disputed that receipt was issued in favour of the plaintiff- maximum bags were sold by the defendants and money was retained- defendants had taken benefit and are liable to restore the same- they cannot take benefit of Article 299 of the Constitution of India- appeal was rightly allowed by the Appellate Court- appeal dismissed.

(Para-11 to 21)

Cases referred:

Mulamchand Vs. State of Madhya Pradesh, AIR 1968 Supreme Court 1218
State of West Bengal Vs. B.K. Mondal and sons, AIR 1962 Supreme Court 779
Union of India Vs. Sita Ram Jaiswal, AIR 1977 Supreme Court 329
K.S. Satyanarayana Vs. V.R. Narayana Rao (1999) 6 Supreme Court Cases 104 t
Sahakari Khand Udyog Mandal Ltd. Vs. Commissioner of Central Excise & Customs (2005) 3

For the appellants: Mr. V.S. Chauhan, Additional Advocate General, with Ms. Parul Negi, Deputy Advocate General.

For the respondent: Mr. Bhupender Gupta, Senior Advocate, with Mr. Janesh Gupta, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. :

By way of the present appeal, the State has challenged the judgment and decree passed by the Court of learned Additional District Judge, Shimla in Civil Appeal No. 3-R/13 of 2004/01 dated 25.02.2006 vide which, learned Appellate Court has allowed the appeal and set aside the judgment and decree passed by learned trial Court and decreed the suit of the plaintiff for recovery of Rs.52,250/- alongwith interest *pendente lite* and future @ 6% till realization.

2. This appeal was admitted on the following substantial question of law on 21.08.2008:

> "Whether the provision of Section 70 of the Indian Contract Act as discussed by the Ld. Lower Appellate Court is attracted in the facts and circumstances of this case?"

3. Brief facts necessary for the purpose of adjudication of the present case are that the plaintiff filed a suit for recovery of Rs.67,141.25/- on the grounds that the plaintiff was a registered potato grower with the Agriculture Department of Himachal Pradesh and used to sell

his produce in the market and he also used to supply the same to the Department on demand. According to him, on the instructions/orders placed by the representatives of District Agricultural Officer, Kinnaur confirmed on telephone by Shri R.S. Verma, District Agriculture Officer, Kinnaur, plaintiff supplied 55 bags of certified seed potato in the month of December, 1998 @ of Rs.950/- per bag to defendant No. 3 at Reckong Peo, District Kinnaur through challan dated 17.12.1998 from Tikkar to Reckong Peo by Truck bearing registration No. HP-51-1535, which was duly received by defendant No. 3. His further case was that the said consignment of 55 bags after being duly received was supplied by the Department to the Growers of Kinnaur District under some Government subsidy Scheme and the value of the said consignment @Rs.950 per bag for 55 bags came to Rs.52,250/-. Despite requests and reminders, the defendant No. 3 did not care to pay the said amount to the plaintiff. It was averred in the plaint that several other crowers had also sent potatoes on demand to defendant No. 3 and out of these growers, about 8 growers had been left high and dry to whom payment had not been made. In these circumstances, the suit was filed by the plaintiff for recovery of the said amount alongwith interest.

4. In the written statement, the defendants denied the case of the plaintiff. As per the defendants, defendant No. 3 never gave any supply order to the plaintiff for the supply of seed potatoes. The plaintiff prepared the challan alongwith bill in the name of defendant No. 3 from Tikkar and unloaded 55 bags of seed potatoes at Bhawanagar of Nichar Block at his own on 17.12.1998, though no supply order had been placed by defendant No. 3. Plaintiff also managed receipt for 55 bags from some grass root level officers of the same station and some other farmers of Shimla District followed the same course which was adopted by the plaintiff and unloaded potatoes at Nichar Block. Defendant No. 3 issued telegrams to those growers, who unloaded the seed potato without any supply order, to lift back their seed potato, but of no avail. This resulted in pilling up of huge quantity of 1006 bags of seed potato in Nichar Block. Out of this, 532 bags of seed potato could be sold by making all out efforts by the defendants and remaining 470 bags got rotten. It was further the case of the defendants that it had become very difficult to identify as to whose consignment was sold and whose had become rotten. In these circumstances, in order to know the factual position, an inquiry was ordered by defendant No. 3 and as per the averments made in the written statement, the decision regarding release of payment of the seed potato could be made after finalization of the said enquiry which was in progress.

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

Issue No. 1: *Whether the plaintiff is entitled to a decree for the suit amount? OPP*

Issue No. 2: *Whether the suit is not maintainable in the present form? OPD*

Issue No. 3: *Whether the suit is bad for non-joinder of necessary parties? OPD*

Issue No. 4: *Whether the suit is not within limitation? OPD*

Issue No. 5: *Whether there was no supply order/contract? If so, its effect? OPD*

Issue No. 6: *Whether the suit is bad for want of better particulars? OPD*

Issue No. 7: *Relief.*

6. The following findings were returned on the issues so framed by the learned trial Court on the basis of the pleadings of the parties:

Issue No. 1: *No.*

Issue No. 2: *Yes.*

Issue No. 3: *Yes.*

Issue No. 4:	*No.*
Issue No. 5:	*Yes.*
Issue No. 6:	*No.*
Issue No. 7:	*Suit dismissed.*

7. Learned trial Court thus dismissed the suit of the plaintiff after holding that in view of the fact that neither written orders were placed nor potatoes were received by any authorized officer at Bhawanagar, the plaintiff was not entitled to get the payment of potatoes, since for any contract to be entered with the State Government, the same has to be entered with the Governor or with the Officer authorized by the Governor in this behalf and that agreement must be in writing and unless an agreement is in writing, no enforceable agreement can be said to be in existence in between the parties. Learned trial Court also held that any contract between the State and an individual has to be in writing, which is a pre-requisite of Article 299 (1) of the Constitution of India.

8. Feeling aggrieved by the said judgment passed by the learned trial Court, the plaintiff filed an appeal. The appeal of the plaintiff was allowed by the Court of learned Additional District Judge, Shimla vide its judgment dated 25.02.2006. Learned Appellate Court held that the absence of contract or order for supply of seed potato is not sufficient to exonerate the defendants from the liability for the payment of the amount, as the defendants after sending telegrams to the plaintiff had retained the proceeds and exercised control over disposal thereof. Learned Appellate Court held that out of 1006 bags received by the plaintiff, the defendants sold 532 bags of seed potato and remaining 474 bags got rotten. The defendants did not bring any material on record to substantiate that the consignment sent by the plaintiff was not sold. It was the own case of the defendants that it was difficult to identify the ownership of the consignment. Learned Appellate Court further held that the seed potato retained by the defendants had been sold by it and, therefore, it did not lie in the mouth of defendants to assert that the plaintiff was not entitled to the payment of the price of the same. It further held that selling of part of the consignment without establishing the identity makes it evident that presumption has to be drawn that the consignment of the plaintiff was also sold by the defendants. Learned Appellate Court also held that in view of the provisions of Section 70 of the Indian Contract Act, the State was bound to make compensation to the plaintiff. Learned Appellate Court further held that the defendants had sent telegrams to many growers, namely Pradeep Ranta, Harender Chauhan, Durga Singh, Krishan Lal, Jitender, Surinder Ranta, Rajinder Paul, Keshav Ram, Purshotam Ranta, Narian Singh, Joginder Singh and Het Ram and afterwards, the defendants had made payments of the amount to S/Sh. Pradeep Ranta, Durga Singh, Krishan Lal, Jatinder, Surinder Ranta, Rajinder Paul, Kashev Ram, Purushotam Ranta, Narian Singh, Partap Singh, Joginder Singh and Het Ram as was evident from the testimony of DW-1 Sh. Sadhu Ram, District Agriculture Officer, Kinnaur. Therefore, as per the learned Appellate Court, it was evident that the defendants had accepted the receipt of consignment of the growers and as such, they were liable to make payment of the bags of seed potato supplied by the plaintiff. Accordingly, learned Appellate Court decreed the suit of the plaintiff for recovery of Rs.52,250/- alongwith interest *pendente lite* and future @ 6% till realization. These findings returned by the learned Appellate Court are under challenge by way of the present Regular Second Appeal.

9. I have heard the learned counsel for the parties and also gone through the records of the case as well as the judgments passed by both the learned Courts below.

10. Section 70 of the Indian Contract Act provides as under:

> *"**70. Obligation of person enjoying benefit of non-gratuitous act**.—Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.1 —Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously,*

and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

Illustrations

(a) A, a tradesman, leaves goods at B's house by mistake. B treats the goods as his own. He is bound to pay A for them. (a) A, a tradesman, leaves goods at B's house by mistake. B treats the goods as his own. He is bound to pay A for them."

(b) A saves B's property from fire. A is not entitled to compensation from B, if the circumstances show that he intended to act gratuitously. (b) A saves B's property from fire. A is not entitled to compensation from B, if the circumstances show that he intended to act gratuitously."

11. The factum of receipt of 55 bags of seed potato from the plaintiff is not disputed by the defendants. Case of the defendants is that the supply of the said seed bags by the plaintiff was a unilateral act and there was no order placed by the defendants to the plaintiff in this regard. It is further the case of the defendants, as is evident from the contents of the written statement that plaintiff managed receipt of said 55 bags from some grass root level officers who were at the station where said seed bags were supplied. In other words, receipt of the said seed potato bags by the defendants supplied by the plaintiff against receipt is not disputed, but as per the defendants, the receipt was issued by some grass root level officer. It is not the case of the defendants that the receipt was not issued by a Government Officer. It is further evident from the material on record especially the deposition of DW-1 that bags of potato seeds were received by defendant No. 3 not only from the plaintiff but from various other growers in the same mode and manner in which it was received from the plaintiff. In fact, it is the defendants own case that after the consignment of seed potatoes was received, it issued telegrams to the land owners to lift the same and when the same was not lifted, part of it was sold and part of it rotted. It is also apparent and clear from the records of the case that other growers similarly situated as the plaintiff have been duly compensated by the Government and they have been made payments for the supply of said seed potato by the defendants. It is also relevant to refer to the testimony of DW-1 Salu Ram who has stated that payments have been made to land owners named by him in his statement in April, 2001.

12. Therefore, here is a case where produce of the plaintiff and similarly situated land owners after receipt by the defendants was sold by it and money was received by the defendants in lieu of the sale of the same. It is defendants' own case that it was not possible to establish that produce of which land owner had been sold and produce of which land owner was destroyed on account of its getting rotten.

13. In my considered view, learned Appellate Court has rightly decreed the suit of the plaintiff in view of the provisions of Indian Contract Act. The provisions of Section 70 of the Indian Contract Act are in fact attracted in the facts and circumstances of the case, as has been rightly discussed and held by the learned lower Appellate Court.

14. Section 70 of the Contract Act envisages that where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

15. In the present case, it stands proved on record that the produce of the plaintiff was received against receipt by the defendants. No material has been produced on record by the defendants to demonstrate that 'grass root officers' who received the consignment of the plaintiff were not authorized to receive the same. Be that as it may, it is the own case of the defendants that part of the produce which was received was sold by it and the remaining part rotted down. It is also the admitted case of the defendants that many owners similarly situated as the plaintiff have been compensated by them by making payments for the seed potatoes supplied by them. In

these circumstances, in my considered view, the defendants cannot apply a different yardstick for the plaintiff. The defendants having sold the produce so received from the plaintiff and similarly situated owners are bound to compensate the plaintiff in respect thereof, especially keeping in view the fact that the defendants have already compensated other owners similarly situated as the plaintiff.

16. It has been held by the Hon'ble Supreme Court in **Mulamchand** Vs. **State of Madhya Pradesh**, AIR 1968 Supreme Court 1218 that a person whose contract is void for noncompliance with Article 299(1) of the Constitution would be entitled to compensation under Section 70 of the Contract Act if he had adduced evidence in support of his claim. The relevant paragraphs of the judgment are quoted hereinbelow:

> *"6. In our. opinion,, the reasoning adopted by the trial court and by the High Court for rejecting the claim of the appellant is not correct. It is now well-established that here a contract between the Dominion of India and a private individual is not in the form required by s. 175 (3) of the Government of India Act, 1935, it was void and could not be enforced and therefore the Union of India cannot be sued by a private individual breach of such contract (See the decision in Seth Bikhrai Jaipuria v. Union of India(1). It was stated in that case that under.s. 175(3) of the Government. of India Act, 1935, the contracts had (a) to be expressed to be made by the Governor-General, (b) to be executed on behalf of the Governor-General and (c) to be executed by offcers duly appointed in that behalf and in such manner as the Governor- General directed or authorised. The evidence in the case showed that the contracts were not expressed to be made by the Governor-General add were not executed on his behalf. It was held by this Court that the provisions of s. 175 (3) were mandatory and the contracts were therefore void and not binding on the Union of India which was not liable for damages for breach of the contracts. The same principle was reiterated by this Court in a later case-State of West Bengal v. Mls. B. K. Mondal and ,Sons(2). The principle is that the provisions of s. 175(3) of the Government of India Act, 1935 or the corresponding provisions if Art. 299 (1) of the Constitution of India are mandatory in character and the contravention of these provisions nullifies the contracts and makes them void. There is no question of estoppel Or ratification in such a case. The reason is that the provisions of section 175(3) of the Government of India Act and the corresponding 'provisions of Art. 299 (1) of the Constitution have not been enacted for the sake of mere form but, they have been enacted or safeguarding the Government against unauthorised contracts. 'he provisions are embodied in s.'175(3) of the Government of India Act and Art. 299(1) of the Constitution on the ground of public policy-on the ground of protection of general public and these formalities cannot be waived- or dispensed with. If the plea of the respondent regarding estoppel or ratification is admitted that would mean in effect the repeal of an important constitutional provision intended for the protection of the general public. that is why the plea of estoppel or ratification cannot be permitted in such a case. But if money is deposited and goods are supplied r if services are rendered in terms of the void contract, the provisions of s. 70 of the Indian Contract Act may be applicable. In other words, if the conditions imposed by s. 70 of the Indian- Con-act Act are satisfied then the provisions of that section can be invoked by the aggrieved party ,to the void contract. The first condition is that a person should lawfully do something for another person or deliver something to him; the second condition is that i doing the said thing or delivering the said thing Ike must, not intend to act gratuitously; and the third condition is that the other person for whom something is done or to whom something is delivered must enjoy the benefit thereof. If these conditions are satisfied, s. 70 imposes upon the latter person the liability to make con sensation to the former in respect of, or to restore, the thing done or delivered. The important point to notice is that in a case falling under s. 70*

the person doing something for another delivering something to another cannot sue for the specific performance of the contract, nor ask for damages for the breach the contract, for the simple reason that there is no contract between him and the other person for whom he does something to whom he delivers something. So where a claim for compensation is made by one person against another under s. 70, it is not on the basis of any subsisting contract between the parties but a different kind of obligation. The juristic basis of the obligation in such a case is not founded upon any contract or tort but upon a third category of law, namely, quasi contract or restitution. 1' Fibrosa v. Fairbairn(1) Lord Wright has stated the legal position as follows "............ any civilised system of law is bound to provide remedies for cases of that has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English Law are generally different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution."

7. In Nelson v. Larholt (2) Lord Denning has observed as follows:

"It is no longer appropriate to draw a distinction between law and equity. Principles have. now to be stated in the light of their combined effect. Nor is it necessary to canvass the niceties of the old forms of action. Remedies now depend on the substance of the right, not on whether they can be fitted into a particular framework. The right here is not peculiar to equity or contract or tort, but falls naturally within the important category of cases where the court orders restitution if the justice of the case so requires."

17. The five Judges Bench of the Hon'ble Supreme Court in **State of West Bengal** Vs. **B.K. Mondal and sons**, AIR 1962 Supreme Court 779 has held as under:

"14. It is plain that three conditions must be satisfied before this section can be invoked. The first condition is that a person should lawfully do something for another person or deliver something to him. The second condition is that in doing the said thing or delivering the said thing he must not intend to act gratuitously; and the third is that the other person for whom something is done or to whom something is delivered must enjoy the benefit thereof. When these conditions are satisfied s. 70 imposes upon the latter person, the liability to make compensation to the former in respect of or to restore, the thing so done or delivered. In appreciating the scope and effect of the provisions of this section it would be useful to illustrate how this section it would operate. If a person delivers something to another it would be open to the latter person to refuse to accept the thing or to return it; in that case s.70 would not come in to operation. Similarly, if a person does something for another it would be open to the latter person not to accept what has been done by the former; in that case again s. 70 would not apply. In other words, the person said to be made liable under s. 70 always has the option not to accept the thing or to return it. It is only where he voluntarily accepts the thing or enjoys the work done that the liability under s.70 arises.

16. It is true that s. 70 requires that a person should lawfully do something or lawfully deliver something to another. The word "lawfully" is not a surplus age and must be treated as an essential part of the requirement of s. 70. What then does the word "lawfully" in s. 70 denote? Mr. Sen contends that the word "lawfully" in s. 70 must be read in the light of s. 23 of the said Act; and he argues that a thing cannot be said to have been done lawfully if the doing of it is forbidden by law. However, even if this test is applied it is not possible to hold that the delivery of a thing or a doing of a thing the acceptance and enjoyment of which gives rise to a claim for compensation under s. 70 is forbidden by s.

175(3) of the Act; and so the interpretation of the word "lawfully" suggested by Mr. Sen does not show that s.70 cannot be applied to the facts in the present case.

17. Another argument has been placed before us on the strength of the word "lawfully" and that is based upon the observations of Mr. Justice Straight in Chedi Lal v. Bhagwan Dass (1). Dealing with the construction of s. 70 Straight, J., observed: "I presume that the legislature intended something when it used the word "lawfully" and that it had in contemplation cases in which a person held such a relation to another as either directly to create or by implication reasonably to justify an inference that by some act done for another person the party doing the act was entitled to look for compensation for it to the person for whom it was done." It is urged that in the light of this test it cannot be said that the respondent held such a relation to the appellant as to be able to claim compensation from the appellant. With respect, we are not satisfied that the test laid down by Straight, J., can be said to be justified by the terms of s. 70. It is of course true that between the person claiming compensation and person against whom it is claimed some lawful relationship must subsist, for that is the implication of the use of the word "lawfully" in s. 70; but the said lawful relationship arises not because the party claiming compensation has done something for the party against whom the compensation is claimed but because what has been done by the former has been accepted and enjoyed by the latter. It is only when the latter accepts and enjoys what is done by the former that a lawful relationship arises between the two and it is the existence of the said lawful relationship which gives rise to the claim for compensation. This aspect of the matter has not been properly brought into the picture when Straight, J., laid down the test on which Mr. Sen's argument is based. If the said test is literally applied then it is open to the comment that if one person is entitled by reason of the relationship as therein contemplated to receive compensation from the other s. 70 would be hardly necessary. Therefore, in our opinion, all that the word "lawfully" in the context indicates is that after something is delivered or something is done by one person for another and that thing is accepted and enjoyed by the latter, a lawful relationship is born between the two which under the provisions of s. 70 gives rise to a claim for compensation."

18. It has been reiterated by the Hon'ble Supreme Court in **Union of India** Vs. **Sita Ram Jaiswal**, AIR 1977 Supreme Court 329 that in order to attract the provisions of Section 70 of the Act, it has to be proved that the goods are delivered lawfully or anything has to be done for another person lawfully, the thing done or the goods delivered is so done or delivered "not intending to do so gratuitously" and the person to whom the goods are delivered "enjoys the benefit thereof."

19. The Hon'ble Supreme Court has further held in **K.S. Satyanarayana** Vs. **V.R. Narayana Rao** (1999) 6 Supreme Court Cases 104 that where a person got money not intended to receive it gratuitously, then that person is liable to return the same.

20. In **Sahakari Khand Udyog Mandal Ltd.** Vs. **Commissioner of Central Excise & Customs** (2005) 3 Supreme Court Cases 738, it has been held by the Hon'ble Supreme Court that no person can be allowed to enrich himself inequitably at the expense of another and that a right of recovery under the doctrine of "unjust enrichment" arises where retention of a benefit is considered contrary to justice or against equity.

21. In my considered view, in view of discussion held above, the provisions of Section 70 of the Indian Contract Act, 1872 are attracted in the facts and circumstances of the case and the findings returned in this regard by the learned Appellate Court are in consonance with the

law as declared by the Hon'ble Supreme Court of India as applied on the facts of the present case and I agree with the same. The substantial question of law is answered accordingly.

22. Thus, there is neither any perversity nor any infirmity with the judgment and decree passed by the learned first Appellate Court and the same is accordingly confirmed and the present appeal being devoid of any merit 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

Raj Kapoor alias Raj and others ……..Respondents

Cr. Appeal No. 105/2012
Reserved on: July 7, 2016
Decided on: July 8, 2016

N.D.P.S. Act, 1985- Section 20 and 29- Scorpio Jeep was signaled to stop- police asked for the documents of the jeep on which occupants of the jeep became perplexed making police suspicious – one blanket bag and a carry bag were found in the boot compartment of the jeep- person sitting in the rear seat was carrying a bag in his lap- bags were checked and 4.5 kg charas was recovered – accused were tried and acquitted by the trial Court- held, in appeal that accused were apprehended at 6:30 A.M at a secluded place- police waited for independent witness but when no one came, search was conducted in the presence of official witnesses- statements of official witnesses are trustworthy and inspire confidence- accused were travelling in the jeep from which contraband was recovered- they knew each other – prosecution had proved beyond reasonable doubt that contraband was recovered from the conscious and exclusive possession of the accused- appeal allowed and accused convicted of the commission of offences punishable under Sections 20 and 29 of N.D.P.S. Act. (Para-14 to 19)

Cases referred:

Karamjit Singh vs. State (Delhi Administration), AIR 2003 SC 1311
State of H.P. vrs. Mehboon Khan and analogous matters, Latest HLJ 2014 (HP) (FB) 900

For the appellant : Mr. P.M. Negi, Deputy Advocate General
For the respondents : Mr. Ajay Sharma and Mr. Vishwa Bhushan, Advocates.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

The State has come in appeal against Judgment dated 28.11.2011 rendered by the learned Special Judge, Fast Track Court, Kullu, HP in Sessions Trial No. 21 of 2011, whereby respondents-accused (hereinafter referred to as 'accused' for convenience sake), who were charged with and tried for offence under Sections 20 and 29 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'Act' for convenience sake), have been acquitted by the learned trial Court.

2. Prosecution case, in a nutshell, is that on 2.3.2011 at 6.30 AM, Incharge PP Jari Dheeraj Singh was present at Suma Chalon in connection with patrolling and *Nakabandi* duty. In the meantime, a Scorpio Jeep having registration No. HR-18E-0014 green in colour came from

Manikaran side. ASI Dheeraj Singh signalled the jeep to stop. Police asked for the documents of jeep. Occupants of the vehicle became perplexed and were reluctant to show the documents. Police suspected that the accused might be carrying some stolen article in the jeep. Driver of the jeep disclosed his name as Nazar Khan, person sitting beside driver disclosed his name as Sahil and third accused who was sitting in the rear seat disclosed his name as Raj Kapoor. Police found one blanket bag and a carry bag in the boot compartment of the jeep. Police noticed that accused sitting in the rear seat was carrying a carry bag on his lap. Occupants of jeep could not give a satisfactory answer to the query raised by the police. Police waited for 15 minutes for some passersby or for another vehicle so that independent witnesses could be associated. The place was isolated. No vehicle or inhabitant crossed at that point of time. Two officials of *Naka* party were associated as witnesses. Police personnel gave their search to the accused. Thereafter they conducted search of the vehicle. Carry bag in the lap of Raj Kapoor was checked. It contained clothes i.e. jean pants, T-shirt and a shirt. Under these clothes, packets, yellow, khaki and soil coloured were found. These packets were opened. Black coloured material wrapped in transparent polythene papers, rectangular in shape was recovered. It was found to be *Charas*. It weighed 4.5 kg. *Charas* and clothes were put back in carry bag and carry bag was wrapped in a piece of cloth. *Pullinda* was sealed with eight impressions of seal 'H'. Accused Raj Kapoor disclosed to the police that 2 kg *Charas* belonged to Nazar Khan, 1.5 kg *Charas* belonged to Sahil and rest 1 kg *Charas* was his own. IO sent *Rukka* to the Police Station through Constable Kuldeep Kumar on the basis of which FIR was registered. Case property was produced before SHO Sher Singh by the IO, who resealed the parcel with three seals of seal impression 'T'. Case property was deposited in the Malkhana. Case property was sent to FSL Junga for chemical analysis. Investigation was completed. Challan was put in the Court after completing all the codal formalities.

3. Prosecution has examined as many as eight witnesses to prove its case against the accused. Accused were also examined under Section 313 CrPC. They denied the prosecution case in its entirety. Their specific defence was that they had an altercation with the police at Jari Bazaar during traffic checking. Police took them to Police Station on 1.3.2011 and obtained their signatures on blank papers. Learned trial Court acquitted all the accused. Hence, this appeal by the State.

4. Mr. P.M. Negi, Deputy Advocate General, has vehemently argued that the prosecution has proved its case against the accused.

5. Mr. Ajay Sharma and Mr. Vishwa Bhushan, Advocates, have supported Judgment dated 28.11.2011.

6. We have heard the learned counsel for the parties and also gone through the Judgment and record carefully.

7. Rajnish Kumar (PW-1) testified that he was posted at PS Sadar, Kullu since February, 2010. On 3.3.2011, MHC Ram Krishan handed over one parcel which was sealed with 8 impressions of seal 'H' and resealed with three impressions of 'T' allegedly containing 4.5 kg *Charas* alongwith docket, copy of FIR, recovy memo, sample seals 'H' and 'T' etc. vide RC No. 68/2011 with the direction to deposit the same at FSL Junga. He deposited the same at FSL Junga on 4.3.2011 and obtained receipt from dealing hand and on his return handed over the receipt to MHC.

8. HC Brij Bhushan (PW-3) testified that on 2.3.2011, at 6.30 AM he alongwith Constable Pritam, Constable Kuldeep Kumar and Constable Munish Kumar was present at village Suma Chalon in connection with *Nakabandi* under the supervision of ASI Dheeraj Singh. In the meantime, one vehicle came from Manikaran side. It was signalled to stop. It was bearing registration No. HR-18E-0014. Three persons were travelling in the jeep. One person was sitting alongwith driver on the front seat and third person was sitting behind the driver. Driver was asked to produce the documents of the jeep. On this the other occupants of the vehicle got perplexed. Driver was reluctant to show the documents. On checking, police found that person

sitting on the back seat was having a bag in his lap. A blanket bag in the boot compartment with carry bag was also found. The spot at Suma Chalon was isolated. There was no residential locality near the spot. No vehicle passed through that place. ASI waited for 15 minutes and when he found no independent witnesses, he associated Constable Pritam and him as witnesses. Bag, which was in the lap of accused Raj Kapoor was checked. Raj Kapoor disclosed that articles inside the bag belonged to him and two other accused Nazar Khan and Sahil. Under the clothes, some packets, yellow, khaki and soil coloured were found. These were opened. They contained *Charas*. It weighed 4.5 Kg. Raj Kapoor disclosed that 2 kg *Charas* belonged to Nazar Khan, 1.5 kg *Charas* belonged to Sahil and the remaining 1 kg *Charas* belonged to him. *Charas* was put back in the packets and packets were put in same carry bag alongwith clothes. *Pullinda* was sealed with 8 impressions of seal 'H'. NCB-I form in triplicate was filled in. Sample of seal was taken on pieces of cloth and one of such samples was Ext. PW-3/B. Seal after use was entrusted to him. Samples of seal and parcel were signed by him, constable Pritam Singh and accused. The *Charas*, vehicle alongwith documents etc. were taken into possession by the police vide memo Ext. PW-3/C. IO prepared *Rukka* and sent the same through Constable Kuldeep to Police Station. Site plan was prepared. In his cross-examination, he deposed that distance of spot from PP Jari was about 1 km. They reached the spot within half an hour. No vehicle crossed through the road during that half an hour. No person was found walking on the road between 5 to 5.30 AM. Village Dhunkra was 200 metres ahread from PP Jari. There were about 8-10 houses in village Dhunkra within the periphery of 40-50 metres. Houses were situate on both the sides of the road. Village Suma Ropa was about 2 kms from Dhunkra. He admitted that police post was just outside the gate of Malana Project Gate which was about 1 km from Jari Bazaar. No bus or truck passed through the spot in between 5.30 to 6.30 AM. He denied the suggestion that the accused were stopped by the police on 1.3.2011 at Jari Bazaar.

9. Ram Krishan (PW-4) deposed that on 2.3.2011, Inspector-SHO Sher Singh deposited one *Pullinda* which was sealed with eight seals of 'H' and three seals of 'T' allegedly containing 4.5 kg *Charas* alongwith NCB form in triplicate, sample of seals. *Pullinda* was handed over to him at 6.20 PM. He deposited the *Pullinda* in Malkhana after making entry at Sr. No. 15 of the Malkhana Register. On 3.3.2011, he handed over *Pullinda* to Constable Rajnish Kumar vide RC No. 68 of 2011, Ext. PW-4/B alongwith docket Ext. PW-4/C, NCB-I form in triplicate, samples of seals 'H' and 'T', copy of FIR and recovery memo with the direction to deposit the same at FSL Junga. He filled in relevant columns of NCB form Ext. PW-4/B. Constable Rajnish Kumar, on his return handed over receipt from FSL Junga to him.

10. SHO Sher Singh (PW-5) testified that on 2.3.2011, ASI Dheeraj Singh sent *Rukka* Ext. PW-5/A through Constable Kuldeep on the basis of which he registered FIR Ext. PW-5/B. on the same day, ASI Dheeraj Singh produced case property related to the case before him alongwith accused. He resealed the *Pullinda* with three seals of impression 'T'. He also took samples of seal 'T' on separate pieces of cloth and one such sample is Ext. PW-5/C.

11. Constable Kuldeep Singh (PW-7) testified that on 2.3.2011 at 6.30 AM, he alongwith HC Brij Bhushan, Prtam Singh, Munish Kumar under the supervision of ASI Dheeraj Singh was present at Suma Chalon in connection with *Nakabandi* when a green coloured Scorpio baring registration No. HR-18E-0014 came from Manikaran side. ASI Dheeraj signalled the vehicle to stop. He asked driver to show the documents. Occupants of the jeep got perplexed. Contraband was recovered from the bag which was carried by Raj Kapoor. All the codal formalities were completed at the spot. *Charas* weighed 4.5 kg. *Rukka* Ext. PW-5/A was prepared by ASI Dheeraj and handed over to him. He took the *Rukka* to MHC Police Station, Kullu. In his cross-examination, by the learned defence Counsel appearing on behalf of accused Raj Kapoor, he deposed that Suma Chalon was about 1 km from PP Jari. In between PP Jari and Suma Chalon, one village Dhunkra was situate having 7-8 houses and one restaurant namely Sanjha Chula, which was about 300 metres away from PP Jari. He admitted that Sanjha Chula was a big hotel. He also admitted that there was a gate in said hotel, where security personnel remained posted. Suma Chalon was about 700 metres from Sanjha Chula. He denied the suggestion that

Suma Ropa was about 200 metres from Suma Chalon. Volunteered that it was about 1 km away from Suma Chalon. No vehicle crossed till the time, *Rukka* was handed over to him. He admitted that IO did not send any person towards Suma Ropa or Sanjha Chula side for arranging the independent witnesses. In his cross-examination by the learned defence Counsel for accused Nos. 2 and 3, he admitted that many people visited old Shiv temple Manikaran on the *Shivratri* festival.

12. ASI Dheeraj Singh (PW-8) deposed the manner in which vehicle was intercepted. Vehicle was searched. Contraband was recovered. All the codal formalities were completed at the spot. He filled in NCB form and prepared *Rukka*. *Rukka* was sent to Police Station, on the basis of which FIR was registered. He also prepared site plan. He produced the case property before SHO for resealing of parcel. SHO resealed the parcel with his own seal. In his cross-examination, he has admitted that it was *Shivratri* on that day and flow of traffic was heavy. People used to visit old Shiv temple at Manikaran. He admitted that he did not send any official to search for independent witnesses. However, fact of the matter is that he waited for 15 minutes. Sanjha Chula was about 700 metres from Suma Chalon. The walking distance from Sanjha Chula to Suma Chalon was about 10-15 minutes. He admitted that village Dhunkra was situate in between Sanjha chula and PP Jari having residential abadi on both side of the road. Village Sumo Ropa was about 1 km from Suma Chalon. He admitted that Suma Ropa was thickly populated having NHPC stores where security personnel always remained deputed.

13. Brij Bhushan, PW-3, in his examination-in-chief has proved that spot Suma Chalon was isolated place and there was no residential locality near the spot. In his cross-examination, he has admitted that the distance of spot from PP Jari was 1 km and no vehicle crossed the road during that half an hour. One village Dhunkra was 1 km from PP Jari. There were 8-10 houses in the village Dhunkra situate on both sides of the road. Suma Ropa was 2 kms from Suma Chalon. Constable Kuldeep Singh (PW-7) also deposed that Suma Chalon was about 1 km from PP Jari. In between PP Jari and Suma Chalon, one village Dhunkra was situate having 7-8 houses and one restaurant namely Sanjha Chula, which was about 300 metres away from PP Jari. He admitted that Suma Chalon was about 700 metres from Sanjha Chula. Dheeraj Singh (PW-8) though admitted that a number of people crossed Sanjha Chula on that day. He did not send any officials to nearby locality to bring independent witnesses. However, fact of the matter is that he has waited for 15 minutes for independent witnesses. Sanjha Chula was 700-800 metres from Suma Chalon. Walking distance from Sanjha Chula to Suma Chalon was about 10-15 minutes. He also admitted that village Dhunkra was situate in between Sanjha chula and PP Jari having residential abadi on both side of the road.

14. Accused were apprehended at 6.30 AM in the morning hours on 2.3.2011. It was dark at that time. Place where accused were apprehended, was isolated. Police has waited for 15 minutes for the independent witnesses. Since independent witnesses were not available, official witnesses were joined as witnesses. Distance of Sanjha Chula and PP Jari was 1 km. Village Dhunkra and restaurant Sanjha Chula were also not in the close proximity from the place where accused were apprehended while travelling in jeep.

15. Statements of official witnesses are trustworthy and inspire confidence. Their lordships of the Hon'ble Supreme Court in the case of ***Karamjit Singh vs. State (Delhi Administration),*** reported in ***AIR 2003 SC 1311,*** have held that there is no principle of law that without corroboration by independent witnesses their testimony cannot be relied upon. Presumption that person acts honestly applies as much in favour of police personnel as of other persons. It has been held as follows:

> " 8. Shri Sinha, learned senior counsel for the appellant, has vehemently urged that all the witnesses of recovery examined by the prosecution are police personnel and in absence of any public witness, their testimony alone should not be held sufficient for sustaining the conviction of the appellant. In our opinion the contention raised is too broadly stated and cannot be accepted. The

> testimony of police personnel should be treated in the same manner as testimony of any other witness and there is no principle of law that without corroboration by independent witnesses their testimony cannot be relied upon. The presumption that a person acts honestly applies as much in favour of police personnel as of other persons and it is not a proper judicial approach to distrust and suspect them without good grounds. It will all depend upon the facts and circumstances of each case and no principle of general application can be laid down. PW11 Pratap Singh has clearly stated in the opening part of his examination-in-chief that ACP Shakti Singh asked some public witnesses to accompany them but they showed their unwillingness. PW10 Rajinder Prasad, SI has given similar statement and has deposed that despite their best efforts no one from public was willing to join the raiding party due to the fear of the terrorists. Exactly similar statement has been given by PW9 R.D. Pandey. We should not forget that the incident took place in November 1990, when terrorism was at its peak in Punjab and neighbouring areas. The ground realities cannot be lost sight of that even in normal circumstances members of public are very reluctant to accompany a police party which is going to arrest a criminal or is embarking upon search of some premises. At the time when the terrorism was at its peak, it is quite natural for members of public to have avoided getting involved in a police operation for search or arrest of a person having links with terrorists. It is noteworthy that during the course of the cross- examination of the witness the defence did not even give any suggestion as to why they were falsely deposing against the appellant. There is absolutely no material or evidence on record to show that the prosecution witnesses had any reason to falsely implicate the appellant who was none else but a colleague of theirs being a member of the same police force. Therefore, the contention raised by Shri Sinha that on account of non-examination of a public witness, the testimony of the prosecution witnesses who are police personnel, should not be relied upon has hardly any substance and cannot be accepted."

16. Accused were travelling in the same jeep, from which contraband was recovered. They have hatched criminal conspiracy to buy *Charas* from one area and to transport the same to outside State. It is not the case of the accused that they were not known to each other. Rather, Raj Kapoor (accused) has, during the course of investigation stated that 2 kg *Charas* belonged to Nazar Khan, 1.5 kg *Charas* belonged to Sahil and rest 1 kg was his own.

17. Mr. Ajay Sharma and Mr. Vishwa Bhushan, Advocates, have argued that a number of vehicles passed through. Court can take judicial note of the fact that persons are generally not agreeable to become witnesses since everybody is in a hurry. Defence version that they were falsely implicated due to altercation at Jari Bazaar, can not be believed. Police has completed all the codal formalities at the spot. Contraband was produced before competent officer. He resealed the same. It was sent to FSL. Report of FSL is Ext. PW-5/D. Contraband was found to be *Charas*.

18. Learned trial Court has erred in law by relying upon judgment in case of Sunil Kumar v. State of H.P. (Latest HLJ 2010 (HP) 207) as the same has been overruled by this Court in the case of ***State of H.P. vrs. Mehboon Khan and analogous matters,*** reported in ***Latest HLJ 2014 (HP) (FB) 900.*** The Full Bench of this Court has categorically held that there is no legal requirement of the presence of particular percentage of resin to be there in the sample and the presence of the resin in purified or crude form is sufficient to hold that the sample was that of *Charas*. It has been held as follows:

> "………….The separated resin is cannabis resin not only when it is in 'purified' form, but also when in 'crude' form or still mixed with other parts of the plant. Therefore, the resin mixed with other parts of the plant i.e. in 'crude' form is also charas within the meaning of the Convention and the Legislature in its wisdom

has never intended to exclude the weight of the mixture i.e. other parts of the plant in the resin unless or until such mixture proves to be some other neutral substance and not that of other parts of the cannabis plant. Once the expert expressed the opinion that after conducting the required tests, he found the resin present in the stuff and as charas is a resinous mass and after conducting tests if in the opinion of the expert, the entire mass is a sample of charas, no fault can be found with the opinion so expressed by the expert nor would it be appropriate to embark upon the admissibility of the report on any ground, including non-mentioning of the percentage of tetrahydrocannabinol or resin contents in the sample…………

f. We are also not in agreement with the findings recorded by the Division Bench in Sunil's case that " mere presence of tetrahydrocannabinol and cystolithic hair without there being any mention of the percentage of tetrahydrocannabinol in a sample of charas is not an indicator of the entire stuff analyzed to be charas" for the reason that the statute does not insist for the presence of percentage in the stuff of charas and mere presence of tetrahydrocannabinol along with cystolithic hair in a sample stuff is an indicator of the same being the resin of cannabis plant because the cystolithic hair are present only in the cannabis plant. When after observing the presence of tetrahydrocannabinol and cystolithic hair, the expert arrives at a conclusion that the sample contains the resin contents, it is more than sufficient to hold that the sample is of charas and the view so expressed by the expert normally should be honoured and not called into question. Of course, neutral material which is not obtained from cannabis plant cannot be treated as resin of the cannabis plants. The resin rather must have been obtained from the cannabis plants may be in 'crude' form or 'purified' form. In common parlance charas is a hand made drug made from extract of cannabis plant. Therefore, any mixture with or without any neutral material of any of the forms of cannabis is to be considered as a contraband article. No concentration and percentage of resin is prescribed for 'charas' under the Act.."

19. Prosecution has proved beyond reasonable doubt that the contraband was recovered from the conscious and exclusive possession of the accused.

20. Accordingly, the appeal is allowed. Judgment dated 28.11.2011 rendered by the learned Special Judge, Fast Track Court, Kullu, HP in Sessions Trial No. 21 of 2011 is set aside. The accused are convicted for offences punishable under Sections 20 and 29 of the Act. Accused be produced to be heard on quantum of sentence on 18.7.2016. Bail bonds of accused are cancelled.

21. Registry is directed to prepare and send the production warrant to the quarter concerned.

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

Bidhi Chand …….Petitioner

Versus

Vinod Kumar and another ……Respondents

Cr. Revision No. 109 of 2008

Reserved on : 04.06.2016

Decided on : 11.07.2016.

Code of Criminal Procedure, 1973- Section 391- An application was filed to bring on record the fact that petitioner had issued number of cheques including cheque in question in furtherance of agreement which was relied upon in the subsequent complaint- petitioner wanted to place on record complaint and agreement filed by the respondent in subsequent case, which was rejected – held, that no suggestion was given to the witnesses regarding issuance of cheque for reasons other than those stated in the complaint- additional evidence is not necessary to decide the present case- cheques are not the subject matter of complaint proposed to be placed on record as an additional evidence- additional evidence can not be led to substitute the evidence which has already been led - in absence of any defence or plea additional evidence could not have been led - application was rightly dismissed by the trial Court. (Para- 7 to 9)

Cases referred:
John K. Abraham versus Simon C. Abraham and another, (2014), 2 SCC 236
Anil Hada Versus Indian Acrylic Limited, AIR 2000 SC 145

For the petitioner : Mr.N.K.Thakur Senior, Advocate, with Ms.Jamuna, Advocate.
For the respondent No.1: Mr. Ajay Sharma, Advocate.
For the respondent No.2: Mr. Pankaj Negi, Deputy Advocate General.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge

Petitioner has been convicted by trial court under Section 138 of the Negotiable Instruments Act for dishonouring two cheques amounting to Rs.10,000/- each and has been sentenced to pay fine of Rs.25,000/- and in case of default in payment of fine, to undergo simple imprisonment for a period of four months with further directions that on realizing of fine amount an amount of Rs.20,000/- will be paid as compensation to the complainant.

2. Judgment passed by trial Court has been affirmed by learned Sessions Judge by dismissing appeal alongwith application filed by petitioner under Section 391 Cr.P.C. for leading additional evidence. Aggrieved by impugned judgment, present revision petition has been preferred.

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

4. Learned counsel for petitioner has submitted that respondent-complainant has failed to prove on record requirement under law in order to draw presumption under Section 118 read with Section 139 of Negotiable Instruments Act. He has relied upon judgment passed by Hon'ble Supreme Court in Case ***John K. Abraham versus Simon C. Abraham and another, reported in (2014), 2 Supreme Court Cases 236***. Para of the judgment relied upon is being reproduced here-in-below:-

> "9. *It has to be stated that in order to draw the presumption under Section 118 read along with 139 of the Negotiable Instruments Act, the burden was heavily upon the complainant to have shown that he had required funds for having advanced the money to the accused; that the issuance of the cheque in support of the said payment advanced was true and that the accused was bound to make the payment as had been agreed while issuing the cheque in favour of the complainant".*

5. Another issue raised by petitioner is that respondent-complainant has filed another complaint subsequent to present complaint stating therein that petitioner had issued number of cheques including cheques in question in present case in furtherance to an agreement arrived at between the parties and said the agreement is being relied upon by respondent-complainant in subsequent complaint whereas in present complaint, respondent-complainant

has stated that cheques in question were issued against payment of amount credited to petitioner. Petitioner had filed an application under Section 391 Cr.P.C. for leading additional evidence before learned Sessions Judge to place complaint and agreement filed by respondent in subsequent case on record in the interest of justice. However, learned Sessions Judge committing a mistake, has rejected said application without considering the fact that additional evidence proposed to be led was not in knowledge of petitioner as same was received by petitioner with summon of another case served upon him subsequent to 05.08.2006 i.e. date of decision rendered by trial Court in present case. Date of filing of another complaint proposed to be placed on record as additional evidence is 04.09.2006.

6. Learned counsel for respondent-complainant has contended that there is presumption under Section 139 of

Negotiable Instruments Act in favour of respondent-complainant. Petitioner-accused has not rebutted the same by leading any evidence. He has relied upon judgment passed by Hon'ble Supreme Court in case ***Anil Hada Versus Indian Acrylic Limited, reported in AIR 2000 SC 145*** stating that it was open to petitioner to adduce evidence to rebut said presumption but failure on the part of petitioner to lead any evidence to rebut presumption does not give any right to him to lead additional evidence. He has stated that all essential ingredients as required under law have been proved by and on behalf of the respondent-complainant including sending a registered letter/notice on same address of accused which has been mentioned by him in present petition. He has argued that respondent-complainant has led cogent and reliable evidence on record in his favour, whereas, petitioner has not rebutted the same by choosing not to lead any evidence.

7. From perusal of evidence on record, there is no likelihood of failure of justice in deciding present case without considering the additional evidence proposed to be placed on record. In absence of any evidence led during trial and also without any plea and suggestion to witnesses on behalf of petitioner during trial regarding issuance of cheques for reasons other than stated in complaint, petitioner is not entitled to lead proposed additional evidence. Additional evidence proposed to be led is not necessary to decide present case. Cheques in present case are not subject matter of complaint proposed to be placed on record as additional evidence. Moreover, additional evidence is to be led to substantiate evidence already placed on record or stand taken in defence but in present case, there is no defence taken or evidence led by petitioner during trial as is proposed to be led in additional evidence. The petitioner is proposing to lead evidence on issue which was never his defence or even part of defence.

8. Contention of petitioner that documents supposed to be placed on record were not in his knowledge prior to receiving summon in subsequent complaint is not true as agreement proposed to be placed on record as additional evidence is dated 29.05.2004 which is duly signed by petitioner and cheques mentioned in said agreement are also issued by petitioner. Present complaint was filed on 10.05.2005 and was decided on 05.08.2006. Despite knowledge of agreement dated 29.05.2004 petitioner had neither referred said agreement in defence nor has placed the same on record. Petitioner has not taken any defence nor has any question/suggestion been put to respondent-complainant that cheques in question were issued in pursuance to some agreement. Even in statement of petitioner recorded under Section 313 Cr. P.C., petitioner has simply stated that he was innocent and did not want to lead evidence in defence. Petitioner is not entitled to invoke provisions of Section 391 Cr.P.C. to lead additional evidence in his favour. Findings of learned Sessions Judge, on this issue does not warrant interference.

9. In instant case amount involved is not so big so as to necessitate inviting evidence for proving availability of funds with respondent-complainant for crediting the said amount to petitioner. When amount of cheque is possible to be advanced in normal circumstances and no defence regarding capability of respondent-complainant to pay amount has been set up and proved, ratio of judgment in John K. Abraham case referred supra is not applicable.

10. Respondent-complainant has examined himself as PW-1 and Ramesh Sharma, Senior Assistant, Punjab National Bank, Bharari as PW-2 to prove his case. All necessary ingredients required under Section 138 of Negotiable Instruments Act have been duly proved on record by leading unimpeachable evidence. In cross-examination, complainant had admitted that there are other 5-6 cheques issued by petitioner which were due. Defence taken in cross-examination is that respondent-complainant had received cheque from petitioner by deceiving him which suggestion has been denied by respondent-complainant. Respondent-complainant has also admitted that he was in possession of other cheques issued by petitioner which were of same series. Respondent-complainant has duly proved cheques Ex. C-1 and C-3, Memo of Bank Ex. C-2 and C-4, Notice Ex. C-5, Postal Receipts Ex. C-6 and statement of Accounts CW-2/A in accordance with law. There is no material on record rebutting evidence produced by respondent-complainant.

11. In view of above discussions, revision petition being devoid of merit warrants no interference under revisional jurisdiction of this Court and therefore revision petition is dismissed and judgments passed lower Courts are upheld. Rs.20,000/- out of fine amount of Rs.25,000/- deposited by petitioner in the Court of learned JMIC, Barsar be remitted to Bank Account of respondent-complainant alongwith proportionate interest, if any, accrued thereupon after expiry of 90 days from today on furnishing of Bank Account Number by respondent-complainant. Remaining amount be dealt with as fine recovered in accordance with relevant provisions. Copy of Judgment alongwith entire record of trial Court as well as First Appellate Court be sent forthwith.

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

Chajju Ram ...Appellant/plaintiff.
Versus
Shamma (deceased) through LRs ...Respondent/Defendant.

RSA No. 271 of 2006.
Reserved on : 23.06.2016.
Date of decision: 11/07/2016

Specific Relief Act, 1963- Section 34- Plaintiff filed a Civil Suit for declaration, injunction and confirmation of possession pleading that they are owners in possession of the suit land and defendant had wrongly recorded himself in the column of possession – the suit was opposed by the defendant by taking a plea of adverse possession - the suit was dismissed by the trial court - an appeal was preferred which was also dismissed- held, in second appeal predecessor-in-interest of the plaintiffs was recorded as owner- an entry was made in the copy of Jamabandi in the year 1993-94 that defendant was in possession with the consent of the plaintiffs- mere possession of the defendant in such circumstances is not sufficient to establish adverse possession of the defendant - appeal partly allowed. (Para 7-9).

For the appellants: Mr. Ajay Kumar, Sr. Advocate with Mr. Dheeraj K. Vashishta, Advocate.
For the respondents: Mr. B.C.Verma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J:

The instant appeal stands directed against the impugned judgement and decree of the learned Additional District Judge, Fast Track Court, Shimla, Himachal Pradesh, whereby he affirmed the rendition of the learned Sub Judge 1st Class, Chopal. The plaintiff chajju Ram

standing aggrieved by the concurrently recorded renditions against him by both the learned Courts below concerts through the instant appeal constituted before this Court, to reverse the judgements and decrees of both the Courts below.

2. The facts necessary for rendering a decision on the instant appeal are that a suit for declaration, perpetual injunction and confirmation of possession was filed by the plaintiffs on the allegations that they are owners in possession of land comprised in Khewat No. 153 min, Khasra No. 5018/41, 5018/50 and 5018/126 measuring 33 bighas 1 biswas situated in Mauja Khadar, Pargana Hamal, Tehsil Chopal, being the successor in interest of original owner late Shri Ramsa. In the month of July, 1996 the defendant began to interfere in the land described in Khasra No. 5018/50/2 measuring 4 bighas 10 biswas. It was alleged that the defendant with the active connivance of the Patwari had managed to get himself entered in the column of possession as Khud Kashat. It is alleged that the said entry is illegal, void and not binding on them. It is further alleged that the entries in column No.4 i.e. column of possession and in column No. 7 i.e. column of Lagaan (*Bila Lagaan Bawaza Razamandi*) in the jamabandi for the year 1993-94 pertaining to the suit land have not only cast cloud on the rights of the plaintiffs but the same are serious invasion in their right, title and interest qua suit land.

3. The suit of the plaintiffs was resisted by defendant by raising preliminary objections qua locus standi, estoppal, bad for non-joinder and mis-joinder of necessary parties, limitation, valuation, non-joinder and mis joinder of cause of action. On merits it was pleaded that the defendant has been in peaceful uninterrupted possession of the suit land since 1975-76 to the knowledge of one and all including plaintiffs and as such to have become its owner by afflux of time. The entry in column of possession is correct and there is no invasion in the rights of the plaintiffs.

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

1. Whether the plaintiffs are entitled for the relief of declaration, as prayed for? OPP.

2. Whether the plaintiffs are entitled for relief of injunction permanent prohibitory, as prayed for OPD.

3. Whether the plaintiffs are entitled for the relief of confirmation of possession, as prayed for? OPP.

4. Whether the plaintiffs have no locus standi to file the suit? OPD

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

6. Whether the suit is barred by limitation? OPD.

7. Whether the suit is bad for non joinder and mis joinder of causes of action? OPD.

8. Whether the suit is not properly valued for the purpose of Court fee and jurisdiction? OPD.

9. Whether the suit lacks better and material particulars? OPD

9(a) Whether the defendant has become owner of the suit land by way of adverse possession? OPD.

10. Relief.

5. On an appraisal of the evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiffs besides the learned First Appellate Court dismissed the appeal preferred therefrom before it by the plaintiffs.

6. Now the plaintiff Chhaju Ram has 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 27.6.2006, this Court admitted the appeal on the hereinafter extracted substantial question of law:-

> 1. Whether the two Courts below have not correctly evaluated the evidence as regards the plea of adverse possession especially the entries in the Jamabandies which show that the possession of the respondent-defendant is permissive (Babaja Rajamandi).

Substantial question of law.

7. The suit of the plaintiffs for declaration qua theirs being owners in possession qua the suit property besides for a relief of permanent prohibitory injunction for restraining the defendant from interfering in their peaceful possession qua the suit land, palpably stands anchored upon the revenue records apposite to it, comprised in the relevant Jamabandis qua it comprised in Ext.PW-1/B, wherein the predecessor in interest of the plaintiffs stands recorded as its owner. However, the aforesaid depiction in the apposite revenue records qua the suit property would not suffice to hold of theirs standing entitled to the relief as espoused by them in the suit unless this Court benumbs the propagation of the defendant of his continuously with an animus possidendi since 1993-94 whereat given the pronunciations in the remarks column No.7 of the apposite Jamabdi comprised in Ext.D-1 of his holding the suit land in the capacity of *Bila Lagaan Bawaza Razamandi* upto the date of institution of the suit, holding possession thereof holding a concomitant sequel of his acquiring a prescriptive title thereto. Both the learned Courts below relied upon oral evidence adduced by the defendant in proof of the contentions reared by him in his written statement wherein he concerted to dislodge the claim qua the suit property of the plaintiffs, contentions whereof bespeak of his acquiring qua the suit property prescriptive title ensuing from the statutorily prescribed period of limitation standing elapsed since 1992 uptill the date of institution of the suit. The quintessential imperative ingredient qua his perfecting title qua the suit property by adverse possession embodied in the factum of his continuously with an animus possidendi holding possession thereof since 1993 upto the date of institution of the suit stood reared by him in his written statement besides in corroboration thereof the defendant adduced evidence comprised in the testimonies of DW-1 and DW-2. Even though both DW-1 and DW-2 depose of the defendant holding possession of the suit property for the last 32-35 years and of the defendant rearing an apple orchard thereon, orchard whereon stands deposed by both to be holding apple trees aged 12 to 13 years, the apposite overt act whereof of the defendant stands construed by both the Courts below to be connotative of the defendant openly denying the title of the plaintiffs qua the suit property hence with his evidently within animus possidendi holding it besides his continuously holding possession thereof since 32 to 35 years, coaxed both the Courts below to construe of the contention reared by the defendant in his written statement to repudiate the claim of the plaintiffs qua the suit property standing clinchingly proven. However, both the learned Courts below while imputing vigour to the testimony of DW-1 and DW-2 appear to undermine the bespeakings in column No.7 of the apposite Jamabandi qua the suit land comprised in Ext.D-1. Since reliance thereupon stood placed by the defendant for succouring his claim qua the suit property, claim whereof stood anvilled on his acquiring title thereto by adverse possession also when Ext.D-1 stood exhibited by him whereas its holding in its Column No.7 an entry of the defendant holding possession thereof in the capacity of *Bila Lagaan Bawaza Razamandi,* in sequel with the signification borne thereof being of the defendant holding possession of the suit property with the permission of the plaintiffs concomitantly eroded his claim of his holding its possession with an animus possidendi since the apposite reflections occurring in Ext.D-1 till it stood adduced in defence by the defendant. In aftermath the depiction in Ext.D-1 unveiling the capacity in which he held possession of the suit property inasmuch as *Bila Lagaan Bawaza Razamandi,* signification borne whereof is of his holding it in a permissive capacity rather than his holding its possession with an animus possidendi. With the aforesaid signification borne by the reflection *Bila Lagaan Bawaza Razamandi,* occurring in Column No. 7 of Ext.D-1 when is palpably imperatively cullable therefrom, as a corollary the apposite reflections qua the capacity in which he held it, occurring in Ext.D-1, are to be construed to stand acquiesced by him. Given his acquiescence to the apposite manifestations in Ext.D-1 qua

the capacity in which he held possession of the suit property, the apposite reflections therein obviously acquire conclusivity. Consequently with conclusivity standing imputed to the apposite reflections in Ext.D-1 unfolding the capacity in which he held possession of the suit property he hence stood estopped to contend of his acquiring title to the suit property by adverse possession also the oral evidence if any as relied upon by both the Courts below for theirs holding of the defendant succeeding in proving his acquiring title to the suit property by adverse possession when rather stood subsumed by the effect of the apposite reflection constituted in Ext.D-1, reflections whereof for reasons aforestated acquire conclusivity prominently also when the reflections therein hence connote of possession if any of the defendant qua the suit property being permissive, concomitantly stain the concurrently recorded verdicts of the learned Courts below with a vice of theirs misappreciating the merit of the entry *Bila Lagaan Bawaza Razamandi* occurring in Column No. 7 of Ext.D-1, Also reiteratedly the reliance by both the Courts below upon oral evidence adduced by the defendant to support his claim qua his acquiring title to the suit property by adverse possession stands stained with an error of theirs misappreciating the oral testimonies of the defendants' witnesses. Consequently, the findings recorded by the learned trial Court on issue No. 9(a) stands reversed and set-aside and stands answered in favour of the plaintiffs.

8. Be that as it may, with the aforesaid inference standing drawn by this Court qua misappreciation by both the Courts below qua the import besides the signification borne by the entry *Bila Lagaan Bawaza Razamandi* occurring in Ext.D-1 with a sequelling effect of its not facilitating the defendant to stake a claim qua his perfecting his title qua the suit property by prescription ensuing from elapse of the statutorily prescribed period of limitation nonetheless with the plaintiffs also acquiescing to the occurrence of the aforesaid reflections in Column No. 7 of the Jamabandi comprised in Ext.PW-1/B, has a bearing upon theirs conceding to the factum of the defendant holding possession of the suit land even if in a permissive capacity. With hence the plaintiffs admitting the possession of the defendant qua the suit land though in a permissive capacity, also the oral evidence adduced by the defendant qua the defendant holding possession thereof being in incongruity thereof. In aftermath with the sine qua none for the plaintiffs holding leverage for obtaining the relief of injunction stands embodied in the factum of theirs provenly holding possession of the suit property, sine qua none whereof for reasons aforestated stands unsubstantiated. In sequel the relief of injunction qua the suit property as claimed by the plaintiffs against the defendant stood tenably refused by both the Courts below dehors the factum of this Court discountenancing the concurrently recorded findings by both the courts below of the defendant acquiring title thereto by adverse possession.

9. The substantial question of law stands answered in favour of the plaintiffs. Consequently, the appeal is partly allowed and the findings rendered by the learned trial Court on issue No. 9(a) stand reversed and set-aside. However, the judgements and decrees rendered by both the Courts below refusing the decree of permanent prohibitory injunction qua the suit property to the plaintiff is affirmed and maintained. Decree sheet be prepared accordingly.

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

Dev Raj Sharma ..Appellant.
Versus
Lakhan Pal Finance & Investments Ltd. and others ..Respondents.

RSA No. 78 of 2006
Reserved on : 28.06.2016.
Date of decision: 11/07/2016

Code of Criminal Procedure, 1973- Section 100- Plaintiff is a private limited concern, which carries on business of leasing, hire purchase, housing, general finance and investment- plaintiff

advanced a sum of Rs. 18,000/- to the defendant No. 1 with interest @ 22% per annum with quarterly rests- defendants No. 2 and 3 stood guarantors - defendant No. 1 paid only two installments of Rs. 1100/- and failed to make payment of the rest of the amount- defendant No. 1 admitted taking of loan and asserted that vehicle was forcibly possessed by the plaintiff and was sold for Rs. 1,60,000/-- defendant No. 1 is entitled for money from the plaintiff- suit was decreed by the trial Court- an appeal was preferred, which was dismissed- held, in second appeal taking loan was not disputed by defendant No.1- rate of interest was specifically mentioned in the loan agreement- loan was taken for plying bus on commercial basis- therefore, rate of interest cannot be said to be excessive - it was not proved that vehicle was forcibly taken away- suit was rightly decreed by the trial court - appeal dismissed. (Para-8 and 9)

For the appellant: Mr. Ramakant Sharma, Sr. Advocate with Ms. Soma Thakur, Advocate.

For the respondents: Mr. Rohit Chauhan, vice Mr. Suneet Goel, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J:

The instant appeal stands directed against the impugned judgement and decree of the learned Presiding Officer/Additional District Judge, Fast Track Court, Hamirpur, H.P., whereby he affirmed the rendition of the learned Senior Sub Judge, Hamirpur, H.P. Defendant Dev Raj Sharma standing aggrieved by the concurrently recorded renditions against him of both the learned Courts below concerts through the instant appeal constituted before this Court to reverse the judgements and decrees of both the Courts below.

2. The facts necessary for rendering a decision on the instant appeal are that plaintiff company is a private limited concern incorporated under the Companies Act, 1956 with Registrar of Companies and carries on business of leasing, hire purchase, housing, general finance and investment and Shri Gian Nath Lakhanpal is the Managing Director of the plaintiff company duly authorized person to file and pursue the present suit. It is alleged that defendant No.1 applied for incorporating the entry qua agreement for hire purchase/hypothecation of vehicle HPM-289 to the Registering Authority Barsar in favour of the plaintiff company and the plaintiff company advanced a sum of Rs.18,000/- to the defendant No.1 and the defendant undertook to pay interest @ 22% per annum with quarterly rests and to liquidate the total liability of Rs.25,920/- within two years. It is further pleaded that the defendants No. 2 and 3 stood guarantors to the liability of defendant No.1 and thereafter defendant No.1 paid only two instalments of Rs.1100/- and thereafter failed to liquidate the liability despite requests.

3. The suit of the plaintiffs was resisted by defendant- 1 and defendant No.3. Defendant No.1 has admitted the agreement of hire purchase and hypothecation of vehicle HPM-289 and competency of the Managing Director to file and pursue the suit on behalf of the plaintiff company. The defendant No.1 has further admitted the advance of Rs.18,000/- taken from the plaintiff company but the defendant No.1 has denied the rate of interest as pleaded and claimed by the plaintiff including the liquidation of liability. The defendant No.1 has further pleaded and claimed that the plaintiff company had taken forcible possession of vehicle HPM-289 from Nand Kishore and thereafter auctioned the same as this vehicle was valued about Rs.1,07,000/- and thereby the defendant has pleaded and claimed that the plaintiff company is liable to pay or adjust the value of the vehicle against the loan amount. The defendant No.3 has taken the preliminary objections qua cause of action, estoppel and on merits the defendant No.3 has denied the competency of the Managing Director to file and pursue with the suit and has further denied any dealings between the plaintiff and defendant No.1. The defendant No.3 has also pleaded that the rate of interest claimed to be very high and arbitrary and thereby has prayed for dismissal of the suit.

4. In the replication filed on behalf of the plaintiff the averments as contained in the plaint were reiterated and those of the written statement contrary to the plaint were refuted.

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

> 1. Whether the plaintiff is entitled for recovery of Rs.34,356/- as prayed for? OPP.
>
> 2. Whether the plaintiff has got no cause of action and locus standi to file the suit? OPD.
>
> 3. Whether the plaintiff is estopped to file the suit by his act and conduct? OPD.
>
> 3(A). Whether the plaintiff had snatched the financed bus HPM-289 and sold the same. If so, its effect? OPD.
>
> 4. Relief.

6. On an appraisal of the evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiff besides the learned First Appellate Court dismissed the appeal preferred therefrom before it by defendant Dev Raj.

7. Now the defendant Dev Raj has 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 27.03.2006, this Court admitted the appeal on the hereinafter extracted substantial questions of law:-

> 1. Whether the impugned judgement and decree is result of misreading, mis-appreciation of Ext. D-1 and DW-4/A?
>
> 2. Whether the learned First Appellate Court went wrong in not discussing the entire oral and documentary evidence?
>
> 3. Whether the interest allowed by the trial Court and the first appellate Court is against the provisions of Interest Act and the Contract Act as well as Code of Civil Procedure?

Substantial questions of law No. 1 to 3.

8. The factum of the defendant/appellant herein borrowing a loan of Rs.18,000/- from the plaintiff company stands admitted by defendant/appellant herein in his pleadings constituted in his written statement instituted to the plaint. Since admissions in pleadings estop the defendant/appellant herein to contest the suit of the plaintiff/respondent herein, as a corollary thereof, the concurrently recorded renditions of both the Courts below qua hence the defendant/appellant herein accepting qua a sum of Rs.18,000/- with costs and future interest @ 22% per annum, standing borrowed by him from the plaintiff not meriting any interference. However, since only a part of the loan borrowed by the defendant/appellant herein from the plaintiff stood uncontrovertedly liquidated by him, he is rendered liable to pay the residue to the plaintiff/respondent herein. However, the defendant No.1 contests the right of the plaintiff to claim its repayment from him with interest leviable thereon @ 22% per annum with quarterly rests. The levy of interest @ 22% per annum with quarterly rests on the loan amount borrowed by the defendant appellant herein from the plaintiff respondent herein stands manifested in Ext.P-3 which constitutes the apposite loan agreement executed inter se the defendant/appellant herein and the respondent herein/plaintiff. However, the learned counsel for the defendant/ appellant herein contends of yet the aforesaid rate of interest as levied upon the loan amount taken by the defendant from the plaintiff under Ext.P-3, execution whereof by the defendant stands uncontested by him being exorbitant/excessive besides beyond the ambit of Section 34 of the Code of Civil Procedure, provisions whereof stand extracted hereinafter:

> "34. Interest (1) where and in so far as a decree is for the payment of money the Court may in the decree order interest at such rate as the

> Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit (with further interest at such rate not exceeding six percent per annum as the Court deems reasonable on such principal sum), from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit.
>
> Provided that where the liability in relation to the sum so adjudged had arisen out of a commercial transaction, the rate of such further interest may exceed six percent per annum, but shall not exceed the contractual rate of interest or where there is no contractual rate, the rate at which moneys are lent or advanced by nationalized banks in relation to commercial transactions."

Sub Section (1) mandates of, in a suit for recovery of money, the Court concerned standing barred to on the decretal sum of money impose interest which is excessive/unreasonable or arbitrary rather its holding empowerment to impose interest on the decretal sum of money which is reasonable, whereas the concurrently recorded decrees of both the Courts below while accepting the rate of interest manifested in Ext.P-3 being the one leviable on the sum borrowed by the defendant from the plaintiff have thereupon purportedly imposed upon the decretal sum of money a manifestly unreasonable besides an exorbitant rate of interest which hence infracts the mandate of sub section 1 of Section 34. However, the aforesaid contention of the learned counsel for the defendant would hold vigour only when the sum claimed to be recovered by the plaintiff from the defendant arises not from a commercial transaction also when the rate of interest leviable on the sum of money lent by the plaintiff to the defendant stands not embodied in the relevant contract or agreement recorded inter se both. However, when evidently their occurs a display in the relevant document executed inter se the plaintiff and the defendant qua the rate of interest leviable on the sum loaned by the plaintiff to the defendant, it was incumbent upon the Court to in concurrence with the rate of interest embodied in the relevant contract impose interest on the decretal amount. Since apparently the plaintiff advanced a loan to the defendant for a commercial purpose constituted in the factum of the defendant borrowing the relevant sum of money for purchasing a bus No. HPM-289 for plying it for commercial purpose rendered the loan borrowed by the defendant from the plaintiff to be for a or arise out of a commercial transaction also when the rate of interest leviable on the amount borrowed by the defendant from the plaintiff stood embodied in the relevant contract recorded inter se the plaintiff and the defendant, in sequel with the proviso to Section 34 of the CPC hence standing attracted proviso whereof enjoins Courts of law qua loans advanced for or arising out of commercial transaction, as is the relevant transaction inter se the plaintiff and the defendant besides when the rate of interest chargeable/leviable thereon stands recited in the apposite agreement, to hence revere the rate of interest embodied in the relevant contract executed inter se the plaintiff and the defendant. Consequently with Ext.-3, the relevant loan agreement recorded inter se the plaintiff and the defendant reciting the rate of interest leviable on the sum of money loaned by the plaintiff to the defendant warranted reverence standing meted thereto by both the Courts below. Consequently, both the Courts below in levying on the loan amount borrowed by the defendant from the plaintiff an interest @ 22% per annum cannot be said to have levied it beyond the ambit of the relevant agreement recorded inter se the parties. In sequel, the submission of the learned counsel for the defendant while standing anvilled merely on sub section (1) of Section 34 whereas his remaining oblivious to its proviso, proviso thereof when is in conformity with besides for reasons aforesaid stands attracted to the factual matrix hereat, it has to suffer the illfate of its standing discountenanced by this Court. It is hence held that the levying of or imposing of interest by both the Courts below @ 22% per annum on the decreetal sum cannot be amenable to its suffering from any infirmity.

9. Both the Courts below dispelled the espousal of the defendant vehicle standing forciblly taken away by the official of the company and on user whereof profits standing

purportedly derived from its apposite user by the plaintiff company standing not appropriated by it to settle the loan, barred the plaintiff to claim the suit money from the defendant. However, the dispelling by both the Courts below of the aforesaid espousal of the defendant stands anvilled upon DW-1 communicating in his examination in chief of his selling bus No.HPM-289 to one Nand Kishore for a consideration of Rs.1,07,000/- under an agreement recorded by him with the former. Reliance by both the Courts below upon the aforesaid communication made by DW-1 in his examination in chief per se is neither inapt nor is interferable, as prominently with the defendant uncontrovertedly alienating the relevant bus to one Nand Kishore for a sale consideration of Rs.1,07,000/- obviously then with the plaintiff company never holding its possession nor hence it ever plying for commercial purpose wherefrom it hence never derived profits therefrom it cannot be concluded of its omission to appropriate a part of the profits reared by its plying the relevant bus for commercial purpose estoping it to claim from the defendant, the sum of loan advanced by it to the former. Also, as a corollary, the impact of any recital in Ext.DW-4/A holds no efficacy, contrarily with the defendant No.1 receiving the sale consideration from Nand Kishore on his alienating the relevant bus to him rather enjoined the defendant No.1 to repay the plaintiff the sum of loan as borrowed by him from it, his omitting to do so renders his accounts with the plaintiff remaining unsettled. Consequently, the suit of the plaintiff merited its standing decreed as aptly done by both the Courts below.

11. The result of the above discussion is that the appeal preferred by the defendant/appellant herein is dismissed and the substantial questions of law are answered against him. The judgements and decrees rendered by the both the Courts below are maintained and affirmed. Decree sheet be prepared accordingly. The parties are left to bear their own costs. All pending applications also stand disposed of accordingly. Records be sent back forthwith.

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

Gurdass Singh ....Petitioner.

Versus

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

Cr. MP (M) No. 813 of 2016.
Decided on: 11th July, 2016

N.D.P.S. Act, 1985- Section 37- Petitioner was apprehended with one kg. charas- it was contended that one kg. is below commercial quantity and rigours of Section 37 of the Act, are not applicable- held, that offence was committed by the accused not only against the individuals but against the society-prima facie case has been made out against the petitioner and he is not entitled to bail- petition dismissed. (Para-3 to 5)

For the petitioner : Mr. Surinder Saklani, Advocate.
For the Respondent : Mr. D.S. Nainta & Mr. Virender Verma, Addl. A.Gs.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

Petitioner is an accused in FIR No.70/16, registered against him under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, hereinafter referred to as the Act in short, in Police Station, Palampur, District Kangra with the allegations that the police of Police Station, Palampur, while on patrol duty and conducting traffic checking at SSB Chowk, received a secret information that charas is being transported in an Alto Car bearing registration No.HP01-M-2294 being driven from Baijnath to Palampur side. The information was reduced into writing

and forwarded to SDPO, Palampur through the Police Personnel. The Police Party left towards Baijnath road. One constable was deputed to bring someone for being associated as independent witness(s). The said constable brought two persons with him, who were associated to witness the search and seizure. Around 5.50 p.m. the car was seen coming from Baijnath side. The Police signaled the person driving the car to stop it. The car was stopped and antecedents of the person on its wheel and other persons were inquired into. It is thereafter the search of the car was conducted. One bag was recovered from its Dickey. It is inside this bag, another polythene bag was found to be kept. Some black substance in the shape of sticks was recovered from that bag. The I.O., on the basis of his experience, found the recovered substance as *charas*. It was weighed and found one kilogram. The recovered *charas* was sealed in a parcel. The sample of seal was obtained separately. NCB-I Form was also filled-in in triplicate. On completion of the investigation on the spot, the accused was brought to Police Station. The case property was deposited in the Malkhana. The investigation, except for the receipt of report from the Laboratory, is complete, however, challan has not been filed so far.

2. The accused petitioner has been arrested on the same day and is presently in judicial custody.

3. Learned counsel has argued with all vehemence that in view of the contraband allegedly *charas* weighing one kilogram being below commercial quantity, the rigours of Section 37 of the Act, are not applicable and the accused-petitioner, who according to learned counsel, is a local resident, has been sought to be released on bail.

4. On the other hand, learned Additional Advocate General while making reference to the notification issued under the Act, has contended that the quantity of charas recovered from the accused is commercial. According to him, otherwise also the recovery of one kilogram charas from the accused petitioner, he is not entitled to be admitted on bail.

5. It is seen that learned Special Judge-III, Kangra at Dharamshala, has dismissed the similar application filed by the accused-petitioner vide order Annexure A-2, to this petition. I am not entering upon the controversy that the quantity of the recovered charas is commercial or not and leave it open to be discussed in some other appropriate case, however, so far as this application is concerned, even if it is believed that the quantity of the recovered substance allegedly charas is below commercial quantity, the accused petitioner is not entitled to be admitted on bail for the reasons that the offence committed by him is not only against an individual but society as a whole. It is noticed that the illicit trafficking of drugs and narcotic substance is playing havoc in the society, particularly with our young generation. Therefore, the accused-petitioner, who prima facie has been found to be carrying charas weighing one kilogram, is not entitled to be admitted on bail. Since nothing has come in the investigation about the source, learned Special Judge has rightly observed that in the event of the accused-petitioner is admitted on bail, he may again indulge in illicit trafficking of the Narcotic Drugs and other contraband, therefore, irrespective of he belongs to District Mandi, Himachal Pradesh, at this stage, he is not entitled to be admitted on bail.

6. In view of what has been said hereinabove, the petition fails and the same is accordingly dismissed.

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

Hari Nand and others ..Appellants.

Versus

Rama Nand and others ..Respondents.

RSA No. 409 of 2006.
Reserved on : 24.06.2016.
Date of decision: 11/07/2016

Indian Succession Act, 1925- Section 63- plaintiff filed a suit pleading that J was owner in possession of the land- he executed a Will in favour of N, T and H- N executed a Will in favour of the plaintiff No. 6- Assistant Collector had wrongly attested mutation in favour of defendants No. 2 to 4 on the basis of illegal and invalid will- defendants pleaded that J had not executed any Will in favour of N, T and H- he had executed a Will in favour of defendants No. 2 to 4 on 15.10.1993- mutation was rightly attested on the basis of Will- suit was decreed by the trial Court- an appeal was preferred, which was dismissed- held in second appeal, Will set up by the plaintiff was duly proved by examining the attesting witnesses- marginal witnesses of the Will set up by the defendants did not prove that the deceased had put his signatures in their presence- thus, they had failed to prove the valid execution of the Will- mere registration will not make the Will valid- appeal dismissed. (Para-8 to 11)

For the appellants: Mr. B.C.Verma, Advocate.
For the respondents: Mr. B.S.Attri, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J:

The instant appeal stands directed against the impugned judgement and decree of the learned District Judge (Forests), Shimla, whereby he affirmed the rendition of the learned Civil Judge (Jr.Division), Theog. The defendants standing aggrieved by the concurrently recorded renditions against them of both the learned Courts below concert through the instant appeal constituted hereat to reverse the judgements and decrees of both the Courts below.

2. The facts necessary for rendering a decision on the instant appeal are that one Jawal was the owner in possession of the land comprised in Khasra No. 16, 18, 19,20, 21, 22, 162, 282/201 and 283/201 measuring 26 bigha and 13 biswas situated in Chak Majholi, Pargana Newal, Tehsil Theog, District Shimla. The deceased Jawal had executed a will of the suit land in favour of S/Sh. Nanku and Totu and Hari Nand on 29.09.1995 Ext.PW-2/A. This will was got registered on 9.5.1997. Nanku, now deceased also executed a valid Will on 5.6.1995 in favour of plaintiff No.6 with his free consent and without any pressure from anybody. The plaintiff No. 6 as such become owner in possession qua the share of Nanku in the suit land. Further averred that the ld. Assistant Collector 2nd Grade has wrongly and illegally attested the mutation with respect to the suit land on 26.3.1998 in favour of defendants No. 2 to 4 on the basis of illegal and invalid will dated 15.10.93 Ext.DA. The defendants No. 2 to 4 on the basis of illegal and invalid will are now threatening to interfere with their possession in the suit land.

3. The suit of the plaintiffs was resisted by defendants 1 to 4 on the ground that Jawal never executed will dated 29.9.1995 qua the suit land during his life time as he was not in a position to execute any document due to his serious illness. He on 15.10.1993 executed a legal and valid will in favour of the defendants No. 2 to 4 while in good state of mind and body. It was executed freely and after due consultation. It is alleged that the last will as alleged by the plaintiffs is false and forged document. The A.C. 2nd Grade as such rightly attested mutation No. 247 dated 26.3.1998 in favour of the defendants No. 2 to 4. With these submissions defendants have prayed for dismissal of the suit with costs.

4. In the replication filed on behalf of the plaintiff the averments as contained in the plaint were reiterated and those of the written statement contrary to the plaint were refuted.

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

1. Whether Jawal had executed a Will dated 29.9.1995, registered on 9.5.1997 in favour of the plaintiffs and defendant No.1, if so, its effect, OPP.

2. If issue No.1 is proved in the affirmative, whether the mutation No. 247 dated 26.3.1998 is liable to be set-aside, alleged? OPP.

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

4. Whether the Jawal executed a Will dated 15.10.1993 to defendants NO. 2 to 4, as alleged? OPD.

5. Relief.

6. On an appraisal of the evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiffs besides the learned First Appellate Court dismissed the appeal preferred therefrom before it by the defendants.

7. Now the defendants 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 6.11.2007, this Court admitted the appeal on the hereinafter extracted substantial questions of law:-

1. Whether both the Courts below have acted illegally and the inference and conclusions as drawn are contrary to the material on record?

2. Whether the learned District Judge has drawn a wrong inference that earlier Will Exhibit DA which was executed on 15.10.1993 and got registered before the Sub Registrar, Theog, on 16.10.1993 has not been proved by the present appellants though as per the claim of the respondents subsequent Will Ext. PW-2/A contain mention of the earlier Will?

3. Whether Ext.DA earlier will of late Sh. Jawal stands proved and the same being valid, therefore, parties are bound by the same?

4. Whether Ext. PW-2/A has not been prepared in conformity with the provisions of Section 63 of the Indian Succession Act?

5. Whether the appellant No. 1 have been held to be joint owner in possession of the suit land on the basis of Ext.PW-2/A, therefore, decree for injunction could not be passed against him?

6. Whether mutation No. 247 having been attested by the competent authority in accordance with law and the fact that the same was not challenged by filing appeal, therefore, the parties are bound by the same?

7. Whether the validity of Will Ext.DA as executed in favour of the appellants having not been challenged, therefore, the same could not be held in valid.

8. Whether subsequent Will Exhibit PW-2/A has not been prepared at the instance of late Shri Jawal and the same is surrounded by suspicious circumstances, therefore, the same is not legal and valid?

9. Whether Ext. PW-2/A having been prepared with the active participation of the beneficiaries and the fact that the deceased was not having sound and disposing mind, therefore, Ext.PW-2/A is not a legal and valid document?

Substantial questions of law No. 1 to 9.

8. The plaintiffs foisted a right qua the suit land, on the anvil of a testamentary disposition of deceased testator Jawal comprised in Ext.PW-2/A. With plaintiffs standing nominated by the deceased testator in Ext.PW-2/A to be his beneficiaries/legatees thereunder, they sequelly stood statutorily enjoined to prove the prime factum qua the valid and due execution of Ext.PW-2/A, by adducing evidence in display of the apposite provisions encapsulated in Section 63 of the Indian Succession Act (hereinafter referred to as “the Act”) standing satiated, provisions whereof stand extracted hereinafter:

63. Execution of unprivileged wills

.-Every testator, not being soldier employed in an expedition or engaged in actual warfare, 1*[or an airman so employed or engaged,] or a mariner at sea, shall execute his will according to the following rules:--

(a) The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the erson signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

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

A reading of the afore extracted relevant provisions manifest of the propounder of the Will standing foisted with a solemn statutory duty to prove the factum of its valid due execution by the deceased testator, proof whereof qua its standing validly and duly executed by the deceased testator would spur, on any of the attesting witnesses thereto with conclusivity deposing qua the deceased testator making his thumb impression thereon in his presence or his appending his signatures thereon in his presence whereafter the attesting witness in the presence of the deceased testator embossing his thumb impression or appending his signatures thereon. In satiation of the aforesaid statutory parameters, for thereupon Will Ext.PW-2/A being construable to be proven to be validly and duly executed by the deceased testator, it is not incumbent upon its propounder to adduce both the marginal witnesses thereto into the witness box, contrarily the deposition of any marginal witness thereto in proof of its valid and due execution is sufficient. Consequently, the propounder of the Will made an attesting witness thereto namely Kansiya to step into the witness box for proving the valid and due execution of the apposite Will by deceased testator Jawal whereat he unequivocally deposed of the deceased testator in his presence thumb marking it, thumb impression whereof of the deceased testator on Ext.PW-2/A stands deposed by him to exist in Red circle, whereafter he deposes of his thereafter in the presence of the deceased testator his appending his signatures thereon besides in his presence another marginal witness appending his signatures thereon. He has deposed of his signatures existing on Ext.PW-2/A in red circle. Also he has deposed of the signatures of the other marginal witness thereto as stood appended thereon by him existing on Ext.PW-2/A in red circle. The aforesaid testimony of Kansiya, an attesting witness to Ext.PW-2/A is palpably reflective of hence the plaintiffs while anvilling their claim to the suit property by placing reliance upon Ext.PW-2/A succeeding in proving its valid and due execution by the deceased testator Jawal thereupon hence theirs staking a claim to the suit property on anchorage thereof cannot stand to be discountenanced.

9. Be that as it may, since the defendants staked assertion of title to the suit property on the anvil of Ext.DA, a testamentary disposition of the deceased testator executed by him prior to his executing registered Will Ext.PW-2/A, it was incumbent upon the defendants, its propounders, to likewise adduce cogent evidence in display of Ext.DA standing proven to be validly and duly executed by the deceased testator Jawal, proof whereof stood constituted in any of the attesting witness thereto testifying the factum of the deceased testator embossing in their respective presence his thumb impressions on Ext.DA whereafter both the attesting witnesses in the presence of the deceased testator endorsing their respective signatures thereon. However, the defendants while propounding Ext.DA had led both the attesting witnesses thereto into the witness box. Both DW-1 and DW-2 though deposed qua the Ext.DA holding their signatures yet they omitted to make any communications in their respective testimonies qua preceding theirs appending their respective signatures thereon, the deceased testator in their respective presence

embossing his thumb impression thereon. Consequently, the depositions of both DW-1 and DW-2, the marginal witnesses to Ext.DA, propounded by the defendants to assert a claim to the suit property manifestly do not satiate the statutory parameter of each prior to theirs appending their respective signatures on Ext.DA seeing the deceased testator embossing his thumb impression thereon, whereas the statutory mandate constituted in Section 63 of the Act enjoined upon both DW-1 and DW-2 to testify in proof qua valid and due execution of Ext.DA by making an unequivocal deposition of both prior to theirs appending their respective signatures thereon theirs seeing the deceased testator embossing his thumb impressions thereon. Inaftermath, with their respective depositions being off the legal tangent qua satiation of the indispensable statutory obligation prescribed by the relevant provisions of the Act standing begotten on satiation whereof alone Ext.DA would be amenable to its standing construed to be cogently proven to be validly and duly executed by the deceased testator Jawal, contrarily when the apposite conclusive proof is amiss hereat qua the indispensable statutory ingredients aforesaid for Ext.DA standing construed to be validly and duly executed by the deceased testator, in sequel the findings recorded by the learned Courts below in dispelling the legal efficacy of Ext.DA do not merit any interference.

10. The learned counsel for the defendants/appellants herein places reliance upon an affidavit sworn by the Sub Registrar concerned who had accepted Ext.DA for registration as an endeavour for proving the factum of its valid and due execution by deceased Jawal. The reliance as placed upon the affidavit sworn by the Sub Registrar concerned who accepted Ext.DA for registration, in affidavit whereof their exists a recital qua on the contents of Ext.DA standing read over and explained by him to Shri Jawal whereafter the deceased testator Jawal purveyed to him his apposite echoings qua the recitals embodied therein holding truth whereupon he proceeded to accept it for registration, cannot perse render Ext.DA to acquire any aura of solemnity dehors non-satiation for lack of adduction of cogent proof of the statutory mandate encapsulated in the relevant Section of the Act. The reason for this Court holding qua legal worth if any, the affidavit sworn by the Sub Registrar concerned holds yet gaining no creditworthiness stands founded upon though his belying the suggestion put to him by the learned counsel for the plaintiffs on the latter holding him to cross-examination of none of the marginal witnesses recording their presence before him at the time he accepted Ext.DA for registration yet with Ext.DA not holding the signatures of any of the attesting witnesses thereto renders the affidavit sworn by the Sub Registrar concerned to hold no vigour in displacing the testimonies of the marginal witnesses thereto, who in their respective depositions, for reasons recorded hereinabove omitted to make any articulation therein qua Ext.DA standing within the ambit of Section 63 of the Act proven to be validly and duly executed by the deceased testator. Even otherwise placing reliance upon the affidavit sworn by the Sub Registrar concerned would sequel a legal casualty of the statutory vigour of the mandate of Section 63 of the Act standing diminished. For obviating the aforesaid legal casualty, any reliance upon the affidavit sworn by the Sub Registrar concerned would be legally insagacious. Even though the deceased testator stood at the stage of the Sub Registrar concerned accepting Ext.DA for registration stood identified thereat by Gulab Singh also thereupon the factum of Ext.DA hence purportedly holding the signatures of the deceased testator would not suffice to castaway the applicability of Section 63 of the Act nor would the deposition of Gulab Singh render dispensable the adduction by the propounders of the Will of the legally enjoined evidence within the apposite mandate of Section 63 of the Act for hence Ext.DA standing construed to be proven by them to be validly and duly executed by the deceased testator especially when it embodies therein the statutory mechanism encompassed in satiation of the parameters enshrined therein satiation whereof would spur on adduction of conclusive evidence by its propounders embedded in the testimony of an attesting witness thereto echoing therein qua the deceased testator making his thumb impression or appending his signatures thereon in his presence whereafter in the presence of the deceased testator his doing likewise whereupon hence the statutory parameters enshrined therein standing satiated an aura of validity would stand imputed to Ext.DA whereas for the reasons aforesaid with the both marginal witnesses not deposing qua the prime factum probandum aforesaid, the mere factum of Ext.DA holding the purported thumb impression of the deceased testator besides his thumb impressions existing on

the relevant endorsements occurring thereon would yet not prove the factum of its valid and due execution by the defendants its propounders. In accepting the factum of Ext. DA holding thereon the thumb impressions of the deceased testator without proof as enjoined by the apposite statutory provisions standing adduced by its propounders qua the deceased testator embossing in the presence of the marginal witnesses his thumb impression thereon who thereafter respectively in his presence signatured it, would sequel the casualty of it being militative of the apposite mandate of Section 63 of the Act, provision whereof holding prescriptions therein qua the mechanism contemplated therein, when alone hold a sacrosanct statutory pedestal for proving the valid and due execution of a testamentary disposition also the mechanism occurring therein standing statutorily conceived to be solitarily resorted to by its propounders as a corollary when the apposite testimonies of the marginal witnesses to Ext.DA hold statutory sinew qua satiation of the statutory parameters encapsulated in Section 63 of the Act standing begotten for hence imputing validity to Ext.DA dehors proof if any of Ext.DA standing registered by the Sub Registrar concerned prominently when the testimonies of the marginal witnesses to Ext.DA for reasons aforestated do not prove the factum of its valid and due execution within the statutory domain of Section 63 of the Act besides when at the time contemporaneous to Ext.DA standing presented and accepted for registration by the Sub Registrar concerned both the marginal witnesses thereto for reasons aforesaid were not present thereat. In aftermath with the solemnity of the sacrosanct principle enshrined in Section 63 of the Act being un-amenable to suffer any dilution, any imputation of credence qua Ext.DA or any recording of an inference by this Court qua it standing proven to be validly and duly executed merely on the anvil of its standing accepted for registration by the Sub Registrar concerned on its standing purportedly presented therebefore by the deceased testator would defile its sanctity. Also the identifier of the deceased testator at the time Ext.DA stood accepted for registration by the Sub Registrar concerned though stepped into the witness box as DW-3 whereat he has proven the factum of Ext.DA holding the signatures of the deceased testator arousable from the factum of the deceased Jawal presenting it for registration before the Sub Registrar concerned, is a feeble untenable attempt on the part of the counsel for the defendants/appellants herein to dilute the mandate of Section 63 of the Act. Since Section 63 of the Act alone enjoys statutory approbation besides enjoins its propounders to prove the statutory parameters encapsulated therein by adducing relevant conclusive evidence whereas the relevant enshrined parameters therein for reasons stated hereinabove standing unsatiated renders the deposition of DW-3 to hold no sanctity in displacement of the apposite mandate engrafted therein, mandate whereof with specificity delineates the statutory mechanism for proving the valid and due execution of the relevant testamentary disposition. Also with DW-1 in his cross-examination denying the suggestion put to him by the learned counsel for the defendants while holding him to cross-examination impinging upon the factum of the deceased testator embossing his thumb impression thereon in the presence of Gulab Singh, the identifier of the deceased testator before the Sub Registrar concerned at the time it stood presented thereat for registration sprouts an inference of Gulab Singh being unavailable at the relevant time when the deceased testator Jawal embossed his thumb impression on Ext.DA besides gives leeway to an inference of even if Ext.DA holds the purported thumb impressions of the deceased testator of theirs standing embossed thereon subsequently in the presence of only the Sub Registrar concerned whereas contrarily when they were enjoined to be embossed thereon in the presence of the attesting witnesses thereto who contrarily respectively display in their respective testimonies of the deceased testator not embossing them in their respective presence, rendering hence the presence of the thumb impressions of the deceased testator on Ext.DA to hold no efficacy in proving the factum of its standing statutorily proven to be validly and duly executed by him. Since Ext.PW-2/A succeeded the execution of Ext.DA nonetheless with a recital occurring in Ext.PW-2/A of the deceased testator cancelling his previous testamentary disposition comprised in Ext.DA also with Ext.PW-2/A for reasons stated hereinabove standing efficaciously proven in consonance with the mandate of Section 63 of the Succession Act to be validly and duly executed, this Court holds qua the findings recorded by both the Courts below not meriting any interference.

11. The result of the above discussion is that the appeal preferred by the defendants/appellants herein is dismissed and the substantial questions of law are answered against them. The judgements and decrees rendered by the both the Courts below are maintained and affirmed. Decree sheet be prepared accordingly. The parties are left to bear their own costs. All pending applications also stand disposed of accordingly. Records be sent back forthwith.

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

Nirmala and Others ....Appellants.
Versus
Kaushalaya Devi & Another ....Respondents.

FAO No. 177 of 2006.
Decided on: 11th July, 2016

Workmen Compensation Act, 1923- Section 4- Deceased was employed as a driver on monthly wages of Rs. 4,000/-- a sum of Rs. 100/- was being paid to him towards the daily allowance- he was coming from Orissa to Paonta Sahib- when truck reached within the territory of State of Bihar, some miscreants pelted stones on the truck as a result of which windscreen of the truck got damaged- deceased reported the matter to the husband of the owner of the truck who advised the truck driver to drive the truck in that condition and assured that truck will be repaired at Nalagarh- deceased went to his village after the delivery of the consignment- he was suffering from high fever and died- Workmen Compensation Commissioner held that it cannot be said without postmortem that deceased died during the course of employment- held in appeal that it was not disputed that instruction was given to drive the truck in same condition- it was not disputed that deceased had died due to high fever – incident had taken place in the month of December, when winter season had commenced, which caused exposure as a result of which deceased suffered high fever- there was direct nexus between the death and discharge of the duties- deceased was 31 years of age at the time of death- taking the income of the deceased as Rs.4,000/- per month, applying the relevant factor of 205.95/- and taking 50% of the wages into consideration; an amount of Rs. 4,11,900/- (205.95 x 4000 x 50 /100) awarded along with interest @ 12% per annum, which shall be paid by the insurer. (Para-9 to 11)

Case referred:

National Insurance Company versus Smt. Gurmeeto and Others, Latest HLJ, 2006 (HP), 33

For the appellants : Mr. Ramakant Sharma, Senior Advocate with Ms. Soma Thakur Advocate.
For the Respondents : Mr. Narender Sharma, Advocate for respondent No.2.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

Claimants in case No.1 of 2005, instituted under Section 22 of Workmen's Compensation Act are in appeal before this Court as they are aggrieved from the Order dated 31.1.2006 passed by learned Commissioner under the Workmen's Compensation Act (Sub Divisional Magistrate), Nalagarh, District Solan, whereby the petition they preferred has been dismissed on the ground that they failed to produce the evidence to the effect that their predecessor-in-interest Nirmal Singh died on account of exposer ultimately turned into high fever on account of driving the truck without its windscreen. Also that postmortem report has not been produced in evidence.

2. As per the case admitted by respondent No.1, the owner of truck No.HP13-9377, deceased Nirmal Singh was employed as driver by her on the monthly wages of Rs.4,000/-. Besides this, additionally a sum of Rs.100/- was being paid to him towards the daily allowance. He, therefore, was earning Rs.7,000/- per month. He drove the truck with consignment loaded therein from Nalagarh to Calcutta on 24.11.2003. He delivered the consignment at Calcutta on 27.11.2003. On way back, he loaded the truck from Cuysum-Giri Factory in Orissa to Paonta Sahib. When he was driving the truck within the territory of State of Bihar, some miscreants pelted stones thereon and as a result thereof windscreen of the truck got damaged being fully broken. The deceased driver has reported the incident to Amrik Singh, the husband of respondent No.1 and owner of the truck. Said Shri Amrik Singh, told the deceased to drive the truck in that condition itself and also that the windscreen will be replaced and other damage caused to the truck will be repaired at Nalagarh. He followed the instructions of said Shri Amrik Singh and brought the truck while driving the same without windscreen to Paonta Sahib on 3.12.2003. He unloaded the consignment at Paonta Sahib and brought the truck to Nalagarh where he reached at 9.00 p.m. He reached his native place at 11.00 p.m. At that time he was suffering from high fever. He was not even in a condition to speak. In the morning of 4.12.2003, his condition deteriorated considerably and before any medical aid could be provided to him, he died.

3. The compensation has been sought to be awarded on the ground that on account of driving the truck without windscreen, he was exposed to stress and strain and fell ill. The exposer resulted in high fever and before anything could be done to provide medical aid to him; he left for his heavenly abode. The cremation was also attended by the husband of respondent-owner. At the time of his death he allegedly was 31 years of age.

4. Respondent No.1-owner has not denied the allegations in the petition and rather admitted the same to be true and correct. The insurance-respondent No.2 has not disputed the insurance of the truck, however, it was claimed that the insurer-respondent No.1 has never lodged any claim with respondent No.2 under the Workmen's Compensation Act. It has also been submitted that the obligations of insurer is only to indemnify the insurance and that too when any liability is fastened upon it legally. It was also claimed that the deceased driver was not holding valid and effective driving licence nor died while discharging his duties as driver. The story that he had driven the truck with broken windscreen is stated to be manipulated. The petition has, therefore, been sought to be dismissed.

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

1. Whether the deceased Nirmal Singh was employed as Workmen by respondent No.1 in her truck No.HP12-9377? OPP

2. Whether deceased Nirmal Singh died due to injuries/disease during the course of employment on date 4.12.2003 as alleged? OPP

3. Whether the petitioner is entitled for compensation under the Workmen's Compensation Act? OPP

4. Whether the deceased Shri Nirmal Singh was not holding valid and effective licence, if so its effect? OPR No.2.

5. Whether the petitioner is incollusion between petitioner and respondent No.2, if so its effects? OPR No.2.

6. Relief.

6. The parties on both sides have produced the evidence and learned Commissioner below on appreciation of the same has dismissed the petition on the sole ground that without postmortem report or any medical certificate, it cannot be said that deceased Nirmal Singh died during the course of his employment. It is this order, which is under challenge in this appeal on the ground that the same is neither legally nor factually sustainable.

7. On hearing learned counsel on both sides and going through the evidence available on record, ultimately the windscreen of truck being driven by the deceased got broken on account of pelting of stones by some miscreants in the State of Bihar. The owner of the truck has also not disputed the instructions given to the deceased to drive the truck to the destination in the same condition. He, therefore, had no option except to obey the instructions of his employer. The truck reached at the destination on 3.12.2003 after unloading, it was driven by the deceased to the place of owner-respondent No.1 at Nalagarh. It is thereafter he went to his native place and as per the version of petitioner No.1, his widow, he was suffering from high fever at that time. Similar is the version of PW-2, Pawan Kumar and PW-3 Shri Durga Chand. The owner-respondent No.1 has not told anything contrary to the version of the petitioners' witnesses and rather supported their version of on all material aspects.

8. Now if coming to the statement of RW-1 Ashish Arora, Assistant Administrative Officer, National Insurance Company, he has admitted that the truck was duly insured with respondent No.2. As per his version, the owner never informed respondent No.2 about the death of driver of the truck. The owner has also not claimed own damages. Nothing, however, has been said by RW-1 about the effectiveness and validity of the driving licence. Rather issue No.4, in this regard, was not pressed during the course of arguments.

9. On analyzing the evidence as has come on record, it would not be improper to conclude that Nirmal Singh was the driver of truck No.HP12-9377. He went with a consignment loaded in the truck from Nalagarh to Calcutta. After delivering the consignment on its destination, on way back, he loaded another consignment from Cuysum-Giri Factory in Orissa to Paonta Sahib. It is also established that the windscreen was broken by some miscreants, when he was driving the truck in the territory of State of Bihar and the owner instructed him to drive it in the same condition to the destination. The deceased had followed the instructions so given and drove the truck from Bihar to Paonta Sahib without their being any windscreen. Being month of December, the winter season has already commenced, which caused exposer and as a result thereof the deceased suffered high fever. He reached at his native place late in the midnight on 3.12.2003. Before, he could be taken to hospital for medical checkup on the following morning, he died.

10 . The dismissal of the petition on the ground that there is no direct evidence qua death of deceased during the course of discharge of his duties are neither legally nor factually sustainable. As a matter of fact, there was direct nexus between the high fever from which the deceased driver was suffering and also discharge of his duties. In a similar set of facts and circumstances, our own High Court in ***National Insurance Company*** versus ***Smt. Gurmeeto and Others, Latest HLJ, 2006 (HP), 33***, has held that the death of deceased driver occurred on account of stress and strain on account of driving the truck without windscreen during the course of his employment. The point in issue, therefore, is squarely covered in favour of the appellants-petitioners herein.

11. Now if coming to the question of award of compensation to the claimants-appellants, as per evidence, the date of birth certificate of the deceased Ex.PW-1/A being 14.11.1972, he was 31 years of age at the time of his death. There is admission on the part of respondent No.1-insured that he was being paid his wages @ Rs.4,000/- per month and in addition to that Rs.100/- was being paid to him towards daily allowance. This Court, however, is taking his income as Rs.4,000/- per month. In view of the age of the deceased as 31 years, the relevant factor in calculation of the compensation would be Rs.205.95.

12. Now calculating the compensation payable to the petitioners-claimants with the formula provided under Section 4 of the Act, it is only 50% of the wages to be taken into consideration. The compensation payable, therefore, would be 205.95x4000x50/100, which comes to Rs.4,11,900/- together with interest @12% per annum, under Section 4-A of the Act, which shall be charged after one month from the date of death of deceased Nirmal Singh. Respondent No.2-insurer is liable to pay the amount of compensation awarded to the petitioner,

however, the penalty @10% on the awarded amount is imposed upon the owner of the truck, respondent No.1-insured. There shall be a direction to respondent No.2-insurer to deposit the amount together with interest upto date within two months.

13. In view of the observations made hereinabove, the appeal succeeds and the same is accordingly allowed. Pending application(s), if any, shall also stand disposed of.

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

Rajesh Kumar …….Appellant.
versus
Himachal Pradesh Vidhan Sabha and another …..Respondents.

LPA No.78 of 2011.
Decided on: July 11, 2016.

Constitution of India, 1950- Article 226- Vidhan Sabha invited applications for filling up one post of Driver- appellant and respondent No. 2 appeared in the selection process- 16 marks were awarded to the petitioner and 17 marks were awarded to selected candidate- petitioner filed a writ petition, which was dismissed- held, that selected candidate was senior in age and was rightly appointed- appeal dismissed. (Para-1 to 4)

For the Appellant: Mr.Praneet Gupta, Advocate.
For the Respondents: Mr.D.Dadwal, Advocate, for respondent No.1.
Nemo for respondent No.2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

This Letters Patent Appeal is directed against the judgment, dated 2nd December, 2010, passed by the learned Single Judge of this Court in CWP No.2866 of 2010, titled Rajesh Kumar vs. Himachal Pradesh Vidhan Sabha & Anr., whereby the writ petition filed by the petitioner (appellant herein) came to be dismissed, (for short, the impugned judgment).

2. Respondent No.1 Vidhan Sabha invited applications for filling up one post of the driver in the Scheduled Caste category. Appellant/petitioner and respondent No.2, alongwtih other candidates, appeared in the selection process. After combining the marks obtained in the driving test and the interview, the writ petitioner got 16 marks, whereas the private respondent/selectee scored 17 marks and came to be appointed.

3. Feeling aggrieved, the appellant/writ petitioner challenged the appointment of respondent No.2, namely, Chaman Raj, by the medium of writ petition. The writ Court, while dismissing the writ petition, has made discussion in paragraphs 1 and 3 of the impugned judgment. It is apt to reproduce paragraph 3 of the impugned judgment herein:

> *"3. Learned counsel for the petitioner submits that when petitioner's 'A' grade in driving test, was treated equivalent to 8.5 marks, how could respondent's 'A' grade in interview have been changed into 8.6 marks. Similarly, according to him, when respondent's 'B' grade, in driving test was changed into 8.4 marks, how could the petitioner's 'B' grade in interview have been changed into 7.5 marks. He says that while changing grading into marks, same marks were required to be awarded for 'A' and 'B' grades, in respect of both the tests. Even if the submission made by the petitioner be accepted, the net result would be almost the same. Respondent No.2 is senior in age to the petitioner. Normal rule is that*

when the score of two persons is equal, senior in age is placed above the one who is junior in age."

4. We have examined the writ record and have gone through the impugned judgment, and are of the considered view that private respondent namely Chaman Raj was senior in age and rightly came to be appointed. Accordingly, we hold that the impugned judgment is well reasoned, needs no interference.

5. Having said so, there is no merit in the instant appeal and the same is dismissed.

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

Sanjeev Kumar …..Petitioner

Versus

Chief General Manager Telecom and others ….. Respondents.

CWP No. 34 of 2013.
Date of decision: 11th July, 2016.

Constitution of India, 1950- Article 226- Father of the petitioner was employed as regular Mazdoor with Telephone Exchange, OCB Dharamshala - he died in harness on 31.1.2008, leaving behind his wife and three children, including the petitioner- legal heirs applied for compassionate appointment, which was rejected- aggrieved from the order, original application was filed, which was dismissed on the ground of delay- held, that petitioner had filed application after more than four years- the family which had survived for four years after the death of earning member cannot be said to be indigent and entitled for compassionate appointment- petition dismissed. (Para-3 to 6)

For the petitioner: Mr. Prashant Sharma, Advocate.
For the respondents: Mr. Rajesh Verma, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Subject matter of this writ petition is order dated 23.8.2012, made by the Central Administrative Tribunal, Chandigarh (Circuit Bench at Shimla), hereinafter referred to as "the Tribunal", for short, in O.A No. 35-HP-2012, titled *Sanjeev Singh versus Chief General Manager, Telecom., and others*, whereby the Original Application filed by the writ petitioner came to be dismissed, for short "the impugned order."

2. Shri Jeet Singh, father of the petitioner was employed as regular Mazdoor with Telephone Exchange, OCB Dharamshala District Kangra, H.P. He died in harness on 31.1.2008, leaving behind his wife and three children, including the petitioner. They made an application for compassionate appointment, Annexure A-2 appended to the Original Application in terms of the policy/guidelines governing the compassionate appointment, which was rejected by the respondents vide order dated 8.11.2009 annexure A-1 appended to the Original Application, constraining the petitioner to file Original Application before the Tribunal for quashing the said order Annexure A-1.

3. The petitioner has not explained the delay in seeking compassionate appointment and in approaching the Tribunal. The Tribunal dismissed the Original Application on the grounds of delay, laches and other grounds.

4. After more than four years, the petitioner has laid application for compassionate appointment, that too, without explaining delay and laches.

5. The question is-whether the family which survives for four years can be said to be an indigent, entitled to compassionate appointment and whether the right still survives. The answer is in the negative.

6. We have gone through the impugned order. The Tribunal has discussed all the facts in paras 6 and 7 of the impugned order, are self speaking merit to be upheld.

7. Accordingly, the impugned order is upheld and the writ petition is dismissed, alongwith pending applications, if any.

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

State of H.P. .....Appellant.
Versus
Chaman Lal .....Respondent.

Cr. Appeal No. 215 of 2008
Date of decision: 11.7.2016

Indian Penal Code, 1860- Section 279, 337 and 304-A- Accused was driving the bus with high speed and hit a car – a person sustained injuries and three persons died in the accident- the accused were tried and acquitted by the Trial Court- held, in appeal one feet snow was found on the spot- PW-2 denied this fact and his testimony cannot be relied upon- the car was being driven towards the wrong side of the road – in these circumstances the negligence of the accused was not proved- appeal dismissed. (Para 8-10)

For the Appellant: Mr. Vivek Singh Attri, Dy.A.G.
For the Respondent: Mr. Munish Kumar, Advocate vice Mr.G.S Rathour, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant appeal stands directed by the State of Himachal Pradesh against the impugned judgment rendered on 31.12.2007 by the learned Judicial Magistrate, Ist Class (4) Shimla, District Shimla H.P In Criminal Case No. RBT 90-2 of 05/04, whereby the learned trial Court acquitted the respondent (for short 'accused') for the offences punishable under Sections 279, 337 and 304-A of the Indian Penal Code.

2. The brief facts of the case are that on 3.1.2003 at about 11.30 a.m. a telephonic information was received at Police Station, Dhalli from Police Assistance Room Mall Road Shimla that one car went out of the road near Kufri on IHM NH-22. On this information, inspector/SHO alongwith police party went to the spot. Rapt No. 18 of 3.1.2003 (Ex. PW-8/A) was registered in this regard. On inspecting the spot it was found that a Maruti car bearing registration No. HP-62-0505 was going to Theog in which four persons namely Gopal Krishan Sharma, Thakur Singh Balyani, Prem Chand Prashar and Bali Ram were traveling. When the said car reached near IHM

NH-22 at about 10.30 /11 a.m., a private bus bearing registration No. HP-15-3745 came from Kufri which was on its route from Bhawanagar to Nalagarh in high speed and struck it against the Maruti Car. As a result of which the car fell in the Dhank about 300 meter below. It has also come to the knowledge of the police party that the bus was being driven by the accused in a rash and negligent manner. In the accident aforesaid Gopal Krishan sustained injuries on his person and other passengers namely Bali Ram, Prem Chand Prashahr and Thakur Singh Balyani died on the spot. Rukka Ex.PW-10/A was prepared, on the basis of which formal FIR Ex. PW-8/B was registered. Spot Map Ex.PW-10/E was prepared. The scattered remains of the Maruti car were taken into possession vide seizure memo Ex.PW-5/A. One cheque book, FDR, receipt book and cash book were taken into possession from the spot and handed over on supardari to Sudhir Kumar Chawla vide memo Ex.PW-3/A. On 17.1.2003, Hoshiar Singh presented to the police R/C, insurance of car, D/L of deceased T.S Balyani vide memo Ex.PW-3/B. Accidental bus No. HP-15-3745 alongwith permit and insurance was taken into possession vide memo Ex.PW-5/C. The bus and Maruti car was mechanically examined. MLC of Gopal Sharma Ex. PZAB was obtained. Postmortem examinations of deceased Bali Ram, Prem Chand and T.S Balyani were got conducted. Postmortem reports Ex. PW-7A/A, Ex.,PW-7A/B and PW-7A/C were obtained. Inquest reports are Ex.PW-6/A, PW-6/B and PW-7/B. Statements of the witnesses were recorded. Photographs of the spot and of the dead bodies were got clicked which are Ex. PW-10/B1 to Ex.PW-10/B3 and Ex.PW-10/C1 to Ex.PW-10/C8. After completing all codal formalities and on conclusion of the investigation into the offence, allegedly committed by the accused challan was prepared and filed in the Court.

3. Notice of accusation stood put to the accused by the learned trial Court for his committing offences punishable under Sections 279, 337 and 304-A of I.P.C, to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 12 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. However, he did not choose to lead evidence in defence.

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

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

7. The learned vice Counsel appearing for the respondent/accused has with considerable force and vigor contended qua the findings of acquittal recorded by the learned trial Court standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

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

9. PW-2, the only eye witness to the occurrence has deposed in proof of the accused while at the site of occurrence driving bus bearing registration No. HP-15-3745 in a rash and negligent manner its colliding it with a car bearing registration No. HP-62-0505 in sequel whereto the latter vehicle rolled into a dhank. However, the testimony of the aforesaid witness gathers no credibility given his deposing of no snow occurring at the relevant site of occurrence, testification whereof rendered by him stands belied by photographic evidence comprised in Ex.PW-10/B1 to Ex.PW-10/B 3. Also his deposition qua non-occurrence of snow at the site of accident stands belied by the Investigating Officer who deposes of on the relevant date, at the site of occurrence, snow of a depth of one feet occurring thereat. Apart from, the fact of the testimony of PW-2 for

the reasons aforesaid standing belied by communications existing in the deposition of PW-10, the prime factum echoed by him of the vehicle driven by the accused at the relevant time occupying the appropriate side of the road also his echoing therein of space yet existing at the relevant site for enabling the movement of the vehicle driven by the complainant, galvanizes no inference than that of the driver of the car aforesaid driving his vehicle on the inappropriate side of the road whereat hence it struck with the bus driven by the accused. Consequently, no negligence can stand imputed to the accused in driving his vehicle.

10. A wholesome analysis of the evidence on record portrays that the appreciation of evidence as done by the learned trial Court does not suffer from any perversity and absurdity nor it can be said that the learned trial Court in recording findings of acquittal has committed any legal misdemeanor, in as much, as, its mis-appreciating the evidence on record or its omitting to appreciate the relevant and admissible evidence. In aftermath this Court does not deem it fit and appropriate that the findings of acquittal recorded by the learned trial Court merit any interference.

11. In view of the above discussion, I find no merit in this appeal, which is accordingly dismissed and the impugned judgment of the learned trial Court is maintained and affirmed. Record of the learned trial Court be sent back forthwith.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J

State of H.P. .....Appellant.

Versus

Kamlesh Kumar .....Respondent.

Cr. Appeal No. 41 of 2008
Date of decision: 11.7.2016

Indian Penal Code, 1860- Section 279 & 337- Accused was driving a bus in a rash and negligent manner - he lost control over the vehicle due to which the bus turned turtle- occupants of the bus suffered injuries – the accused was tried and acquitted by the Trial Court- held, in appeal the informant and eye witnesses had not disclosed that accused was talking on the mobile phone while driving the vehicle which makes their testimonies in the Court to this effect doubtful- width of the road was not mentioned in the site plan- possibility of sudden collapsing of kacha portion causing the vehicle to turn turtle cannot be ruled out - prosecution case is not proved beyond reasonable doubt - the accused was rightly acquitted by the Trial court- appeal dismissed.

(Para-9 to 11).

For the Appellant: Mr. Vivek Singh Attri, Dy.A.G.
For the Respondent: Mr. Ashok K Thakur, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant appeal stands directed by the State of Himachal Pradesh against the impugned judgment rendered on 14.9.2007 by the learned Judicial Magistrate, Ist Class, Court No. II, Hamirpur, H.P in police Challan No. 47-II-2005, whereby the learned trial Court acquitted the respondent (for short 'accused') for the offences punishable under Sections 279 and 337 of the Indian Penal Code.

2. The brief facts of the case are that on 14.7.2005 at about 11.00 a.m. at place Badhar accused was found to be driving a bus bearing registration No. HP-22-4834 in rash and

negligent manner on a public road so as to endanger human life and personal safety of the others. Due to his rash and negligent driving he lost control over the vehicle and bus turned turtle due to which Duni Chand, Hukam Chand and Harnam Singh received simple inquires on their person. It has been alleged that the matter was reported to the police vide Rapat Ex.P-4. Statement of the complainant Ex. Ex.PW-1/A was recorded. On the basis of which FIR Ex. PW-7/A was registered. Rukka Ex.PW-6/B was prepared. Injured were medically examined on an application Ex.PW-9/A. Spot map Ex. PW-10/B was prepared. RC and insurance of the bus was taken into possession vide seizure memo Ex,.PW-4/B. Bus was taken into possession vide recovery mmeo Ex.PW-5/A. DL of the accused was also taken into possession. Bus was got mechanically examined and its mechanical report is comprised in Ex.PW-6/A. Photographs Ex. PW-8/A to PW8/C were clicked. Statements of the witnesses were recorded. After completing all codal formalities and on conclusion of the investigation into the offence, allegedly committed by the accused challan was prepared and filed in the Court.

3. Notice of accusation stood put to the accused by the learned trial Court for his committing offences punishable under Sections 279 and 337 of I.P.C, to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 12 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. However, he did not choose to lead evidence in defence.

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

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

7. The learned vice Counsel appearing for the respondent/accused has with considerable force and vigor contended qua the findings of acquittal recorded by the learned trial Court standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

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

9. The accused while driving the bus aforesaid in a rash and negligent manner sequelled its turning turtle whereupon injuries stood entailed on the persons of Duni Chand, Hukam Chand and Harnam Singh. The rash and negligent manner of the driving of the vehicle aforesaid by the accused stands espoused by the prosecution to spur from the factum of his being inebriated at the relevant time besides his conversing on his mobile phone. The aforesaid factum also stands deposed by the eye witnesses to the occurrence who stepped into the witness box as PWs 2 and 3. However the aforesaid factum as stands ascribed by the prosecution to the accused, factum whereof is personificatory of his negligently swerving his vehicle to that portion of the road whereat it turned turtle, stands not proclaimed by the complainant in the apposite FIR lodged by him qua the occurrence also the eye witnesses aforesaid did not disclose the aforesaid factum in their respective previous statements recorded in writing by the Investigating Officer. Consequently, the omission on the part of the complainant to disclose the aforesaid factum in the FIR lodged by him qua the occurrence renders his testification in Court qua the factum of the driver being negligent in driving his vehicle, negligence whereof arose on his being inebriated at the relevant time besides from his conversing over his mobile also hence testifications in Court by the eye witnesses qua the factum aforesaid when starkly contradicting their respective previous statements recorded in writing are all rendered discardable theirs

standing tainted with an obvious vice of embellishments besides improvements vis-à-vis their previous statements recorded in writing also the factum aforesaid acquires a similar taint awakened by the factum of theirs not in their respective previous statements recorded in writing making any communications in tandem therewith. Consequently, when their depositions are ridden with a vice of embellishments or improvements no reliance thereupon can stand imputed by this Court as tenably done by the learned trial Court.

10. Apparently the vehicle driven by the accused had swerved to the kucha portion of the road, portion whereof stands suddenly collapsed sequelling the bus driven by the accused to turn turtle. Since the swerving of the vehicle driven by the accused stands concluded to stand not begotten by the accused negligently and rashly driving the bus aforesaid also when depictions in the spot map comprised in Ex.PW-10/B also reflections in the photographs qua the relevant spot are not communicatory of given the expanse of the width of the road, the vehicle driven by the accused at the relevant time would not moving thereto unless its being negligently driven by the accused, whereupon hence an inference of negligence may stand marshaled against the accused. However, absence of the aforesaid apposite portrayals in the site plan besides in the photographs, sequels an ensuing conclusion of the width of the road at the relevant site of occurrence being narrow also its being constricted in its expanse permitting the plying thereon of only a single vehicle necessarily when hence the kutcha portion of the road was close to the tarred portion thereof, the sudden collapsing of the kutcha portion is to be construed to be the cause for the vehicle driven by the accused turning turtle.

11. A wholesome analysis of the evidence on record portrays that the appreciation of evidence as done by the learned trial Court does not suffer from any perversity and absurdity nor it can be said that the learned trial Court in recording findings of acquittal has committed any legal misdemeanor, in as much, as, its mis-appreciating the evidence on record or its omitting to appreciate relevant and admissible evidence. In aftermath this Court does not deem it fit and appropriate that the findings of acquittal recorded by the learned trial Court merit any interference.

12. In view of the above discussion, I find no merit in this appeal, which is accordingly dismissed and the impugned judgment of the learned trial Court is maintained and affirmed. Record of the learned trial Court be sent back forthwith.

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

State of H.P. .....Appellant.

Versus

Suresh Mehta .....Respondent.

Cr. Appeal No. 221 of 2008
Date of decision: 11.7.2016

Indian Penal Code, 1860- Section 324 and 506- The informant and one 'R' had gone to the shop of 'B' – the accused was sitting inside the shop- the accused started abusing the informant and threatened to do away with his life – the accused picked a glass and threw it towards the informant- accused caught hold of the informant and gave beatings to him- the accused was tried and convicted by the Trial Court - an appeal was preferred which was allowed- held, in appeal PWs 2 and 5 have admitted that a duel had taken place between the accused and the informant- the possibility of sustaining injuries by way of fall cannot be ruled out- the Appellate Court had rightly acquitted the accused- appeal dismissed. (Para - 9 to11)

For the Appellant: Mr. Vivek Singh Attri, Dy.A.G.
For the Respondent: Mr. B.S Chauhan, Sr. Advocate with Mr. Munish Kumar, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant appeal stands directed by the State of Himachal Pradesh against the impugned judgment rendered on 28.2.2008 by the learned Sessions Judge, Shimla, H.P. in Criminal Appeal No. 54-S/10 of 2007, whereby the learned appellate Court while reversing the findings of conviction recorded on 31.10.2007 by the learned Judicial Magistrate, 1st Class, Theog, District Shimla, H.P., in case No. 322-1 of 2006 acquitted the respondent (for short 'accused') for the offences charged.

2. The brief facts of the case are that on 1.9.2006 the complainant alongwith Virender Singh came to the police Post, Deha at about 11.30 a.m. and had reported that he alongwith Ram Lal had come to the shop of one Bihari at about 11.00 a.m. It is further averred that the accused was also sitting inside the shop. On seeing the complainant the accused started abusing him. The accused has threatened him that earlier also he had taught him a lesson and now he will not leave him. It is also averred that the accused had also threatened him to do away with his life. On being objected to such acts, the accused picked up a glass kept on the table and had thrown the same on him. The glass had struck against his arm owing to which he had received injuries on his arm. It is averred that thereafter the accused caught hold of the complainant from his neck and gave beatings to him. The accused had also pushed him on account of which he had struck against the glass of the counter. The complainant was saved from the clutches of the accused by S/Sh. Ram Lal, Keshav Ram and Mohan Lal etc. The shirt of the complainant was also torn by the accused. On such statement rapat No. 4 was recorded, on the basis of which FIR Ex.PW-4/A came to be registered. During investigation, the complainant was got medically examined at PHC Ghorana. His MLC Ex. PW-6/A was obtained. Spot map Ex.PW-4/B was prepared. The broken pieces of glass of counter was taken into possession alongwith T shirt vide seizure memo. The statements of the witnesses were recorded. After completing all codal formalities and on conclusion of the investigation into the offence, allegedly committed by the accused challan was prepared and filed in the Court.

3. The accused stood charged by the learned trial Court for his committing offences punishable under Sections 324 and 506 of the Indian Penal Code, to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 6 witnesses. On closure of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded in which he pleaded innocence. He did not choose to lead any evidence in defence.

5. On an appraisal of the evidence on record, the learned trial Court returned findings of conviction against the accused for offences punishable under Sections 324 and 506 of the Indian Penal Code. However, in an appeal preferred therefrom by the accused before the learned appellate Court, the latter Court while reversing the findings of conviction recorded by the learned trial Court acquitted the accused.

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

7. The learned Counsel appearing for the respondent/accused has with considerable force and vigor contended qua the findings of acquittal recorded by the learned Appellate Court standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

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

9. The learned Deputy Advocate General contends of with the deposition of PW-6 (Dr. Abhishek Sharma) unveiling the factum of the injuries depicted in MLC Ex. PW-6/A being sequellable by the complainant standing struck with a piece of glass also with its recovery standing effectuated under memo Ex.PW-1/A, besides with PW-5 deposing of the scuffle which erupted inter-se the victim and the accused standing terminated on the intersession of PW-2 and PW-5 in quick succession whereof the victim/complainant stood subjected to medical examination, cumulatively depict of the accused inflicting with a piece of glass recovered under memo PW-1/A injuries on the person of the complainant. Consequently, he submits of the findings of acquittal recorded by the learned Sessions Judge qua the accused warranting interference, their arising from gross mis-appreciation of the testimonies of PWs 2 and 5 besides suffering from gross undermining by him of the import of the recovery memo comprised in Ex. PW-1/A.

10. The aforesaid submission addressed before this Court by the learned Deputy Advocate General holds no vigor as he has solitarily read besides focused upon the testimonies of both PW-2 and PW-5 in portrayal of the purported efficacious recovery of pieces of glass under memo Ex.PW-1/A whereas he has overlooked the earlier portion of their respective testimonies wherein each respectively echoes of a duel erupting inter-se accused and the complainant, duel whereof ended on the intersession of both the PWs aforesaid, wherein both omit to echo therein the prime factum of the victim standing inflicted with an injury by the accused with his using a broken piece of glass. Since the aforesaid prime factum was enjoined to be enunciated by both PW-2 and PW-5, the eye witnesses to the occurrence whereas it stands unpronounced by each renders the afore-stated pronouncements in the MLC aforesaid also renders the efficacious recovery, if any, of broken pieces of glass under memo Ex. PW-1/A to hold no vigor. Preeminently with PW-6 underscoring in his cross-examination of the injuries occurring on the person of the victim being sequellable by fall**,** it appears hence of the duel, if any, which erupted inter-se the accused and the victim/complainant begetting the accidental breaking of glass, accidental breaking whereof appears to cause the accidental falling thereon of the complainant whereupon injuries stood entailed on his person.

11. A wholesome analysis of the evidence on record portrays that the appreciation of evidence as done by the learned Appellate Court does not suffer from any perversity and absurdity nor it can be said that the learned Appellate Court in recording findings of acquittal has committed any legal misdemeanor, in as much, as, its mis-appreciating the evidence on record or its omitting to appreciate the relevant and admissible evidence. In aftermath this Court does not deem it fit and appropriate that the findings of acquittal recorded by the learned Appellate Court merit any interference.

12. In view of the above discussion, I find no merit in this appeal, which is accordingly dismissed and the judgment of the learned Appellate Court is maintained and affirmed. 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 AJAY MOHAN GOEL, J.

State of Himachal Pradesh .....Appellant.

Vs.

Giri Raj alias Denny and others .....Respondents.

Cr. Appeal No.: 327 of 2007
Reserved on: 05.07.2016
Date of Decision: 11.07.2016

Indian Penal Code, 1860- Section 376 (g)- Prosecutrix is suffering from mental disorder- B called the informant and informed him that a lady was crying by the side of tank- informant found the prosecutrix with accused and one boy who was wearing ear rings- one accused was lying there as his arm was fractured- prosecutrix informed them that she had been raped and her leg had been fractured- father-in-law of the prosecutrix made inquiries from informant and requested him to accompany him to police station- an FIR was registered against the accused- accused were tried and acquitted by the trial Court- held, in appeal that Medical Officer has stated that there was no recent sexual intercourse with the prosecutrix- no application was moved for examination to ascertain the mental state of the prosecutrix- no identification parade of the accused was conducted - respondent has been arrayed as accused on the basis of the alleged recovery of ear ring- recovery of ear ring has also not been established beyond reasonable doubt by the prosecution- PW-10 has not supported the prosecution version- chain of circumstances is totally incomplete and it cannot be said that the case against respondent No. 3 is proved- in view of these circumstances, there is no infirmity or perversity in the findings recorded by the trial Court- appeal dismissed. (Para- 17 to 35)

Cases referred:

Vijay Thakur Vs. State of Himachal Pradesh, (2014) 14 Supreme Court Cases 609

Sangili alias Sanganathan Vs. State of Tamil Nadu, (2014) 10 Supreme Court Cases 264

For the appellant:	Mr. V.S. Chauhan, Addl. A.G., with Mr. Vikram Thakur and Mr. Puneet Rajta, Dy. A.Gs.
For the respondents:	Respondents No. 1 and 2 are proclaimed offenders. Mr. Naresh Kaul, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

<u>Ajay Mohan Goel, J.</u> :

By way of the present appeal, State has challenged the judgment passed by the Court of learned Additional Sessions Judge (1), Kangra at Dharamshala in Sessions Case No. 58-N/2005 dated 24.05.2007 vide which, learned trial Court acquitted the accused for offence punishable under Section 376 (g) of the Indian Penal Code. Before proceeding further, it is pertinent to take note of the fact that there are three respondents in the present appeal and respondents No. 1 and 2 have been declared as proclaimed offenders by this Court vide order dated 26.02.2013. Accordingly, the present appeal is being heard qua respondents No. 3 Chhinder alias Chhindu.

2. Briefly, the case of the prosecution is that prosecutrix is suffering from mental disorder and on 31.05.2005, complainant Nek Mohammad and one Kalu Ram were on duty as Chowkidars from 8 p.m. till 5 a.m. At about 12:30 a.m. during the intervening night of 31.05.2005/01.06.2005, the said persons were performing their patrolling duty at Gandhi Bazaar. One Shri Bishamber, R/o Raja Ka Talab called the complainant and informed that there was a lady crying from the side of tank. The complainant and Kalu Ram went towards the tank and they found the prosecutrix there with accused Gurmail alias Fauji and Giri Raj alias Denny and one other boy who was wearing ear rings. The said three persons were without their pants and under wears and the moment the complainant and Kalu Ram threw torch light, the boy who was wearing the ear ring ran away from the spot. However, accused Gurmail alias Fauji was lying there as his arm was fractured. The complainant and Kalu thereafter threw light inside the tank where the prosecutrix was found. There was no water inside the tank. One Dinesh alias Jatt went inside the tank and brought the prosecutrix out from the tank. Prosecutrix informed them that she had been raped and that her leg had been fractured. Complainant Nek Mohammad tied the string knot of trouser of the prosecutrix and Dinesh alias Jatt had picked up Gurmail alias Fauji, bundled him in his vehicle and took him away. Kalu Ram picked up the prosecutrix on his back

and took her to Bus Stand and then made her lie there on the bench. Thereafter, Kalu and the complainant left to their houses. The family members of the prosecutrix came to know about the said occurrence and on 02.06.2005 Hazari Ram, father-in-law of the prosecutrix came to the house of the complainant and made inquiries from him in this regard. Thereafter, he requested the complainant to accompany him to the Police Station. FIR Ex. PW 12/A was registered against the accused. The accused were arrested and the accused as well as the prosecutrix were got medically examined. During the course of investigation, one Chandni Guru Jassi Mahant, resident of Raja Ka Talab produced one ring Ex.-PA before the police which was taken into possession vide memo Ex. PW3/A. The said Chandni Guru Jassi Mahant stated that this ring was that of accused Chhinder. After completion of the investigation, police challaned the accused persons for having committed offence punishable under Section 376(g) of the Indian Penal Code. The challan was presented before the Court.

3. As a prima facie case was found against the accused, accordingly they were charged for the commission of offence punishable under Section 376(g) of the Indian Penal Code, to which they pleaded not guilty and claimed to be tried.

4. In order to substantiate its case, the prosecution in all examined 12 witnesses.

5. Dr. D.R. Riyal appeared as PW-1 and stated that in the year, 2005, he was posted as Medical Officer in C.H. Nurpur and on 06.06.2005, accused Chhinder was produced before him for conducting his medical examination. On examination of Chhinder, vide M.L.C. Ex. PW1/A, he opined that the said accused was found fit to perform sexual intercourse.

6. Dr. Ashutosh appeared as PW-2 and stated that he had conducted the medical examination of accused Giri Raj and Gurmail vide MLCs. Ex. PW2/B and Ex. PW2/CV and as per his opinion, both of them were capable of performing sexual intercourse.

7. Complainant Nek Mohammad stepped into the witness box as PW-3 and stated that besides being an agriculturist, he was also Panchayat Chowkidar for the last 35-40 years. He was the Watchman of bazaar. He performed his duties as a Bazaar Watchman from 8 p.m. till 5 p.m. The other Chowlidar with him was Kalu Ram, who is resident of Sukhar. He further deposed that on 31.05.2005, Kalu Ram was on duty with him. At about 12:30 a.m. during night when they were on patrolling duty at Gandhi Chowk/bazaar, one boy, s/o Master Bishamber, R/o Raja Ka Talab called them and informed that some lady was crying from the tank side. That boy also stated that he was checking electric tube light at that time. He has further deposed that tank was about 6 meters from the road in an orchard of mangoes. He and Kalu Ram went towards the tank and with torch light they found one lady there alongwith accused Fauji alias Gurmail, whose one hand was broken at the relevant time. Accused Giri Raj alias Denny was also there and the third person present there run away from the spot. PW-3 further deposed that he threw the torch light towards him, but he could not identify him. All that he could see was that the third person was wearing an ear ring in his ear. All the three persons were naked at that time. He has further deposed that he saw accused Gurmail alias Fauji lying outside the tank and the lady was inside the tank. With torch light he saw that the said lady inside the tank was Savitri, who was mentally disturbed and quite often she was seen roaming around in the bazaar for the last many years. There was no water in the tank. He has further stated that no person by the name of Jatt came there and he and Kalu took out that lady from the tank. The trouser of the lady was tied by Kalu. The said witness was declared hostile as he has resiled from his previous statement and the prosecution was permitted to cross-examine him. In his cross-examination, he admitted that on 02.06.2005, he, Hazari Ram, Savitri Devi and Pushpa Devi went to the Police Station and lodged the FIR. He also admitted it to be correct that after recording the FIR, police read over the same to him and the contents thereof were admitted to be correct by him. He has denied the suggestion that Dinesh Jatt, driver had come at the water tank and that he had entered the water tank and tied the trouser of the prosecutrix and took the lady out of the tank. He denied the suggestion that on 07.06.2005, Chandni Guru Jassi had produced an ear ring of accused Chhinder before the Police in his presence and that from ear ring he had identified accused Chhinder on the night

of occurrence was the same person who run away from the spot. Thus, the said witness has partially supported the case of the prosecution about the factum of accused Gurmail and Denny being there in the tank with the prosecutrix. However, the remaining case of the prosecution has not been supported by the said witness.

8. Hazari Ram, father-in-law of the prosecutrix has entered into the witness box as PW-4. He has stated that Savitri Devi was mother of four children. After she gave birth to her fourth child, she was taken to hospital at Jawali for family planning operation and thereafter she lost her mental balance. He also stated that she was not mentally fit for last 20 years and on account of this, she was found roaming around in the bazaar and roads and some time, she also visited her house. She talks irrelevant and she had fits. He has further deposed that on 02.06.2005, he went to Raja Ka Talab for purchasing some household articles. There one Subash, Pradhan told him that Nek Mohammad, Chowkidar had told him that Savitri Devi had been raped during the intervening night of 31.05.2005 and 01.06.2005. On receipt of the said information, he immediately went to the house of Nek Mohammad where Nek Mohammad revealed everything to him about the occurrence of the event. Nek Mohammad told him that two persons had committed rape with Savitri Devi in a tank which was 6 feet deep. One of the rapists was disclosed by him as Fauji and other was disclosed as Denny and third person had been apprehended by the police itself. He also deposed that after arrest of these three persons, in the Police Station they had disclosed in his presence that they had raped Savitri Devi. He has further deposed that all the accused persons were working in the house of Jassi.

9. PW-5 Piara Ram has deposed that he had gone to Police Station alongwith Puran Singh and remained associated with the police. SHO had shown him ear ring, which was given to him by Chandni Guru Jassi Mahant and the same was sealed by SHO in a match box, which was taken into possession vide memo Ex. PW3/A. He has further deposed that the ear ring was identified by Nek Mohammad and thereafter he and Puran Chand had signed the said memo.

10. Rakesh Kumar (PW-6) has stated that on 31.05.2005, a Maha Yagya was conducted at the back of his house, which was to last up to 08.06.2005. He was deputed by the villagers to keep an eye on this function. He was checking the light in front of his gate. At that time, two Watchmen were crossing from site. He told them that he had heard some noise coming from a distance of about 100 meters. He has further deposed that there were orchard, service station and shop towards the side from where noise was coming. He further deposed that later on after the arrival of the police, he came to know that some lady had been raped.

11. PW-7 Puspa Devi has stated that Savitri Devi was her mother-in-law and she was mentally unstable for last many years. Savitri used to come to the house and some time, she kept on wandering on the roads. She has further deposed that she was told by her father-in-law that her mother-in-law had been raped and he asked her to accompany him to the Police Station. She further deposed that she, Hazari Ram and her mother-in-law had gone to the Police Station.

12. PW-8 HC Ramesh Chand is a formal witness, who has deposed with regard to depositing of parcels containing the case property with him in the Malkhana register as well as the sending of the said parcels by him to FSL, Junga through Constable Sudershan Singh for chemical analysis.

13. PW-9 Sudershan Singh has deposed that MHC Ramesh Chand handed over five parcels and two envelopes which were deposited by him at FSL, Junga vide R.C. No. 113/21 on 16.05.2005. On his return, he handed over the RC to MHC.

14. PW-10 Chandani Guru Jassi Mahant has deposed that she was residing in Raja Ka Talab for the last 15 years with her Guru Jassi Mahant. Accused Chhinder is from her illaqua and he is just like her brother. He was residing with her for the last 15/16 years. Chhinder goes out with her to the houses of other person whereever function is organized. They receive offerings in lieu of this. She has further deposed that they wear ear rings on such occasions. She further deposed that once her ear ring had fallen in the house of a person where they had gone for getting

something and the other ring was with her. She has denied the suggestion that she had given one ear ring to accused Chhinder and that he used to wear it.

15. PW-11 Dr. Nishu Priya has deposed that she was posted as Medical Officer in Civil Hospital, Nurpur from March 2005. On 02.06.2005, she medically examined Savitri Devi and she issued MLC Ex. PW11/A. She further deposed that as per her medical opinion, the prosecutrix was having third degree UV and was used to sexual intercourse and after receipt of medical examination, the final opinion had been given by her which is Ex. PW11/C and according to which, there was no evidence of recent sexual intercourse.

16. Inspector Nathu Ram has deposed as PW-12 and he has stated that FIR Ex. PW12/A was written by MHC as per the version of the complainant and thereafter it was signed by him. He also deposed that he moved an application Ex. PW11/A for the medical examination of the prosecutrix. He has also stated that he recorded the statements of the witnesses as per their versions. He has further stated that report of Chemical Examiner Ex. PX was received by him and thereafter he prepared the challan and presented the same in the Court for trial. In his cross-examination, he has stated that he had not moved any application to the Medical Officer to know the mental state of the prosecutrix. He has denied the suggestion Nek Mohammad was admitted in the hospital on 01.06.2005 and 32 bottles of glucose had been administered to him. He has self stated that Nek Mohammad was admitted in the hospital on 02.06.2005 and discharged on 04.06.2005. He has admitted the suggestion that he had gone to the house of Chandani Guru Jassi, but he has denied that he had brought the ear ring from her house. He has admitted it to be correct that identification parade of accused was not conducted by him.

17. This is the entire evidence which was produced on record by the prosecution in order to substantiate its case. Learned trial Court on the basis of the said material produced on record by the prosecution, concluded that the prosecution had not been able to prove its case against the accused especially in view of the fact that PW-11 Dr. Nishu Priya has stated that as per her final opinion, there was no evidence of recent sexual intercourse with the prosecutrix. Accordingly, learned trial Court concluded that from the evidence on record, it becomes clear that there is no evidence of rape of the prosecutrix by the accused. Accordingly, it held that the prosecution had not been able to bring home the guilt of the accused for offence punishable under Section 376(g) of the Indian Penal Code. Learned trial Court thus acquitted the accused.

18. Feeling aggrieved by the said judgment passed by the learned trial Court, the State has preferred the present appeal. It was strenuously argued by the learned Additional Advocate General that the judgment of the learned trial Court was perverse and not sustainable in law. Mr. Chauhan argued that the conclusions arrived at by the learned trial Court were not borne out from the records of the case and the learned trial Court had erred in coming to the conclusion that the prosecution had not been able to prove its case against the accused. As per Mr. Chauhan, the prosecution had successfully proved on the basis of material placed on record that the prosecutrix was mentally unstable lady and she had been raped by the accused. On these grounds, he stated that the judgment passed by the learned trial Court was liable to be set aside and the accused deserved to be convicted for offence with which they were charged.

19. Mr. Naresh Kaul, learned counsel appearing for respondent No. 3, on the other hand, has argued that there is neither any infirmity nor any perversity with the judgment which has been passed by the learned trial Court. Mr. Kaul argued that in the present case, the identity of respondent No. 3 was not proved at all. He further submitted that there was no independent witness who corroborated the story of the prosecution and further it was evident from the deposition of PW-11 Dr. Nishu Priya that the prosecutrix has not been subjected to any sexual intercourse as alleged by the prosecution. Accordingly, he argued that there was no merit in the appeal filed by the State and the same was liable to be set aside.

20. Before proceeding further, we may take note of the fact that in the present case, there is no eye witness, therefore, it is a case of circumstantial evidence.

21. At this stage, it is relevant to take note of the judgment of the Honble Supreme Court on circumstantial evidence in **Vijay Thakur** Vs. **State of Himachal Pradesh**, (2014) 14 Supreme Court Cases 609, relevant paras of which are quoted below:

> *"18. It is to be emphasized at this stage that except the so-called recoveries, there is no other circumstances worth the name which has been proved against these two appellants. It is a case of blind murder. There are no eyewitnesses. Conviction is based on the circumstantial evidence. In such a case, complete chain of events has to be established pointing out the culpability of the accused person. The chain should be such that no other conclusion, except the guilt of the accused person, is discernible without any doubt. Insofar as these two appellants are concerned, there is no circumstance attributed except that they were with Rajinder Thakur till Sainj and the alleged disclosure leading to recoveries, which appears to be doubtful. When we look into all these facts in entirety in the aforesaid context, we find that not only the chain of events is incomplete, it becomes somewhat difficult to convict the appellant only on the basis of the aforesaid recoveries.*
>
> *19. In Mani v. State of Tamil Nadu, (2008) 1 SCR 228, this Court made following pertinent observation on this very aspect:*
>
> > *"26. The discovery is a weak kind of evidence and cannot be wholly relied upon on and conviction in such a serious matter cannot be based upon the discovery. Once the discovery fails, there would be literally nothing which would support the prosecution case...."*
>
> *20. There is a reiteration of the same sentiment in Manthuri Laxmi Narsaiah v. State of Andhra Pradesh, (2011) 14 SCC 117 in the following manner:*
>
> > *"6. It is by now well settled that in a case relating to circumstantial evidence the chain of circumstances has to be spelt out by the prosecution and if even one link in the chain is broken the accused must get the benefit thereof. We are of the opinion that the present is in fact a case of no evidence."*
>
> *21. Likewise, in Mustkeem alias Sirajudeen v. State of Rajasthan, (2011) 11 SCC 724, this Court observed as under:*
>
> > *"24. In a most celebrated case of this Court, Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116, in para 153, some cardinal principles regarding the appreciation of circumstantial evidence have been postulated. Whenever the case is based on circumstantial evidence the following features are required to be complied with. It would be beneficial to repeat the same salient features once again which are as under: (SCC p.185) "(i) The circumstances from which the conclusion of guilt is to be drawn must or should be and not merely 'may be' fully established;*
>
> *(ii) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;*
>
> *(iii) The circumstances should be of a conclusive nature and tendency;*
>
> *(iv) They should exclude every possible hypothesis except the one to be proved; and*
>
> *(v) 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."*

22. Thus, the salient points which have been carved out by the Hon'ble Supreme Court in the case of circumstantial evidence, on the basis of which the guilt of the accused can be brought home are as under:

> *"(i) The circumstances from which the conclusion of guilt is to be drawn must or should be and not merely 'may be' fully established;*
>
> *(ii) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;*
>
> *(iii) The circumstances should be of a conclusive nature and tendency;*
>
> *(iv) They should exclude every possible hypothesis except the one to be proved; and*
>
> *(vi) Thee 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."*

23. The Hon'ble Supreme Court in **Sangili alias Sanganathan** Vs. **State of Tamil Nadu**, (2014) 10 Supreme Court Cases 264 has held as under:

> *"15. To sum up what is discussed above, it is a case of blind murder. There are no eyewitnesses. Conviction is based on the circumstantial evidence. In such a case, complete chain of events has to be established pointing out the culpability of the accused person. The chain should be such that no other conclusion, except the guilt of the accused person, is discernible without any doubt. In the present case, we find, in the first instance, that the appellant was roped in with suspicion that it was a case of triangular love and since he also loved PW-3, he eliminated the deceased when he found that the deceased and PW-3 are in love with each other. However, we are of the view that this motive has not been proved. The evidence of last seen is also not established. Father of the deceased only said that the deceased had received a call and after receiving that call he left the house. In his deposition, he admitted that he had not seen the appellant before and he did not recognize his voice either. Therefore, he was unable to say as to whether the phone call received was that of the appellant. Proceeding further, we find that the deceased was not seen by anybody after he left the house. When we look into all these facts in entirety in the aforesaid context, we find that not only the chain of events is incomplete, it becomes somewhat difficult to convict the appellant only on the basis of the aforesaid recoveries.*
>
> *16. In Mani v. State of Tamil Nadu, (2009) 17 SCC 273, this Court made following pertinent observation on this very aspect:*
>
> > *"26. The discovery is a weak kind of evidence and cannot be wholly relied upon and conviction in such a serious matter cannot be based upon the discovery. Once the discovery fails, there would be literally nothing which would support the prosecution case...."*
>
> *There is a reiteration of the same sentiment in Manthuri Laxmi Narsaiah v. State of Andhra Pradesh, (2011) 14 SCC 117 in the following manner:*
>
> > *"6. It is by now well settled that in a case relating to circumstantial evidence the chain of circumstances has to be spelt out by the prosecution and if even one link in the chain is broken the accused must get the benefit thereof. We are of the opinion that the present is in fact a case of no evidence."*
>
> *17. Likewise, in Mustkeem alias Sirajudeen v. State of Rajasthan, (2011) 11 SCC 724, this Court observed as under:*

"24. In a most celebrated case of this Court, Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116, in para 153, some cardinal principles regarding the appreciation of circumstantial evidence have been postulated. Whenever the case is based on circumstantial evidence the following features are required to be complied with. It would be beneficial to repeat the same salient features once again which are as under: (SCC p.185) "(i) The circumstances from which the conclusion of guilt is to be drawn must or should be and not merely 'may be' fully established;

(ii) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(iii) The circumstances should be of a conclusive nature and tendency;

(iv) They should exclude every possible hypothesis except the one to be proved; and

(v) 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."

24. In these circumstances because it is a case of circumstantial evidence, this Court has to satisfy its judicial conscience as to whether by way of circumstantial evidence produced on record by the prosecution, it has been able to link the commission of the offence with the accused or not.

25. As per the case of the prosecution, the alleged occurrence of the incident was intimated to complainant Nek Mohammad and Kalu Ram by son of Bishamber, R/o Raja Ka Talab. The son of Bishamber, i.e. Rakesh Kumar has entered into the witness box as PW-6. The complainant has entered into the witness box as PW-3. Rakesh Kumar has deposed that on the fateful night, he heard some noise coming from a distance of about 100 meters from the side where there was an orchard, service station and shops etc. and he disclosed this fact to two Watchmen who were crossing from that site. PW-3 Nek Mohammad has deposed that on the fateful night PW-6 told him that some lady was crying from the tank side. The second Watchmen, namely Kalu has not been examined by the prosecution. PW-6 Rakesh Kumar has not mentioned in his statement that he informed the Watchman that he heard the noise of a lady crying from the tank side. Thus, there is contradiction between the statement of PW-6 and PW-3 as to what was actually reported to the complainant by PW-6.

26. Further, as per the case of the prosecution, when the two Watchmen reached the spot, they found three persons with the prosecutrix, out of which one ran away. One Dinesh alias Jatt came there who went inside the tank and took the prosecutrix out from the tank on his lap. The prosecutrix thereafter told them that she had been raped and her leg had been fractured. Complainant tied the string knot of the trouser of the prosecutrix and Dinesh alias Jatt picked Gurmail bundled him in his vehicle and took him away. Prosecutrix was taken back to the Bus Stand by Kalu Ram.

27. This version of the prosecutrix is not supported by the complainant, i.e. PW-3. Not only this, surprisingly the prosecution has not produced Dinesh alias Jatt in the witness box. In this view of the fact that there is variation in the statements of PW-3 and PW-6 and further neither Kalu nor Dinesh alias Jatt have been produced in the witness box by the prosecution, the version put forth by the prosecution with regard to the alleged occurrence of the event gets shrouded with doubts.

28. Now coming to the deposition of father-in-law of the prosecutrix PW-4 Hazari Ram, he has stated that on 02.06.2005, he went to Raja Ka Talab for purchasing some household articles and there one Subash Pradhan met him and told him that Nek Mohammad had told him that Savitri Devi had been raped during the intervening night of 31.05.2005 and 01.06.2005. The said witness has been confronted with the statement which he had made to the police, in which

statement, it is not so recorded that Subhash, Pradhan told PW-4 that he had been told by Chowkidar Nek Mohammad that daughter-in-law of PW-4 was raped on the fateful night. In fact, what has been recorded in the statement of PW-4 made under Section 161 of Cr. P.C. is that Subhash Pradhan told him that his daughter-in-law had been raped by some people and thereafter he went to the house of Chowkidar Nek Mohammad. The prosecution incidentally has not examined the said Subhash Pradhan also. Nek Mohamad has not supported the version of the prosecution and he has been declared as hostile witness. According to PW-4, he, Nek Mohammad, prosecutrix and his daughter-in-law went to the Police Station and thereafter the FIR was got registered.

PW-7 Pushpa Devi in her statement has deposed as under:

> "I, Hazari Ram and my mother-in-law had gone to the Police Station. I don't know any other person."

29. Thus, as per PW-7, Nek Mohammad did not accompany them to the Police Station. In our considered view, both PW-4 and PW-7 are interested witnesses as they are closely related to the prosecutrix. Therefore, their statements have to be read very carefully in order to conclude whether they inspire any confidence and whether they are trustworthy so as to be made basis for the conviction of the accused.

30. In our considered view, the statements of these witnesses as well as other prosecution witnesses, especially the complainant do not inspire confidence. There are too many improvements and contradictions in the statements of these persons. Normally Court does expect variations keeping in view the fact that much time elapses between the occurrence of the event, recording of statements under Sections 154 and 161 Cr. P.C. and the witnesses thereafter deposing in the Court of law. However, in this case, the contradictions are glaring.

31. Another important and factual aspect of the matter is that according to the prosecution, the prosecutrix was mentally unstable, however, strangely the prosecution has not got the prosecutrix medically examined to establish this fact on record. PW-12 Inspector Nathu Ram has stated that no application was moved for forming Medical Board so as to ascertain the mental state of the prosecutrix. Now, in this background, when we peruse the statement of PW-11 Dr. Nishu Priya and the MLC issued by her, both shatters the case of the prosecution.

PW-11 has categorically stated as under in her stated in the Court:

> *"After receipt of report of Chemical Examiner, the final opinion has been given by me which is Ex. PW11/C, according to which there was no evidence of recent sexual intercourse."*

32. Further, a perusal of Ex. PW-11/C demonstrates that the final medical opinion given by PW-11 is as under:

> *"….Hence, there is no evidence of recent sexual intercourse/…………….as per the chemical analysis report. Report has been signed by Chemical Examiner to the Govt. of Himachal Pradesh."*

33. Another important aspect of the matter is that the identity of respondent No. 3 has also not been established beyond reasonable doubt by the prosecution. PW-12 has admitted in his cross-examination that no identification parade of the accused was conducted by him. There is no material on record to suggest that the complainant or the other Chowkidar present with him had identified respondent No. 3 at the spot. The said respondent has been arrayed as accused on the basis of the alleged recovery of ear ring. The alleged recovery of ear ring has also not been established beyond reasonable doubt by the prosecution. Chandani Guru Jassi Mahant has not supported the story of the prosecution. Though the said witness was declared as hostile, but in her cross-examination, the prosecution has not been able to elucidate anything relevant to further the cause of the prosecution.

34. Therefore, it is evident from the discussion held above that the prosecution has not been able to link the accused/respondent No. 3 with the commission of the offence. The chain of circumstances is totally incomplete and it cannot be said on the basis of material produced on record by the prosecution that the case against respondent No. 3 stood proved by the prosecution beyond reasonable doubt.

35. Further, a perusal of the judgment passed by the learned trial Court reveals that all these aspects of the matter have been minutely gone into by the learned trial Court and thereafter on the basis of the appreciation of material on record, learned trial Court has come to the conclusion that the prosecution has not been able to establish its case against the accused beyond reasonable doubt. We do not find any perversity or infirmity with the findings so recorded by the learned trial Court. In our considered view also, on the basis of the material produced on record by the prosecution, it has not been able to prove beyond reasonable doubt that respondent No. 3 was guilty of the offence alleged against him. Accordingly, the judgment passed by learned trial Court in this regard qua respondent No. 3 is upheld and the present appeal qua respondent No. 3 is accordingly dismissed.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

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

Cr. Appeal No.384 of 2008
Decided on: 11th July, 2016

Indian Penal Code, 1860- Section 325- Informant was in his house when he was told that some persons were quarreling- informant went to the spot to separate them- accused was also present - when the informant tried to save 'S', accused pushed 'S' and informant due to which informant and 'S' fell down- accused was tried and acquitted by the trial Court- held, in appeal that testimonies of prosecution witnesses were contradictory- PW-5 had not supported the prosecution version- there was delay in reporting the matter to police- trial Court had taken a view, which was reasonable- appeal dismissed. (Para-12 to 15)

Cases referred:
K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258
T. Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401

For the appellant : Mr. Virender K. Verma, Additional Advocate with Mr. Pushpinder Singh Jaswal, Dy. Advocate General.
For the respondent : Ms. Neha Scott, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge (oral).

The present appeal is maintained by the appellant-State of Himachal Pradesh against the judgment of acquittal of the accused in a case under Section 325 of the Indian Penal Code passed by the learned Judicial Magistrate 1st Class, Court No.III, Hamirpur, District Hamirpur, H.P, dated 1.3.2008, in Criminal Case No.19-II of 2006.

2. Briefly stating the facts giving rise to the present appeal are that on 22.12.2005, complainant Khem Chand made a statement under Section 154 Cr.P.C to HC Pardeep Kumar, vide report No.14 of Roznamcha, wherein he stated that he is a transporter and has also contested election for Pardhan, but he was defeated. On 20.12.2005 at about 5:00 pm, when the complainant was in his house, children told him that Sunil Kumar, Hem Raj and Sarup are quarrelling. Complainant went to the spot to separate them. Accused was also there and when he tried to save Sunil Kumar, accused pushed Sunil Kumar and the complainant due to which he fell down on the ground whereas Sunil Kumar fell on the stairs of the house of Sarup. The occurrence has been witnessed by Parven Kumar. When he was taken to hospital at Tauni Devi, the complainant told that he fell down from the 'danga'. He came to know through newspaper that Suresha Kumari, reported the matter to the police against him, on which he had also lodged the report. After completion of the investigation the challan was presented in the Court.

3. The prosecution, in order to prove its case, examined as many as 07 witnesses. Statement of the accused was recorded under Section 313 Cr.P.C, wherein the accused denied the prosecution case and claimed innocence. No defence evidence was led by the accused.

4. I have heard learned Additional Advocate General for the appellant/State and learned defence counsel for the respondent/accused.

5. To appreciate the arguments of learned Additional Advocate General and learned defence counsel, this Court has gone through the record in detail and minutely scrutinized the statements of the witnesses.

6. PW-1 complainant Khem Chand, has deposed that while Hem Raj, Sarup and Sunil Kumar were quarreling, he went to the spot and he was pushed by the accused. He fell down and got injured in the waist. While he was under treatment he read in newspaper that a case has been registered against him. Complainant lodged report and as per medical examination, one bone of his was found to be fractured. In his cross-examination, he admitted that he had given a statement to the Medical Officer at Tauni Devi that he has fallen down from the 'danga'. He denied that he alongwith others had administered beatings to Suresha Devi and Ram Swaroop. He cannot say as to how Suresha Devi was injured.

7. PW-2 Sunil Kumar has deposed that accused had pushed the complainant and him as accused was drunk. Hem Raj called them to the house of Suresha Devi and when they reached there they were pushed. In his cross-examination, he denied that he alongwith Khem Chand had revealed to the Medical Officer at Tauni Devi that they have fallen down on their own. He denied that they were badly drunk and fell down on their own. He has denied that a false case has been prepared by Khem Chand, as he has lost the election.

8. PW-3 Dr. D.R. Sharma, has examined the complainant and issued MLC Ex.PW3/A. He opined that injury to be grievous as "compression of L2 vertibra" was found. He has admitted that injury is possible by accidental fall.

9. PW-4 Dr. D.B. Kulkarni, gave report Ex.PW4/A, x-ray films Ex.PW4-B and Ex.PW4/C of the complainant observing compression. PW-7 Mohinder Pal, lodged FIR Ex.PW7/A, after medical report was received. PW-5 Parveen Kumar, has pleaded ignorance about the occurrence. In his cross-examination, he has denied that accused had pushed Sunil Kumar and Khem Chand, as a result of which they got injured. He has also admitted that complainant Khem Chand is his uncle. He had not given any statement to the police and the police had recorded the statement as given by the complainant.

10. PW-6 HC Pardeep Kumar, Investigating Officer of the case and deposed that the complainant had got his statement Ex.PW1/A recorded with him. MLC Ex.PW3/A was issued after he had moved an application Ex.PW6/A. The investigation was conducted on 14.1.2006 and spot map Ex.PW6/B was prepared. In his cross-examination, he admitted that complainant has revealed that he fell down from the 'danga' and got injured.

11. Dr. D.R. Sharma, has not ruled out the possibility of sustaining injuries by accidental fall whereas PW-5 Parveen Kumar has admitted his relationship with complainant, has not supported the prosecution story.

12. After going through the aforesaid discussion, it comes out that the version of the complainant is full of contradictions and the other eye witness i.e. PW-2 has differentiated himself on vital aspects coupled with the fact that PW-5 is related to the complainant has not supported the complainant's version. Thus, the delay in lodging FIR as also the contradictions makes out a case where it can be said that the prosecution has not proved its case beyond reasonable doubt.

13. It has been held in **K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258,** that when two views are possible, appellate Court should not reverse the judgment of acquittal merely because the other view was possible. When judgment of trial Court was neither perverse, nor suffered from any legal infirmity or non consideration/misappreciation of evidence on record, reversal thereof by High Court was not justified.

14. The Hon'ble Supreme Court in **T. Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401,** has held that where two views are reasonably possible from the very same evidence, prosecution cannot be said to have proved its case beyond reasonable doubt.

15. So, in my considered view the prosecution story is uncorroborated by witnesses and taking into consideration the evidence which has come on record this Court finds that the prosecution has failed to prove the guilt of the accused conclusively and beyond reasonable doubt.

16. In view of the aforesaid decisions of the Hon'ble Supreme Court and discussion made above, I find no merit in this appeal and the same is accordingly dismissed. Bail bonds of accused are discharged.

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

Tej Ram ….Petitioner.

Versus

State of H.P. & others …Respondents.

CWP No: 387 of 2009.

Date of Decision: 11th July, 2016.

Constitution of India, 1950- Article 226- Interviews were conducted for the post of Physical Education Teacher by PTA - petitioner was selected and posted as PTE - State had constituted committees to inquire into the cases of irregular appointment- a complaint was filed before the Committee that appointment of petitioner was illegal- Committee ordered the removal of the petitioner- appeal was preferred before Deputy Commissioner, Kullu, which was dismissed- held, that committee was required to ascertain whether appointment of petitioner was in accordance with the rules or not- mere redrawing of the merit list is not sufficient to conclude that appointment was illegal- petition allowed and Committee asked to examine the appointment on the basis of PTA Rules, 2006. (Para-5 to 11)

For the Petitioner : Mr. P.P.Chauhan, Advocate.

For the Respondents: Mr. Rupinder Singh Thakur, Additional Advocate General, with Mr. Rajat Chauhan, Law Officer, for respondents No. 1 to 5.

Mr. Vivek Singh Thakur, Advocate, for respondent No.8.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (Oral)

By way of present writ petition under Article 226 of the Constitution of India, the petitioner has invoked the extra ordinary jurisdiction of this Court and has prayed for following relief:-

(a) ***to issue a writ of certiorari or direction in nature thereof, quashing the impugned notification dated 27.5.2008 being Annexure P-2 of the writ petition, as unconstitutional and illegal and contrary to the rule by taking away vested legal rights of the petitioner and the selection criteria cannot have been laid down after the selection process is over and the appointment has been given to the petitioner;***

(b) to issue a writ of certiorari or direction in nature thereof, quashing the impugned order dated 21.08.2008 being Annexure P-4 passed by the respondent Sub Divisional Officer – cum – Chairman, Enquiry Committee, Kullu and impugned order dated 09.01.2009 (Annexure P-6) passed by the respondent Deputy Commissioner, Kullu, as unconstitutional and illegal and contrary to the law;

(c) to issue a writ of mandamus, appropriate writ, order or direction in nature thereof, directing the respondent Department to permit the petitioner to continue discharging his duties as PET on parents Teacher Association basis in Government Middle School Benchi w.e.f. his illegal termination with all the consequential benefits, including arrears of salary along with interest thereon @18% PA and quash the appointment of private respondent, if made during the pendency of this Civil Writ Petition;

(d). to issue an appropriate writ order or direction in nature thereof to give full justice to the petitioners in the circumstances of the case and may pass such further writ, order or orders as this Hon'ble Court may deem fit, just and expedient in the circumstances of the case; and

(e) Direct the respondents to produce all the relevant records as along with reply for perusal by this Hon'ble Court;

(f) Allow the cost of this writ petition to the petitioner, and;

(d) Allow such other relief or pass such other orders as deemed fit and proper in the facts and circumstances of the case in favour of the petitioner and justice be done.

And for this Act of kindness, the humble petitioner as in duty bond, shall every pray."

2. Briefly stated facts as emerge from the record are that the respondents-State realizing that there are large number of vacancies, especially in difficult and remote area schools lying vacant and there is no likelihood of making regular recruitment in near future, decided that PTAs may be allowed to make recruitment qua C & V category teachers i.e OT (Shashtries), LT, DM, and PETs (**Annexure P-1).** However, while making aforesaid decision respondent specifically stipulated in the communication dated 13.7.2007 that no Music Teacher, Home Science Teacher or Craft Teacher, shall be provided by the PTAs for the time being. The respondents-State while issuing the aforesaid communication dated 13th July, 2007 authorizing PTAs to make appointment as referred above, prescribed the following procedures:-

(i) ***The PTA shall have to display the vacancy position in respect of posts intended to be filled up through PTAs giving venue/date of interviews on the notice board of the concerned school, the PTAs Office (if any), notice board of the Gram Panchayat concerned as well as the adjoining of the Gram Panchayat concerned as well as the adjoining Gram Panchayat. If PTAs have sufficient funds they may even consider publicity through press/ advertisement.***

(ii) ***Atleast 15 days time shall be given to desirous candidates to apply.***

(iii) ***Dates for interview should be decided in advance. Interviews shall be held either on 5th or on 20th of a month so that the desirous candidates have advance information about the interview dates. In case dates happen to fall on a holiday, interviews should be held on the next working day.***

(iv) ***The candidates should be selected strictly on the basis of merit adopting by an objective competitive criteria.***

(v) ***Only those candidates should be selected who fulfill the requisite educational and professional qualification as per Recruitment and Promotion Rules for that post. Non unqualified person or who does not fulfill alteast minimum educational qualification shall be allowed to function as PTA teacher.***

(vi) ***PTAs shall associate a subject matter specialist of the subject for which post interviews take place.***

The Headmaster/ Principal when accepting the candidature of a particular teacher under PTA shall satisfy himself that the above criteria has been met with. I may be made clear that no grant-in-aid shall be available to the PTAs in case any of the above codal formalities has not been completed. While conveying the names of the selected candidates to the Principal, the PTA shall give an undertaking that the directions contained in para 3(i) to (vi) above have been complied with. Any appointment made by PTAs between 6.11.2006 and issue of this letter shall not be eligible for grant-in-aid while subsequent appointments shall be subject to the adoption of above procedure only.

You may kindly circulate these instructions to all the Principals/Headmasters of your District for strict compliance. Please note that any deviation from the above shall make the PTA ineligible for reimbursement of grant-in-aid under GIA to PTA Rules, 2006. Other instructions relating to these appointments shall also be kept in view as circulated from time to time. The availability of TGTs by PTA shall not be made till further orders.

3. In pursuance to aforesaid communication/ circular issued by respondent No.6 i.e. Pradhan, Parents Teachers Associations(in short "PTA"), Government Middle School, Bench, Tehsil and District Kullu, H.P conducted interviews for the post of Physical Education Teacher(in short" PET") on PTA basis for Government Middle School, Benchi. The interviews for the post were held on 5.10.2007, where 16 candidates along with petitioner as well as respondents No.7 and 8 appeared. Record further reveals that present petitioner was selected and appointed as PET in the Government Middle School, Benchi on 10th/11th October, 2007. Thereafter vide **Annexure P-2** i.e. letter No. DEM-A-Kha(7)3/2006, dated 27th May, 2008, Higher Education Department H.P. Government, issued notification in continuation of its earlier notification dated 19th April,

2008, whereby respondents-State had constituted committees to inquire into the cases of irregularly appointed teachers by the PTA but subsequently vide notification dated 27th May, 2008, Higher Education Department H.P. Govt., provided that the committees will hear the affected parties/complainants after going through the records and guidelines framed vide notification referred above.

4. Record reveals that respondent No.7 namely Om Prakash being aggrieved with the appointment of the present petitioner as PET filed complaint (**Annexure P-3**) before learned Sub Divisional Magistrate, Kullu H.P complaining therein that the petitioner was appointed illegally and arbitrarily in violation of the Rules prescribed for the appointment of Teacher by PTA. The Sub Divisional Magistrate (Civil) vide order dated 21st August, 2008 (**Annexure P-4)** ordered to remove the petitioner from the post of PET. Perusal of order dated 21st August, 2008 suggest that on the basis of complaint filed by respondent No.7, Sub Divisional Magistrate(Civil) Kullu constituted committee in terms of the notification dated 19th April/27th May, 2008. It also appears that committee while considering the complaint preferred by respondent No.7 redrawn the merit list and concluded that the petitioner was wrongly appointed as PET since there were number of other persons including respondents No.7 and 8, who were higher in merit.

5. Present petitioner being aggrieved with the order dated 21.8.2008, passed by Sub Divisional Magistrate Kullu, H.P filed an appeal before the learned Deputy Commissioner, Kullu, District Kullu,H.P but same was dismissed vide order dated 9.1.2009 (**Annexure P-6)** .

6. Perusal of Annexure P-6, passed by learned Deputy Commissioner, Kullu suggest that vide notification EDN-A-Kha(7)3/2006 dated 19.4.2008 and 27.05.2008, new rules were framed and respondent No.4 was appointed as Chairman of inquiry Committee, who vide order dated 21.8.2008 concluded that the petitioner was not appointed in accordance with Rules as PET in the school concerned and as such, ordered removal of the petitioner. However, careful perusal of the order dated 21.8.2008 nowhere suggest that Inquiry Committee while deciding the complaint of respondent No.7 actually referred to the records of the interviews conducted/held by the PTA on 5.10.2007, where 16 candidates including petitioner, respondents No.7 and 8 had appeared. It appears that committee decided the complaint of respondent No.7 on the basis of the guidelines framed vide notification dated 27.5.2008 without referring to the PTA Rules 2006, which were prevalent at the time of appointment of the petitioner in the year, 2007. But at this stage, after perusing the impugned order, passed by SDM as well as Deputy Commissioner kullu, it is not clear at all whether any proceeding were ever initiated by the SDM (Civil) Kullu strictly in terms of notification dated 19-04-2008/27-05-2008 because bare perusal of order passed by SDM suggest that after receipt of complaint made on behalf of respondent No. 7, merit list was redrawn and marks were given on the basis of mechanism evolved vide notification dated 27-05-2008, whereas in opinion of this Court, committee at first instance was supposed to ascertain whether appointment of petitioner, which was made in the year 2007 was in accordance with rules prevalent at that time or not. It is undisputed that at the time of appointment in the year 2007, petitioner was appointed in terms of PTA Rules 2006. Hence, any decision of the inquiry committee constituted in terms of the notification dated 27-05-2008 redrawing the merit list on the basis of notification, which was admittedly issued in the year 2008 could not be made basis to conclude that the appointment made in the year 2007 was in violation of the Rules made in the year 2008. During the proceedings of the case, this Court was unable to lay its hand on any document suggestive of the fact that the respondents had actually conducted some inquiry on the complaint submitted by respondent No. 7 because only document which is available on record is impugned order dated 21.8.2008 passed by SDM(Civil) Kullu, which nowhere suggest that while holding that appointment of petitioner is bad, committee had taken into consideration the record pertaining to the selection process held in the year, 2007 i.e. 5.10.2007. Rather, perusal of this order dated 21.8.2008 clearly demonstrate that all the candidates whose candidature were considered in the year, 2007 by the then PTA were again scrutinized by this Committee afresh on the basis of guidelines contained in notification dated 27.5.2008. But at this stage, this Court is at loss to fathom that how the Rules made in the year, 2008 could be made applicable in the case

of the petitioner, who was admittedly appointed in the year, 2007 on the basis of PTA Rules 2006, prevalent at that time.

7. However, during the proceedings/ hearing of the case, learned counsel representing the respondent No.8 made available copy of judgment dated 23rd November, 2010 passed by Division Bench of this Court in CWP No.2286 of 2009. Further perusal of order dated 16.11.2009 passed in the instant case by this Court also suggest that CWP No.2286 of 2009 was ordered to be tagged with the present matter but some how same stands decided on 23rd November, 2010. Perusal of the judgment dated 23.11.2010 suggest that writ petitioner in that case (respondent No.8) had prayed for following relief:-

(i) ***That he may be appointed in terms of orders passed by respondent No.4 dated 21.8.2008 Annexure P-10 which is selection list being a selected candidate as the petitioner is having higher rank in comparison of 16 candidates and further including the respondent No.7 and 8 who are on the lesser side.***

(ii) ***That the respondents may kindly be directed to give all the benefits to the petitioner as admissible in near future under the law and policy for such post in question."***

8. Further careful perusal of judgment dated 23.11.2010 passed by Division Bench of this Court in CWP No.2286 of 2009 suggest that taking note of the averments contained in that writ petition, Division Bench of this Court concluded as under:-

" ***In view of the above clarification issued by the Director of Higher Education, Himachal Pradesh, the impugned orders are liable to be set aside. Ordered accordingly. However, we make it clear that it will be open to the Enquiry Committee to consider the matter afresh in the light of the instruction referred to above. The needful, if required, shall be done expeditiously from the date of the production of a copy of this Judgment by either side. It is also made clear that in the cases of those teachers who are working in the schools, in case they have not been paid their due wages, the same shall be paid and the State shall ensure that the required grant-in-aid is given to the Schools, as per the Rules forthwith. In case the vacancy still exists, we make it clear that it will be open to the respondents to reengage the petitioner, subject to the outcome of the inquiry and in case, the petitioner is thus reengaged, he shall be paid the eligible benefits during the period of service."***

9. Close reading of the judgment dated 23.11.2010 passed by Division Bench of this Court clearly suggest that order dated 21.8.2008, which is subject matter of the present writ petition, has been already quashed and set aside by the Division Bench of this Court with the direction to the Inquiry committee to consider the matter afresh in the light of the instructions issued on 24th September, 2009. Since by way of present writ petition, petitioner has also prayed for quashing of order dated 21.8.2008 passed by SDM (Civil) Kullu, which has been already quashed and set aside by Division Bench of this Court in CWP No. 2286/2009, this Court sees no reason, whatsoever, to interfere in the present matter. However, it may be clarified that once Division Bench in CWP No.2286 of 2009 quashed the order dated 21.8.2008 passed by SDM (Civil) Kullu, any further order passed by the Deputy Commissioner in appeal filed by petitioner against order dated 21.8.2008 also deserves to be quashed and set aside because appeal is/was continuation of the proceedings initiated at the level of SDM, who had passed order dated 21.8.2008 on the basis of complaint made by respondent No.7.

10. But keeping in view the peculiar facts and circumstances of the case, it would be in the interest of justice and strictly in compliance of the judgment dated 23.11.2010 passed by Division Bench of this Court in CWP NO.2286 of 2009, to direct the respondents to consider the matter afresh in the light of instructions issued vide notification dated 24.9.2009 as well as

directions contained in para 3 of the judgment passed by the Division Bench of this Court, if not already complied with. At his stage, it may be observed that inquiry committee while deciding the matter afresh in the light of the instructions dated 24.9.2009 shall keep it in mind that appointment of petitioner was made in the year, 2007 that too on the basis of PTA Rules 2006 prevalent at that time and as such, Inquiry Committee is expected/ required to ascertain whether appointment of petitioner as PET in the year, 2007 was strictly in terms of PTA Rules 2006 prevalent at that time or not.

11. Since the petitioner as well as respondents No.7 and 8 have been litigating for the last 6-7 years, it would be in the interest of justice, if respondents are directed to conclude the inquiry in terms of judgment dated 23.11.210 within stipulated time. Accordingly, respondents are directed to do the needful as observed above within a period of three months.

In view of the discussion made hereinabove, the present petition is accordingly disposed of. Pending application(s), if any, shall also stands(s) disposed of.

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

Tourism and Civil Aviation .....Petitioner.

Versus

Smt. Sunita Bhandari & Another .....Respondents.

Criminal Revision No. 10 of 2009.
Decided on: 11th July, 2016.

H.P. Tourism and Trade Act, 1988- Sections 42 and 49- Accused opened a hotel without mandatory registration - a composition fee of Rs. 1,28, 700/- was imposed – the amount was not deposited on which a complaint was filed – the accused confessed their guilt and fine of Rs. 5,000/- was imposed- an appeal was preferred on which a fine of Rs. 100/- per day was imposed from 25-2-2000 till 18-11-2002 - aggrieved from the judgment, appeal was preferred – held, that it was open for the complainant to prefer an appeal even in a case where the accused had confessed to the commission of crime - confession meant that accused admitted their liability to pay the statutory sum of money - imposition of fine of Rs. 5,000/- was not proper- Ld. Sessions Judge should have imposed fine from the date of the opening of the hotel till the production of the certificate- appeal allowed - fine imposed from the date of opening of the hotel till the production of documents. (Para 2-4)

For the Petitioner: Mr. Vivek Singh Attri, Dy. A.G.
For the Respondent : Mr. Anand Sharma, Advocate with Mr. Rajesh Kumar, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

The complainant/petitioner herein instituted a complaint against the respondents/accused herein for theirs infracting the provisions of Section 49 read with Section 42 of the H.P. Tourism and Trade Act, 1988 (hereinafter referred to as the "Act"). The breach aforesaid at the instance of the accused/respondents occurred on theirs operating a hotel without theirs obtaining from the competent authority concerned its apposite mandatory registration. The breach aforesaid on the part of the respondents/accused, as apparent on a reading of paragraph 7 of the complaint, constrained the competent authority to levy a composition fee of Rs.1,28,700/- upon the accused/respondents, composition fee whereof stood calculated by the

competent authority from 22.12.1998 to 24.2.2000 where within the apposite breach occurred. The aforesaid amount as apparent on a perusal of the relevant records remained undeposited by the respondents/accused. The effect of non deposit by the respondent/accused of the aforesaid amount constrained the complainant/petitioner herein to institute a complaint before the Judicial Magistrate concerned wherebeforewhom the respondents/accused confessed their guilt whereupon a fine of Rs.5000/- stood imposed upon each of the accused/respondents.

2. The complainant/petitioner herein standing aggrieved by the order of the Judicial Magistrate concerned preferred an appeal therefrom before the learned Sessions Judge, Chamba. The learned Sessions Judge, Chamba in his rendition had assessed fine at the rate of 100/- per day calculated from 25.2.2000 upto 18.11.2002. However, the learned Sessions Judge, Chamba did not proceed to assess fine upon the respondents/accused from 22.12.1998 upto 24.2.2000, though even within the aforesaid period, the respondents/accused had infracted the provisions of Section 42 of the Act whereupon composition fee stood assessed by the competent authority, composition fee whereof on remaining undeposited by the respondents/accused, an apposite averment in consonance therewith stood manifested in the complaint.

3. The learned counsel appearing for the accused/respondent has submitted with force of the impugned order of the Sessions Judge, Chamba lacking in jurisdictionally vigour qua the appeal constituted before him by the complainant/petitioner herein standing barred by the provisions of Section 375 of the Code of Criminal Procedure (hereinafter referred as the "Cr.P.C.), provisions whereof mandate on an accused pleading guilty whereupon he stands convicted bars the aggrieved to institute an appeal therefrom before the competent Appellate Court. However, the aforesaid submission is unacceptable, as Clause (b) of Section 375 of the Cr.P.C., excludes the embargo against preferment of an appeal by the aggrieved where the accused pleads guilty besides, stands sentenced predominantly when the legality of the sentence imposed upon him is contested by the aggrieved. Consequently, with the aggrieved/complainant standing aggrieved by the quantum of sentence of fine imposed upon the accused/respondents for theirs infracting the mandatory provisions of Section 42 of the Act, grievance whereof stood engendered by the sentence of fine as stood imposed upon them by the Magistrate concerned for theirs breaching the statutory provisions of the Act transgressing the ordained method qua its computation, whereupon its imposition upon the accused stood fastened with an illegality hence rendered the appeal preferred by it before the learned Sessions Judge to be within the domain of Clause (b) of Section 375 of the Cr.P.C., concomitantly, also the pronouncement of a verdict thereupon by the learned Sessions Judge, Chamaba holds jurisdictional vigour. Provisions of Section 375 of the Cr.P.C., read as under:-

> **"375. No Appeal in certain cases when accused pleads guilty.-** Notwithstanding anything contained in section 374, where an accused person has pleaded guilty and has been convicted on such plea, there shall be no appeal.-
>
> (a) if the conviction is by a High Court; or
>
> (b) if the conviction is by a Court of Sessions, Metropolitan Magistrate or Magistrate of the first or second class, except as to the extent or legality of the sentence."

4. Since, the accused/respondents had before the learned Judicial Magistrate concerned confessed their guilt, the effect thereof is of theirs admitting their liability to pay to the complainant/petitioner herein the statutory sums of money fastenable upon them as fine for theirs infracting the provisions of Section 42 of the Act. In sequel, the order of the Judicial Magistrate concerned whereby it had imposed a fine of Rs.5000/- upon each of the accused/respondents appears to be per se infracting the provisions of Section 42 of the Act, provisions whereof proclaim of in the event of breach of its provisions occurring, breach whereof being a continuing one besides with no evidence existing on record qua the classification of the hotel, his not imposing upon the accused the minimum statutory fine of Rs.100/- per day, renders his verdict to be jurisdictionally void. In aftermath, also the orders of the learned Sessions Judge while levying fine upon the accused/respondents from 25.2.2000 to 18.11.2002 is per se in transgression of the mandate of the provisions of Section 42 of the Act which

contrarily enjoined upon the learned Sessions Judge to from 22.12.1998 upto 24.2.2000 where within for reasons aforesaid the breach occurred besides uptill the respondents/accused breaching the provisions of Section 42 of the Act levy fine upon the respondents/accused quantified in a sum of Rs.100/- per day. The learned Sessions Judge Chamba while not levying upon the accused/respondents fine at the rate of Rs.100/- per day from 20.2.1998 uptill the continuance of breach by the respondents/accused qua the apposite statutory provisions, has committed a gross impropriety. In sequel, the instant petition is allowed and the impugned order stands quashed and set aside. The respondents/accused are directed to from 22.12.1998 upto theirs producing before the competent authority the apposite certificate qua theirs obtaining the registration of their hotel from it, pay to the competent authority fine at the rate Rs.100/- per day within one month from today. However, in case, the aforesaid quantum of fine computed at a rate of Rs.100/- per day stands deposited by the respondent/accused before the competent authority, no insistence be made upon them for theirs depositing the aforesaid quantum of fine before it.

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

Ajnesh Kumar …..Petitioner.

Versus

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

CWP No.4159 of 2010.
Judgment reserved on: 21.06.2016.
Date of decision: July 12, 2016.

Constitution of India, 1950- Article 226- Petitioner filed a writ petition that certain influential persons including respondents No. 5 were keen to get the road constructed in a forest area and had relied upon some documents in support of their claim- respondents stated that building plan of respondent No. 5 was sanctioned as per law- path is in existence and is being maintained by M.C. Shimla- held, that no material was placed on record to show that petition has been filed in public interest- petitioner had chosen to target respondent No. 5 and no other person - petitioner had filed the present petition to espouse his private interest- he is resident of Jutogh situated at a distance of 5 kilometers from the place – no tree was cut or uprooted- no debris was put- petitioner has filed the present writ petition to conduct fishing and roving inquiry, which is not permissible- petition dismissed with cost of Rs. 50,000/-. (Para-17 to 33)

Case referred:

State of Uttaranchal Vs. Balwant Singh Chaufal (2010) 3 SCC 402

For the Petitioner :	Ms.Vandana Misra Panta, 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 3 and 6.
	Mr.Hamender Chandel, Advocate, for respondent No.4.
	Mr.Ramakant Sharma, Senior Advocate with Ms.Devyani Sharma, Advocate, for respondent No.5.
	Mr.B.C.Verma, Advocate, for respondents No.7 to 9.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

The petitioner claims to have filed this petition as *probono publico* wherein it is averred that a large portion of the area in and around the "Kamna Devi" temple at Shimla is a

forest area which is under the ownership and possession of respondents No.2 and 3, but of late certain influential persons including respondents No.5, who is the Executive Engineer in the Municipal Corporation, Shimla had purchased land around and adjacent the said forest cover and he i.e. respondent No.5 was very keen to get a road constructed upto his plot. It is averred that respondent No.5 in order to obtain permission for construction of building had submitted false, fabricated and forged documents and managed to get the same approved in collusion with the officials of respondent No.4. It is also averred that the revenue officials in order to please and provide illegal help to respondent No.5 had inserted a note at the left and right of the tatima (spot map) regarding existence of certain stairs adjoining the plot of land belonging to respondent No.5. It is further averred that respondent No.4 without prior sanction or approval from the Forest Department had constructed stairs from "Chakkar till Kamna Devi" temple and recently the construction of a new motorable road had started in the forest adjoining "Kamna Devi" and this road was being built right upto the plot of respondent No.5 and for this purpose men, material and vehicles belonging to respondent No.4 were blatantly being used by him without any restraint. The petitioner also placed reliance upon certain news items which appeared in the Hindi Daily "Dainik Bhaskar" on 8th and 9th March, 2010 wherein it was reported that a stretch of 80 metres of road was being constructed over forest area to the plot of respondent No.5 and there were a large number of trees that have been marked and would eventually be cut down. On such pleas, the petitioner has sought the following substantive reliefs:-

"1. That appropriate writ/direction/order may kindly be issued to Respondents neither to construct, nor permit any construction of road/path over FOREST/CPWD land around Kamna Devi Temple area.

2. That Respondent No.6 may kindly be directed to carry out proper demarcation of Forest Land around Kamna Devi temple by competent Revenue Official not below the rank of Tehsildar (AC Ist Grade) strictly in accordance with the H.P. Settlement Manual, in the presence of all other respondents as well as land owners if any and thereafter give proper fencing for protection of Forest Land by removing and demolishing encroachment if any.

3. That appropriate directions may kindly be issued to change the description of the nature of the forest land under the occupation of CPWD (Respondent No.3) from "Gair Mumkin Ahata" to that of protected Forest Land with further direction to CPWD not to cut a single tree in their occupation without prior permission of this Hon'ble Court.

4. That appropriate action may kindly initiated against the erring officials of respondent No.4 and 6 including against respondent No.5 for issuance, use and approval of fabricated Tatima (Annex P.2) on the basis of which building construction plan of Respondent No.5 was approved and sanctioned.

5. That appropriate directions may kindly be issued to Respondent No.4 to initiate Departmental action against Respondent No.5 for gross misuse of official position by which he got his own building plan sanctioned on the basis of fabricated Tatima (Annex P-2) while himself working as the Architect Planner of Respondent No.4 with further direction to cancel and withdraw the said building plan permission of Respondent No.5.

6. That appropriate action may kindly be initiated against Respondent No.5 for gross and blatant misuse of official powers as the Executive Engineer of Municipal Corporation, Shimla for deliberately carrying out road construction over Forest Land and construction of his own building near Kamna Devi Temple by unauthorisedly and illegally employing the men and material of Respondent No.4."

2. Respondents No.1 and 2 i.e. Principal Secretary (Forests) and Principal Chief Conservator of Forests have filed a common reply wherein it is averred that most of the area near "Kamna Devi" temple either belongs to CPWD or to private owners but they have not received any complaint regarding any tree being uprooted or cut in the forest land and have also not received

any complaint regarding debris being thrown thereupon. It is further averred that though one proposal for diversion of forest land for construction of ambulance road through DPF-Sandal was received by the Commissioner, Municipal Corporation, Shimla and sent to Divisional Forest Officer (DFO), Shimla, and subsequently received in the Office of respondent No.2 but the same was returned for attending to some observations which were duly conveyed by DFO, Shimla to respondent No.4.

3. Insofar as the construction being raised by respondent No.5 is concerned, it is specifically averred that the prescribed distance for construction from the forest land is five metres, whereas, the construction being undertaken by respondent No.5 could only be measured after completion of demarcation.

4. The Superintending Engineer of CPWD, has been arrayed as respondent No.3 and in its separate reply has raised preliminary objections regarding locus-standi and maintainability of the petition. On merits, it has been averred that the area under the possession of CPWD is not forest land but is classified as "Gair Mumkin Ahata", in the revenue records and similarly the area where the staff quarters have been constructed is again not the forest land but is "Ghasni Sarkar" (pasture land belonging to the Government). It is then averred that the CPWD as and when required is taking adequate steps to protect its land and no road has been constructed over the land under its possession.

5. Respondent No.4 i.e. the Municipal Corporation, Shimla, in its reply has raised preliminary objections questioning the locus of the petitioner and maintainability of the petition on the ground that respondent No.5 while carrying out of his building work has not violated any provision of the building regulations. On merits, it has specifically been averred that the petitioner has given a concocted story to make out a case of building violation. The building plan submitted by respondent No.5 after proper verification and ensuring the compliance of the mandatory provisions governing the construction was sanctioned on 06.03.2003. Insofar as the existence of stairs is concerned, the same had been pointed out in many building maps submitted by the private individuals and such path is otherwise being repaired from time to time by the Corporation and there was no objection raised by anyone at any given time. It also stands clarified that the construction raised by respondent No.5 is being undertaken strictly as per the sanctioned map and he has left set back of 5.55 metres beyond the stairs and boundary of his house and has also surrendered three metres wide strip of his land for path. Insofar as the path from "Chakkar to Kamna Devi" is concerned, it has been averred that the same is in existence since long and is being maintained by the replying respondent. The allegation regarding construction of motorable road has been specifically denied and it has been averred that the matter regarding construction of ambulance road in the area was under the active consideration of the Corporation since long as there were lot many demands received not only from the residents of the locality but also from Municipal Councillor of the area.

6. As regards the news items published in "Dainik Bhaskar", it is specifically averred that after enquiring into the facts, a detailed contradiction was issued to the Bureau Chief of the said newspaper on 12.03.2010 which clearly shows that the contents of the news item were not only false and baseless but had been published with the sole aim of tarnishing the image of "*hard working and sincere Officers in the eyes of public and also to damage the reputation of the authorities of the respondent-Corporation".*

7. Respondent No.5 has filed a separate reply wherein preliminary objections regarding locus-standi, competence, maintainability and suppression of true and material facts etc. etc. have been raised. It is specifically averred that though the petition claims to have been filed in public interest, whereas, it is not so as it has been filed at the instance of one Vinod Kumar son of late Shri S.P. Sharma and Smt. Vijay Sharma, wife of Shri Ashok Sharma, both residents of Prospect Hill, Boileauganj, who are none other than the neighbours of respondent No.5 and are residing in the building above the plot of land owned by respondent No.5. These persons had earlier filed a complaint against respondent No.5 with regard to construction being

raised by him, which was enquired into and ultimately the proceedings were dropped by respondent No.4 vide its order dated 14.06.2006. This order was assailed by the aforesaid persons in appeal before the learned Additional District Judge, Fast Track Courts, Shimla, who too was dismissed on 05.06.2007. Thereafter, both these orders were assailed before this Court in CMPMO No.155 of 2007. On 21.11.2007 the petition came up for consideration and this Court directed respondent No.4 to personally carry out inspection of the spot or depute a technical expert to find out as to whether the retaining wall constructed by the respondent had caused any damage to the structure of the petitioners therein or had got any potential to cause any damage in future. The Executive Engineer after visiting the spot in presence of the parties had reported that there was no defect in the retaining wall constructed by the replying respondent and it was also reported that no damage on account of construction of the retaining wall had been caused to the structures of the petitioners therein. But, despite this report, both Shri Vinod Kumar and Smt.Vijay Sharma were bent upon to harass the replying respondent and had got instituted this petition through a person, who was not even a resident of the area by claiming that it had been filed in public interest. It is specifically pleaded that filing of the petition was nothing but an abuse of the process of law and had only been filed in order to settle scores. It is also averred that Smt. Vijay Sharma had herself encroached upon forest land comprised in Khasra No.547 by raising construction of a part of her building and had thereafter got the land measuring 37.68 square metres of this Khasra Number transferred in her name from the Settlement Officer in violation of the provisions of the Forest Conservation Act, 1980 and this fact was duly brought to the notice of all concerned, but to no avail.

8. On merits, it is averred that this petition has been filed out of vindictiveness as the replying respondent had cancelled the work and thereafter forfeited the earnest money of one of the brothers of petitioner, Shri Dinesh Sood, who was working as a Government Contractor with the Municipal Corporation, Shimla. Respondent No.5 has specifically denied that he had obtained permission by submitting a false and fabricated tatima and further denied to have obtained permission by exercising influence.

9. Insofar as the path on the left side of the tatima is concerned, it is specifically averred that path starts from "Chakkar Chowk to Kamna Devi" temple and is infact the only approach to the temple. The path is stated to be around 450 metres in length and is in the shape of ascending staircase and has been in existence for the last many years. Respondent No.4 itself has paved the land of this path by laying red stones on its entire length and breadth for which permission was granted on 29.06.2006. That apart, along the path the forest land has been duly fenced for past many years and in any case before the maps submitted by the replying respondent had been approved by respondent No.4.

10. The Principal Secretary (Revenue) has been arrayed as respondent No.6 and in its reply has averred that respondent No.5 is the owner of land situate in Mauza Kereru comprising Khata Khatauni No.278/401, Khasra No.1626/548, measuring 442-00 square metres and the plot is under construction. It has further been averred that path/stairs adjoining to Khasra No.1626/548 is being used by general public.

11. During the pendency of the petition, three persons namely Pawan Kumar, Bhim Singh and Padam Chand got themselves impleaded as respondents No.7 to 9 and filed their separate replies opposing the claim of the petitioner. It has been averred that all these persons are having their residential buildings at the place where the construction work of the building of respondent No.5 is being undertaken since 2006. It is also averred that the construction being carried out by respondent No.5 is strictly in accordance with the sanctioned plan. It is then averred that inhabitants of the locality have for the long time been demanding an ambulance road by submitting various representations and on receipt of the same the department had moved the case for seeking approval from the competent authority under the provisions of the Forest Conservation Act. It is also pointed out that the petitioner infact has tried his level best to get the construction work of the ambulance road stayed, though he has not come forward against installation of three big telecommunication towers which have been installed in the same

locality and were a source of health hazard which proves that the petitioner by instituting the instant petition really has no genuine public interest.

12. In rejoinder to the reply filed by respondents No.1 and 2, the petitioner has averred that respondent No.5 under the garb of the ambulance road had already dug the forest land and constructed a road upto his plot and by exercising his official power has prevailed upon respondent No.4 to somehow lobby "*with the Forest Department of Himachal Pradesh for permission to build a road for upcoming residential building through the forest land on the pretext of ambulance road*". It is further contended that the forest land has been encroached by respondent No.5 by submitting false and fabricated tatimas and the extent of such encroachment can only be known after the land is actually demarcated by the revenue officials.

13. In rejoinder to the reply filed by respondent No.3, the petitioner has admitted that he is not a resident of the area, but claims to have no personal interest in the litigation, save and except, that he is sincerely interested in protecting the beautiful forest cover around "Kamna Devi" temple. It is also averred that the area in possession of CPWD is full of thick forests with huge 'Deodar', 'Pine' and 'Oak' trees and as such is a part of the forest land. The revenue records to the contrary, therefore, deserve to be corrected. It has further been averred that the ambulance road has been constructed by respondent No.5 over the land belonging to CPWD.

14. In rejoinder to the reply filed by respondent No.4, the petitioner has sought to justify his locus-standi and has also averred that a demarcation ought to have been conducted so as to ascertain the extent of encroachments made by the private builders over the forest land. It is also averred that some private builders have even thrown their debris in the forest land and official respondents have simply acted as mute spectators as one of its very sincere Officer is carrying out construction of his house adjoining forest land. The petitioner has once again impeached the veracity of the tatimas by claiming that the same are false and fabricated inasmuch as the tatima issued in 2002 Annexure P-2 appears an entry by a different hand and by a different person wherein mention regarding three metres wide stairs on the left side of the plot has been made, whereas, nothing of this sort has been mentioned in the latest tatima of the same plot issued on 17.03.2010 (Annexure P-3). In support of such contention the petitioner has now annexed a copy of revenue map as Annexure P-8. It is thereafter averred that in absence of proper demarcation, the actual extent of encroachment cannot be ascertained. But, despite this the official respondents are more than willing to give a clean chit to respondent No.5 notwithstanding the allegations made by the petitioner and also appearing in the print media.

15. In rejoinder to the reply filed by respondent No.5, it has been averred that the said respondent is deliberately raising issue regarding some previous litigation with one of his neighbours which infact has nothing to do with the subject matter of the present petition. It is averred that this petition is essentially against the illegal and unauthorized construction of road/path over the forest land around "Kamna Devi" temple. It is further claimed that the instant petition has infact been filed against the encroachments made by the private land owners/builders over the forest land adjoining "Kamna Devi" temple. The allegation that the petitioner is being used by one Shri Vinod Kumar and Smt. Vijay Sharma to vent their grudge against respondent No.5 has been denied. The petitioner has stated that he has nothing to do with his brother Shri Dinesh Sood with whom he otherwise does not even enjoy a very cordial relationship. It is also averred that the petitioner has separate and independent business and is no way concerned with the business activities of his brother. The petitioner has thereafter reiterated the averments regarding the veracity of the tatima, the reports appearing in the media and the so-called influence being exercised by respondent No.5.

16. In rejoinder to the reply filed by respondent No.6, it has been averred that unless and until there is a proper demarcation, the extent of encroachment cannot be ascertained.

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

17. We have deliberately referred to the pleadings of the parties in extenso so as to enable us to come to a conclusion as to whether the petitioner is indeed a *probono publico* and has infact filed the instant petition in larger public interest.

18. At the outset, we may observe that save and except for a bald statement that the petition has been filed in public interest, there is no material whatsoever placed on record by the petitioner whereby it can be inferred that he is a *probono publico* or that the petition has infact been filed in public interest. Rather, if one would go through the entire petition, it would be evident that the element of public interest is conspicuously absent. The credibility of the petitioner becomes further doubtful when he chooses to target only respondent No.5 and does not question the construction admittedly being made by the other so-called influential persons including Shri Vinod Kumar and Smt. Vijay Sharma (supra). The petitioner's credentials become all the more doubtful when he even does not deny that the aforesaid persons are known to him. He further does not deny that one of his brothers Shri Dinesh Sood is working as a Government Contractor with the Municipal Corporation, Shimla and in the year 2010 the work allotted to him by the Corporation had been cancelled at the instance of respondent No.5 and even his earnest money had been forfeited.

19. What we can, therefore, prima facie, infer is that the petitioner has been set up as a dummy and has, therefore, indulged in public mischief for oblique motive and in such circumstances the Court has to act ruthlessly while dealing with such imposters, busybody and meddlesome interlopers impersonating as public spirited holy men. The petitioner cannot masquerade as crusader of justice and is only pretending to act in the name of *probono publico,* though he has no interest in the public to protect. The instant petition has been filed under ploy for achieving oblique motives.

20. It is more than settled that merely because a petition is styled as a Public Interest Litigation but infact is nothing more than a camouflage to foster personal disputes or vendetta and the petitioner infact is a proxy litigant the same cannot be regarded as a Public Interest Litigation. There has to be a real and genuine public interest involved in a litigation and there must be concrete and credible basis for maintaining a cause before the Court and not merely an adventure of knight errant borne out of wishful thinking. Only a person acting bonafide and having sufficient interest in the proceedings of PIL will alone have a locus-standi and can approach the Court to wipe out the tears of the poor and needy, suffering from violation of their fundamental rights, but not a person(s) for personal gain or private profit or any other oblique consideration.

21. Public Interest Litigation is a weapon which has to be used with great care and circumspection and the Judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or public interest seeking is not lurking. It is to be used as an effective weapon in the armoury of law for delivering social justice to the citizens.

22. The attractive brand name of Public Interest Litigation cannot be allowed to be used for suspicious products of mischief. This has so been held by the Hon'ble Supreme Court in its various pronouncements and the same have been repeatedly reiterated and followed by this Court in a batch of writ petitions, CWP No.7249/2010 titled 'Devinder Chauhan Jaita versus State of Himachal Pradesh and others', being lead case, decided on 03.12.2014, another batch of writ petitions, CWP No.9480/2014 titled 'Vijay Kumar Gupta versus State of Himachal Pradesh and others', being the lead case, decided on 09.01.2015, CWP No.2775/2015 titled 'Anurag Sharma and another versus State of Himachal Pradesh and others', decided on 07.07.2015, CWP No.328 of 2016 titled 'Lala Ram and others versus State of H.P.and others, decided on 01.03.2016, CWP No.4838 of 2015 titled 'Ali Mohammed versus State of H.P. and others, decided on 16.03.2016, CWP No.4240 of 2015 titled 'Om Prakash Sharma versus State of H.P. and others, decided on 19.04.2016 and CWP No.3131 of 2014, titled 'Dr.J.S.Chauhan versus State of H.P. and others, decided on 06.05.2016.

23. The issue regarding public interest litigation has elaborately been dealt with by this Bench in CWP No.9480 of 2014, titled 'Vijay Kumar Gupta versus State of H.P. and others, decided on 09.01.2015 (supra) and after taking into consideration the entire law on this subject this Court laid down the following parameters for permitting litigation in public interest:-

> "29. From the aforesaid exposition of law, it can safely be concluded that the Court would allow litigation in public interest only if it is found:-
>
> *(i) That the impugned action is violative of any of the rights enshrined in Part III of the Constitution of India or any other legal right and relief is sought for its enforcement;*
>
> *(ii) That the action complained of is palpably illegal or malafide and affects the group of persons who are not in a position to protect their own interest or on account of poverty, incapacity or ignorance;*
>
> *(iii) That the person or a group of persons were approaching the Court in public interest for redressal of public injury arising from the breach of public duty or from violation of some provision of the Constitutional law;*
>
> *(iv) That such person or group of persons is not a busy body or a meddlesome inter-loper and have not approached with mala fide intention of vindicating their personal vengeance or grievance;*
>
> *(v) That the process of public interest litigation was not being abused by politicians or other busy bodies for political or unrelated objective. Every default on the part of the State or Public Authority being not justiciable in such litigation;*
>
> *(vi) That the litigation initiated in public interest was such that if not remedied or prevented would weaken the faith of the common man in the institution of the judicial and the democratic set up of the country;*
>
> *(vii) That the State action was being tried to be covered under the carpet and intended to be thrown out on technicalities;*
>
> *(viii) Public interest litigation may be initiated either upon a petition filed or on the basis of a letter or other information received but upon satisfaction that the information laid before the Court was of such a nature which required examination;*
>
> *(ix) That the person approaching the Court has come with clean hands, clean heart and clean objectives;*
>
> *(x) That before taking any action in public interest the Court must be satisfied that its forum was not being misused by any unscrupulous litigant, politicians, busy body or persons of groups with mala fide objective or either for vindication of their personal grievance or by resorting to black-mailing or considerations extraneous to public interest."*

24. It would thus be clear that public interest litigation can only be entertained at the instance of a bonafide litigant and cannot be used by unscrupulous litigants to disguise personal or individual grievance as a public interest litigation. The instant petition fails to qualify the above parameters.

25. Here we may also note that in compliance to the directions issued by the Hon'ble Supreme Court in ***State of Uttaranchal Vs. Balwant Singh Chaufal (2010) 3 SCC 402,*** this Court vide notification dated 08.04.2010, with a view to preserve the purity and sanctity of Public Interest Litigation and also to keep a check on frivolous letters/petitions has framed Rules known as The Himachal Pradesh High Court Public Interest Litigation Rules, 2010. Rules 3 and 4 thereof read as under:-

"3. The petitions/complaints/letters and new paper clippings falling under the following categories can be treated under Public Interest Litigation.

(i) Bonded labour matters.

(ii) Neglected children.

(iii) Non-payment of minimum wages to workers and exploitation of casual workers and complaints of violation of Labour Laws (except in individual cases).

Provided that in respect of clauses (i), (ii) and (iii) above, if any of these matters forming the subject matter of the communication relates to one person (as opposed to a group of persons) this cannot be termed as a PIL and can be at best be treated as an individual writ petition.

(iv) Petitions against atrocities on women; in particular harassment of bride, bride burning, rape, murder, kidnapping etc;

(v) Petitions complaining of harassment or torture of villagers by co-villagers or by police in respect of persons belonging to Scheduled Castes and Scheduled Tribes and economically backward classes;

Provided that in respect of clauses (iv) and (v) above if any of these matters of the communication relates to one person (as opposed to a group of persons) this cannot be called as a PIL.

(vi) Petitions pertaining to environmental pollution, disturbance of ecological balance, drugs, food adulteration, maintenance of heritage and culture antiques, forest and wild life, encroachment of public property and other matters of public importance;

(vii) Petitions from riot-victims; and

(viii) Family pension.

EXPLANATION: *The test to treat a communication as PIL is whether any particular communication relates to an individual, if it does, it will be an individual, if it does, it will be an individual's C.W.P. and not a PIL irrespective of the fact whether the individual is complaining of any harassment or any violation of rights, which may also be akin to a group. If, however, the communication relates to a group and it is felt that group cannot defend itself or is not in a position to come to the Court, that would be a PIL warranting interference of the High Court in that PIL.*

4. However, no petition involving individual/personal matter shall be entertained as Public Interest Litigation including the matters pertaining to landlord tenant disputes, service matters except concerning pension and gratuity; the petitions for early hearing of cases as well as the petitions concerning maintenance of wives, children and parents."

26. As per Rule 9, the Court before entertaining a Public Interest Litigation shall keep in view the following factors:-

"(i) to verify the credentials of the petitioner;

(ii) satisfaction regarding the correctness of the contents of the petition;

(iii) substantial public interest is involved;

(iv) the petition which involved larger public interest, gravity and urgency must be given priority over other petitions;

(v) to ensure that the PIL is aimed at redressal of genuine public harm or public injury. It shall also be ensured that there is no personal gain, private or oblique motive behind filing the public interest litigation.

> (vi) *to ensure that the petition filed by busybodies for extraneous and ulterior motives must be discouraged by imposing exemplary costs or by adopting similar novel methods to curb frivolous petitions and the petitions filed for extraneous consideration."*

The petition does not even fulfill the criteria as prescribed in the aforesaid Rules and even though the petition is claimed to have been filed in Public Interest Litigation, it does not even qualify to be registered as such and is therefore, not maintainable for the reasons all stated above and for reasons recorded hereinafter also.

27. Adverting to the facts once again it would be noticed that the petitioner as per his own showing is a resident of Jatog which is atleast five kilometres from "Kamna Devi" temple and, therefore, we wonder what special interest the petitioner has in this litigation, especially, when it has come in the reply of the official respondents that a beautiful path of red sand stone has been constructed by respondent No.4 from "Chakkar Chowk to Kamna Devi" temple which infact is the only approach to the temple and this is so reflected in the spot map.

28. The material placed on record further reveals that no trees have been illegally felled or uprooted. No debris has been dumped over any portion of the so-called forest land and even the construction being raised by respondent No.5 is strictly in accordance with the law as he while raising construction of his house has left mandatory set backs. Even the so-called forest land in possession of the CPWD i.e. respondent No.3 is not so classified or recorded in the revenue records and further there is no road that has been constructed through the alleged forest land. Likewise, the petitioner has also failed to substantiate his allegations regarding encroachment(s) over the so-called forest land and except for naming respondent No.5 that too for obvious reasons, the petitioner has further failed to name the so-called private builders, who have either thrown debris or have encroached over the alleged forest land. That apart, the petitioner before approaching this Court has never called upon the authorities concerned by making a representation inviting their attention to what has now been stated in this petition. Ordinarily, any petitioner, who applies for a writ or order in the nature of mandamus should in compliance with a well known rule of practice, ordinarily, first call upon the authority concerned to discharge its legal obligation and show that it has refused or neglected to carry out the same within a reasonable time before applying to a Court for such an order.

29. This case is a classical example where the petitioner has indulged in a proxy war and the instant petition has been filed with oblique motive by making frivolous and vexatious allegations that too at the instance of Shri Vinod Kumar and Smt. Vijay Sharma, who are none other than the neighbours of respondent No.5. The petitioner has used the attractive brand name of public interest litigation for suspicious products of mischief. This petition in no manner seeks redressal of genuine public wrong or public injury but is founded on personal vendetta and to say the least is a proxy litigation.

30. It would also be noticed that what the petitioner infact seeks is fishing and roving inquiry without having placed on record any contemporaneous official records to substantiate the allegations levelled by him, more particularly, against respondents No.3 to 5. 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. If the petitioner was really keen in preserving and protection of the natural endowed and dense forests in and around Shimla and had special interest in the heritage monuments/temples situate in Shimla, then he would have atleast placed on record some material in support of such contentions. Not only this, if the petitioner was genuinely interested in preserving all that he claims, then why the details of atleast one of such similar work undertaken by him is not forthcoming?

31. It would thus be evident from the aforesaid discussion that the petitioner has not approached this Court with clean hands. This Court in exercise of its extraordinary jurisdiction is a Court of equity and any person approaching is expected not only to act with clean hands but

also with clean mind, clean heart and with clean objective. He who seeks equity must do equity. The judicial process cannot become an instrument of oppression or abuse or a means in the process of Court to subvert justice for the reasons that the Courts exercise jurisdiction only in furtherance of justice. The interest of justice and public interest coalesce and therefore, they are very often one and the same.

32. In view of the aforesaid discussion not only is there no merit in this petition, but the same is also mischievous and has only resulted in wastage of precious Court's time. Even the respondents have unnecessarily been dragged into an otherwise avoidable litigation.

33. Accordingly, this petition is dismissed with costs of Rs.50,000/- to be paid by the petitioner to respondent No.5 within a period of three months, failing which respondent No.5 shall be at liberty to recover the costs by seeking execution of this order. The petition is 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.

Baldev Singh and others. ...Appellants.
Versus
Kalan Devi and others. ...Respondents

RSA No. 549 of 2002
Reserved on: 4.7.2016
Decided on: 12.7.2016

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit pleading that one M started living with plaintiff's sister N - M purchased land and constructed a house- son of M left village and never returned- plaintiff started residing with M- defendant No. 1 had never married the son of M and was not in possession of the house- she filed a civil suit, which was decreed ex-parte in her favour – plaintiff had become owner by way of adverse possession- suit was decreed by the trial Court- an appeal was filed, which was partly allowed- held, in second appeal that plaintiff was not served with any notice when the Civil suit was instituted by defendant No. 1- he was also not summoned when the mutation was attested- it cannot be believed that defendant No. 1 started residing in the house of B as servant- there is plethora of evidence that she was married with B and she was recorded as wife of B in the Pariwar Register and voter list – it was duly proved that defendant No. 1 was never married to son of M and she had concocted a false story regarding the marriage- appeal dismissed. (Para-17 and 18)

For the Appellants : Mr. Ajay Sharma, Advocate.
For the Respondents: Ms. Vandana Kuthiala, Advocate for respondent Nos. 1 (b) to 1 (e).

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This Regular Second Appeal is directed against the judgment and decree dated 6.8.2002 rendered by the Additional District Judge-II, Kangra at Dharamshala in Civil Appeal No. 89-K/97 whereby an appeal preferred by the appellants-defendants (hereinafter referred to as the "defendants" for convenience sake) was partly allowed to the extent that the decree of the trial court holding that the plaintiff-respondent (hereinafter referred to as the "plaintiff" for convenience sake) had become owner by way of adverse possession of the suit land was set aside,

however, the judgment and decree to the effect that it has declared the judgment and decree rendered in Civil Suit No. 99/89 as null and void was upheld.

2. “Key facts” necessary for the adjudication of this appeal are that according to the averments made in the plaint, about 35-36 years back, one Mangatu son of Tegu came to village Chari and started leaving with plaintiff's sister Nihatu widow of Sh. Podu. Nihatu had constructed a house in Khasra No. 1710 and was living therein. Plaintiff, his brother and sister were also living with Nihatu. He was looking after Nihatu. Mangatu and his son Chamaru were also living there. Mangatu purchased land comprised in Khata No. 422, Khatanu No. 874, Khasra Nos. 1709 and area measuring 0-01-08 hectares Gair Mumkin Abadi situated in Mohal and Mauza Chari, Tehsil Dharamshala, District Kangra. He had constructed a house thereon. He alongwith his son started living in the house. Thereafter, about 30 years back, Chamaru left village and never came back again. Since Mangatu was quite old, plaintiff started living with him. In the earthquake of 1986, the house of Mangatu collapsed and destroyed. Plaintiff was in occupation of that house. He was given compensation of Rs. 1200/- by the State Government. Defendant No.1 Smt. Amriti never married with Chamaru nor ever lived with him. She never came into possession of the suit land or the house. She was wife of Basakhu Ram son of Panna, resident of Saddoon, Tehsil and District Kangra. Smt. Amriti Devi in collusion with defendant Nos. 2 to 6, as arrayed in the original suit, filed a Civil Suit No.99/89 in the court of Senior Sub Judge, Kangra at Dharamshala, titled as ***Smt. Amriti Devi*** vs. ***General Public***. Amriti Devi in collusion with defendant Nos. 2 to 6 defrauded and misrepresented the Court by claiming falsely to be wife of Chamaru son of Mangatu which she never was. Plaintiff was never impleaded as defendant in the suit knowing fully well that plaintiff was in possession of the suit land since the death of Mangatu. Learned Sub Judge 3rd Class, Dharamshala passed an *ex parte* decree on 30.12.1989 in Civil Suit No. 99/89 in favour of Amriti Devi. Mutation No. 502 was also attested in her favour on 23.11.1991. In the alternative, it was prayed that the plaintiff has become owner of the suit land by way of adverse possession. Plaintiff came to know that Amriti has sold the suit land to defendant Nos. 2 to 6.

3. The suit was contested by the defendants. On merit, it was stated that the plaintiff was not owner of the suit land, rather Amriti was owner of the suit land and she has sold the suit land in favour of defendant No.4, namely, Multan Singh. Nihatu had never constructed a house adjoining to land bearing Khasra No. 1709. This Khasra number belonged to defendant Nos. 2 to 5. There was no relationship of the plaintiff with Nihatu or Mangatu and Chamaru Ram was married to Amriti. They lived together. Chamaru had gone to Punjab in search of some job. He never came back. Mangatu father of Chamaru also died about 20 years back. Plaintiff was not collateral of Mangatu or Chamaru. Defendant Amriti started living in village Saddoon and left dilapidated house under the care of Mehar Singh predecessor-in-interest of defendant Nos.2 to 6. The house collapsed. Civil Suit No. 99/89 was rightly decreed.

4. Issues were framed by the Civil Judge 1st Class, Dharamshala on 11.9.1992. She decreed the suit declaring that the plaintiff has become owner of the suit land by way of adverse possession and Amriti Devi was not the legally wedded wife of Chamaru Ram. The judgment and decree passed by Sub Judge Class-III, Dharamshala in Civil Suit No. 99/89 titled as ***Amriti Devi*** versus ***General Public*** decided on 30.12.1989 was the result of fraud and mis-representation and was null and void and not binding upon the plaintiff. Defendants filed an appeal against the judgment and decree dated 31.7.1997 before the Additional District Judge-II, Kangra at Dharamshala. He partly allowed the appeal as discussed hereinabove. Hence, the present appeal. It was admitted on 23.12.2002 on the following substantial questions of law:

1. **Whether in view of the judgment and decree passed in earlier suit brought by way of additional evidence before the learned Addl. District Judge, Dharamshala demolishes the case of the plaintiff in its entirety as he already stand adjudicated not to be in possession?**
2. **Whether without specifically alleging and pleadings qua the alleged fraud and misrepresentation and without an iota of evidence with**

respect to the fraud/misrepresentation, both the courts below erred in declaring the judgment and decree in civil suit No.99/89 as null and void stand vitiated and liable to be quashed and set aside?

5. Mr. Ajay Sharma, learned counsel for the appellants, on the basis of substantial questions of law framed, has vehemently argued that the judgment and decree dated 30.12.1989 rendered in Civil Suit No. 99/89 was binding on the plaintiff. Plaintiff has not led any evidence that it was outcome of fraud or misrepresentation. He also contended that learned first appellate court has not decided the application filed under order 41 rule 27 of the Code of Civil Procedure at the time of final hearing.

6. Ms. Vandana Kuthiala, learned counsel for the respondents has supported the judgments and decrees passed by both the courts below.

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

8. Since both the substantial questions of law are interconnected and interlinked the same are taken up together for determination to avoid repetition of discussion of evidence.

9. Learned Sub Judge 1st Class has framed issue No.2 as under:

Whether the judgment and decree dated 30.12.89 passed by Sub Judge III Class (1) Dharamshala in civil suit No. 99/89 is null and void and not binding on the plaintiff being a result of fraud, and mis-representation as alleged?"

10. PW-1 Puran Chand, in his examination-in-chief, has deposed that Mangatu son of Tegu had come with his son Chamaru to village Chari about 37-38 years back. Nihatu was living in her house constructed in Khasra No. 1710. Mangatu has died 32 years back and Chamaru left the village before 5-6 months of the death of Mangatu. He has never come back. He started living in the house of Mangatu. Mangatu was his grand-father in relation. Amriti was not related to Chamaru. She has neither stayed with Chamaru nor with Mangatu. She never remained in possession of the house. Amriti was married to one Basakhu of village Saddoon. Amriti filed civil suit in collusion with Multan Singh. He has never received any summons. Amriti claimed herself to be wife of Chamaru and obtained decree in her favour. Mutation was also attested. He was not summoned at the time of attestation of mutation. Till Chamaru lived in Chari, he never married. Respondents have no concern with the suit land. They wanted to forcibly oust him.

11. PW-2 Rattan Chand has testified that Amriti Devi never resided with Chamaru. In his cross-examination, he has denied that after departure of Chamaru from village Chari, Amriti resided with Mangatu and after the death of Mangatu, she handed over the keys of house to Mehar Chand. In fact, PW-2 Rattan Chand is resident of village Chari.

12. PW-3 Amar Chand was the Pradhan of Gram Panchayat Saddoon. He has deposed that in Panchayat family register, Smt. Amriti Devi has been recorded as wife of Basakhu Ram. They were living together for the last 35-36 years. He has proved copy of family register Ex.PW-3/A. In Ex.PW-3/A, Amriti Devi has been entered as wife of Basakhu Ram. PW-3 Basakhu Ram is an independent witness.

13. PW-4 R.S. Rana has proved the copy of plaint in Civil Suit No. 99/89 Ex.PW-4/A and stated that it was drafted by him on the instructions of Amriti Devi.

14. PW-5 Jagdish Thakur was the Election Kanungo. He has proved the extracts from the Election Roll for the year 1983 of Shahpur Assembly as Ex.PW-5/A. In Ex.PW-5/A, at Sr. Nos. 289 and 290, name of Basakhu Ram son of Punnu and Amriti Devi wife of Basakhu Ram, resident of Saddoon are recorded as voters.

15. DW-1 Multan Singh has deposed that Chamaru was the owner of the suit land and after the death of Chamaru, his wife Amriti Devi became the owner. He has shown his ignorance about the marriage of Amriti with Chamaru and has deposed that his father had told him about the marriage of Amriti with Chamaru. He has also admitted that Amriti Devi was residing with Basakhu Ram and shown his ignorance to the fact that in what capacity Amriti Devi was living with Basakhu Ram.

16. Amriti Devi has appeared as DW-2. She has testified that her marriage was solemnized with Chamaru Ram at the age of 12 years. She used to live in the house of her Mamas and sometime in the house of Chamaru for 5-7 years. Chamaru went somewhere for job. He never came back. Her father Managatu remained alive for 10-12 years after the departure of Chamaru. She had gone there on his death and after his death started living in Saddoon in the house of Basakhu as a servant as he was having no children. In her cross-examination, she has stated that after the demise of Mangatu, she has not abandoned the suit land, but used to come occasionally and after the departure of Chamaru, she was living with Basakhu and she was voter of Saddoon village and used to cast her vote. She has not produced any witness to prove her marriage with Chamaru. She has not produced even her maternal uncle as she has stated that she was residing with her maternal uncle. In Civil Suit No. 99/89, Amriti Devi has examined Bhagwan Dass and Onkar Chand to prove the fact that she was legally wedded wife of Chamaru, but these witnesses have not been produced in the present case. These were the most material witnesses.

17. Plaintiff has never been served with any notice when Civil Suit No. 99/89 was instituted. He was also not summoned when the mutation was attested in favour of Amriti Devi. It cannot be believed that Amriti Devi had started residing in the house of Basakhu Ram as servant. In fact, there is plethora of evidence that she was married with Basakhu Ram and in the Pariwar Register, name of Amriti Devi has been recorded as wife of Basakhu Ram and in the voter list also, she has been shown as wife of Basakhu Ram. Evidence of DW-1 Multan Singh is hearsay as he has deposed that he was told by his father that Amriti Devi was wife of Chamaru. Plaintiff has duly proved that Amriti Devi has never married with Chamaru. He has also duly proved that Amriti Devi in collusion with defendant Nos.2 to 6 has concocted false story of her marriage with Chamaru and filed a false case and obtained a decree of declaration that she was legally wedded wife of Chamaru.

18. Mr. Ajay Sharma has vehemently argued that the plaintiff has not pleaded that the decree dated 30.12.1989 in Civil Suit No. 99/89 was outcome of fraud and misrepresentation.

19. Ms. Vandana Kuthiala has drawn the attention of the Court to para No.13 of the plaint whereby it is specifically pleaded that Amriti Devi in collusion with defendant Nos. 2 to 6 has played a fraud on the court as well as the plaintiff by claiming falsely to be the wife of Chamaru son of Mangatu which she never was and the plaintiff was not impleaded as party. It is reiterated that the plaintiff has duly proved that Amriti Devi was never married to Chamaru. Plaintiff had started living in the house of Mangatu after the departure of Chamaru. He was also paid compensation by the State Government. Amriti Devi could not dispose of the land to defendants on the basis of decree rendered in Civil Suit No. 99/89, which was null and void.

20. Defendants had also filed an application under order 41 rule 27 of the Code of Civil Procedure to adduce copy of judgment and decree dated 14.11.1996 in Civil Suit No. 132/93/91 passed by the learned Senior Sub Judge, Kangra at Dharamshala and copy of judgment rendered in Civil Appeal No. 7-D/XIII/97. The application was contested by the plaintiff that Civil Suit No. 132/93/91 was filed for recovery . The application was allowed by the Additional District Judge-II, Kangra at Dharamshala on 26.3.2002. The judgments and decrees were permitted to be taken on record and the same were exhibited.

21. Ms. Vandana Kuthiala has drawn the attention of the Court to judgment and decree dated 14.11.1996 rendered in Civil Suit No. 132/93/91. It is evident from the judgment and decree dated 14.11.1996 that the plaintiff had filed suit for recovery against one Sh. Multan

Singh, Kalyan Singh, Chatur Singh and Baldev Singh. The suit was dismissed and the appeal preferred against the judgment and decree dated 14.11.1996 in Civil Appeal No. 7-B/XIII/97 was also dismissed being incompetent. These two documents have no bearing on the present case. Merely that the application filed under section 41 rule 27 of the Code of Civil Procedure was decided on 26.3.2002, being not heard with the main case, has not prejudiced the case of defendants in view of the facts and circumstances discussed hereinabove.

22. The substantial questions of law are answered accordingly.

23. In view of the analysis and discussion made hereinabove, there is no merit in the present appeal and the same is dismissed.

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

Bir Singh alias Bir Nath son of Dile Ram and another ....Revisionists.

Vs.

State of HP . ....Non-revisionist.

Cr. Revision No. 21 of 2008
Judgment reserved on:18.5.2016.
Date of judgment: July 12 ,2016

Indian Penal Code, 1860- Section 341, 325, 323, 427 read with Section 34- Accused in furtherance of their common intention wrongfully restrained the informant and gave him beatings due to which he sustained simple and grievous injuries- accused also damaged car of the informant- accused were tried and convicted by the trial Court- an appeal was preferred- learned Sessions Judge modified the sentence but maintained conviction- held, in revision that PW-5 had specifically stated that accused had given beatings to him and had damaged the vehicle- his testimony was duly corroborated by PW-6- Medical Officer also found the injuries on the person of the informant- there are no material contradictions in the testimonies of the witnesses- minor contradictions are bound to come with the passage of time – testimonies of witnesses are trustworthy, reliable and inspire confidence- Court had rightly convicted the accused- revision dismissed. (Para-11 to 21)

Cases referred:

C. Muniappan and others Vs. State of Tamil Nadu 2010 (9) SCC 567
Sohrab and another Vs. State of M.P. AIR 1972 SC 2020
State of U.P. Vs. M.K. Anthony AIR 1985 SC 48
Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat AIR 1983 SC 753
State of Rajasthan Vs. Om Parkash AIR 2007 SC 2257
Prithu Chand and another Vs. State of HP, 2009 (11) SCC 588
State of UP Vs. Santosh Kumar and others, 2009 (9) SCC 626
State Vs. Saravanan and another, AIR 2009 SC 151
Appabhai and another Vs. State of Gujara, AIR 1988 SC 696
Rammi Vs. State of M.P, AIR 1999 SC 3544
State of H.P. Vs. Lekh Raj and another, 2000(1) SCC 247
Laxman Vs. Poonam Singh and others, 2004 (10) SCC 94
Bhe Ram Vs. State of Haryana, AIR 1980 SC 957
Rai Singh Vs. State of Haryana, AIR 1971 SC 2505
State of Punjab Vs. Suraj Prakash, AIR 2016 SC 1015
Jose Vs. State of Kerla, AIR 1973 SC 944
Bipin Kumar Mondal Vs. State of West Bengal, AIR 2010 SCW 4470

Dharnidhar Vs. State of Uttar Pradesh, AIR 2010 SCW 5685
Bipin Kumar Mondal Vs. State of West Bengal, AIR 2010 SCW 4470
State of Andhra Pradesh Vs. Bogam Chandraiah and another, AIR 1986 SC 1899
Datar Singh Vs. State of Punjab, 1974 SC 1193
Yunish Vs. State of M.P., AIR 2003 SC 539
Balram Vs. State of Punjab, AIR 2003 SC 2213

For revisionists: Mr. Anup Chitkara, Advocate
For Non-revisionist: Mr. M.L.Sharma Additional Advocate General with Mr.R.K.Sharma Deputy Advocate General.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present revision petition is filed against judgment and sentence passed by learned Sessions Judge Kullu District Kullu HP whereby learned Sessions Judge Kullu affirmed conviction of revisionists passed by learned Trial Court and modified sentence part only.

Brief facts of prosecution case:

2. Brief facts of case as alleged by prosecution are that on intervening night of 25th/26th June 2005 at about 12.15 AM at village Khaknal District Kullu HP accused persons in furtherance of common intention wrongfully restrained complainant Ludar Chand and caused grievous hurt by way of giving fist blows due to which one tooth of Ludar Chand was broken and other teeth were placed in damaged condition. It is further alleged by prosecution that accused persons in furtherance of common intention caused hurt to complainant by way of fist blows. It is further alleged by prosecution that accused persons committed mischief by way of causing wrongful damage to martuti Van No HP-58A-0182 belonging to Ludar Chand. It is further alleged by prosecution that statement of complainant under Section 154 Cr.PC Ext PW4/A was recorded and on the basis of statement of complainant FIR Ext PW4/B was registered against accused persons. It is further alleged by prosecution that spot map Ext PW7/A was prepared and photographs Ext P1 to Ext P8 obtained and MLC Ext PW2/A and x-ray report film Ext PW1/B and dental report Ext PW1/A also obtained. Charge was framed against accused persons by learned Trial Court under Sections 341, 325, 323, 427 IPC read with Section 34 IPC. Accused persons did not plead guilty and claimed trial.

3. Prosecution examined seven witnesses and also tendered documentary evidence. Learned Trial Court convicted both accused under sections 341, 325, 323, 427 IPC read with Section 34 IPC. Learned Trial Court sentenced convicts to undergo simple imprisonment for period of one month each and to pay fine of Rs.250/- each under Section 341 IPC read with section 34 IPC. Learned Trial Court further directed that in default of payment of fine convicts would undergo simple imprisonment for a period of seven days. Learned Trial Court further sentenced convicts for a period of three months rigorous imprisonment each and to pay fine of Rs.500/- each under Section 323 IPC read with section 34 IPC. Learned Trial Court further directed that in default of payment of fine convicts would undergo simple imprisonment for a period of fifteen days. Learned Trial Court further sentenced convicts to undergo rigorous imprisonment for a period of six months each and to pay fine of Rs.1000/ each under Section 325 IPC read with Section 34 IPC. Learned Trial Court further directed that in default of payment of fine convicts would undergo simple imprisonment of one month. Learned Trial Court further sentenced convicts to undergo simple imprisonment for a period of three months each and to pay fine of Rs.500/- each under Section 427 IPC read with Section 34 IPC. Learned Trial Court further directed that in default of payment of fine each convicts would undergo simple imprisonment for a period of fifteen days. Learned Trial Court further directed that all sentences would run concurrently.

4. Feeling aggrieved against the judgment and sentence passed by learned Trial Court Criminal Appeal No. 27/2006 and Criminal Appeal No. 28/2006 filed by convicts before learned Sessions Judge Kullu. Learned Sessions Judge Kullu disposed of both appeals on dated 10.1.2008. Learned Sessions Judge Kullu upheld judgment of learned Trial Court and modified sentence part only. Learned Sessions Judge Kullu reduced sentence to 15 days each under section 341 IPC read with section 34 IPC and in default of payment of fine each convicts would undergo imprisonment for seven days. Learned Sessions Judge Kullu further directed that sentence under Section 323 IPC read with Section 34 IPC is reduced to rigorous imprisonment for one month each and in default of payment of fine convicts would undergo imprisonment for fifteen days. Learned Sessions Judge Kullu reduced the sentence of rigorous imprisonment of six months under Section 325 IPC read with Section 34 IPC to rigorous imprisonment of two months each. Learned Sessions Judge Kullu further directed that in default of payment of fine each convicts would undergo simple imprisonment for fifteen days. Learned Sessions Judge Kullu further reduced the sentence of imprisonment of three months under Section 427 IPC read with Section 34 IPC to rigorous imprisonment of one month. Learned Sessions Judge further directed that in default of payment of fine the convicts would undergo simple imprisonment of seven days. Learned Sessions Judge Kullu further directed that all sentence would run concurrently. Learned Sessions Judge further directed that amount of fine imposed by learned Trial Court is retained and learned Sessions Judge modified the sentence part accordingly.

5. Feeling aggrieved against the judgment and sentence passed by learned Sessions Judge Kullu convicts filed present revision petition.

6. Court heard learned Advocate appearing on behalf of revisionists and learned Additional Advocate General appearing on behalf of non-revisionist and also gone through entire record carefully.

7. Following points arise for determination in present criminal revision petition:

1. Whether revision petition filed by revisionists is liable to be accepted as mentioned in memorandum of ground of revision petition?

2. Final order.

<u>8.Findings on point No.1 with reasons</u>:

8.1 PW1 Dr.Yogita Thakur medical officer has stated that on 27.6.2005 injured Ludar Chand was medically examined who was referred for dental opinion. Medical officer has stated that on medical examination following injuries were observed. (1) Avulsed upper right lateral incisor. (2) Grade-II mobility with upper right and left central. (3) Tenderness with upper right and left central incisor. (4) Swelling with upper lip in relation with upper right and left central and lateral incisor and advised X-ray. Medical officer has further stated that nature of injury was grievous as per x-ray film and x-ray report. In cross examination Medical officer has admitted that aforesaid injuries could be caused if person strikes against hard objects. PW1 Dr. Yogita Thakur also proved report Ext PW1/A placed on record.

8.2 PW2 Dr. Rakesh Negi has stated that injured Ludar Chand was examined on 26.6.2005. He has stated that there was small lacerated wound measuring around 0.5-1cm on upper lip middle with multiple abrasions on upper lip. He has stated that case was alleged history of loss of tooth and on examination of injured Ludar Chand socket was bleeding and tooth was missing. He has stated that there was swelling in the socket. He has stated that upper lip was swollen. PW2 Dr. Rakesh Negi proved MLC Ext PW2/A. He has stated that aforesaid injuries could be caused if person strikes against edged object forcefully.

8.3 PW3 MC Shanta Kumar has stated that he was posted in police station Manali. He has stated that rapat No. 36 Ext PW3/A was recorded which was written by him and the same is correct as per original record.

8.4 PW4 Inspector Jagdish Chand has stated that he was posted as SHO at police station Manali since July 2003. He has stated that on dated 26.6.2005 he recorded statement of Ludar Chand under Section 154 Cr.PC Ex PW4/A and FIR Ext PW4/B was recorded which was signed by him. He has stated that endorsement Ext PW4/C was signed by him.

8.5 PW5 Ludar Chand injured has stated that on 25.6.2005 he had gone to participate in marriage ceremony of one Karam Chand. He has stated that at about 11.30 night he came back to his house in maruti van No.HP-58A-0182. He has stated that on dated 25.6.2005 he, Pana Lal, Ailoo Ram,Chet Ram, Karam Chand were travelling in vehicle No HP-58-A-0182 during night period. He has stated that when they reached at village khaknal then co-accused Leela Sagar @ Neel Chand smashed his vehicle from driver side.He has stated that when they reached at village Sajla then co-accused Bir Singh and Leela Sagar were standing there and they stopped his vehicle and took him outside from his vehicle and beaten him with fist blows upon his mouth and teeth. He has stated that due to injuries inflicted by accused persons upper tooth broken and other teeth also damaged.He has stated that accused persons have also damaged his vehicle.He has stated that thereafter criminal report was filed. He has stated that he was medically examined. He has stated that his vehicle sustained damage to tune of Rs.5000/- (Five thousand) to Rs.6000/- (Six thousand). He has denied suggestion that accused persons have not caused injuries upon his body. He has denied suggestion that his tooth was broken when his vehicle was dashed with electric pole. He has denied suggestion that he filed false criminal case against accused persons.

8.6 PW6 Ailoo Ram eye witness of incident has stated that on 25.6.2005 at about 11 night when they were coming back after attending marriage ceremony then co-accused Bir Singh came from behind and dashed his vehicle with vehicle of PW5 Ludar Chand injured and driven his vehicle ahead to the vehicle of PW5 Ludar Chand injured. He has stated that when they reached at village Sajla then accused persons present in the Court started beatings to Ludar Chand injured. He has stated that one tooth of Luder Chand was broken due to beating process conducted by accused persons. He has stated that accused persons inflicted leg blows upon vehicle of Ludar Chand and created dent in the vehicle of Ludar Chand. He has stated that quarrel took place for about 6/7 minutes. He has denied suggestion that tooth of Luder Chand injured was broken when his vehicle was dashed with electric pole. He has denied suggestion that Ludar Chand filed false criminal case against accused persons.

8.7 PW7 HC Mehar Singh has stated that he was posted as investigating officer in police station Manali since 2002. He has stated that at about 1.15 night on dated 25th /26th June 2006 statement of Ludar Chand Ext PW4/A was recorded. He has stated that medical examination of Ludar Chand injured was conducted. He has stated that he recorded statement of prosecution witnesses. He has denied suggestion that he prepared site plan contrary to factual position. He has denied suggestion that he recorded statement of witnesses as per his own convenience. He has denied suggestion that during investigation it was observed by him that Ludar Chand injured struck his vehicle with the vehicle of accused persons. He has denied suggestion that during investigation it was observed that vehicle of injured struck with electric pole.

9. Statement of accused persons recorded under section 313 Cr.PC. Accused persons have stated that a false criminal case filed against them. Accused persons did not lead any defence evidence.

10. Following documentaries evidence produced by prosecution. (1) Ext PW4/B is the copy of FIR No. 125 dated 26.6.2005 under sections 341, 323, 427 and 34 IPC. (2) Ext PW4/A is rukka. (3) Ext PW4/C is the endorsement on rukka. (4) Ext PW7/A is the copy of site plan. (5) Ext P1 to Ext P9 are photographs of smashed vehicle of Ludar Chand along with negatives. (6) Ext PW2/A is the MLC of injured Ludar Chand injured aged 22 years. (7) Ext PW1/A is the x-ray report of injured. (8) Ext PW1/B is the x-ray films of injured. (9) Ext PW3/A is rapat No. 36 dated 25.6.2005.

11. Submission of learned Advocate appearing on behalf of revisionists that judgment and sentence passed by learned Trial Court and learned First Appellate Court are against law and facts and on this ground revision petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. PW5 Ludar Chand injured has specifically stated in positive manner that accused persons during night period struck their vehicle with his vehicle and thereafter inflicted injuries upon mouth and teeth of injured with fist blows. PW5 Ludar Chand has specifically stated in positive manner that due to criminal act of accused persons one tooth of injured fallen and other teeth of complainant also damaged. PW5 Ludar Chand has further stated that accused persons have damaged vehicle of injured also. Testimony of PW5 Ludar Chand is trustworthy, reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of PW5 Ludar Chand. There is no positive evidence on record that injured has hostile animus with accused persons.

12. Testimony of PW5 injured Ludar Chand is also corroborated by PW6 Ailoo Ram eye witness of incident. PW6 Ailoo Ram has specifically stated in positive manner that accused persons inflicted injury upon Ludar Chand and due to injury sustained by injured one tooth of injured fallen and broken. PW6 Ailoo Ram has stated in positive manner that accused persons have created dent in the vehicle of Ludar Chand by way of leg blows. Testimony of PW6 Ailoo Ram independent eye witness is trustworthy, reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of PW6 Ailoo Ram placed on record. There is no evidence on record that PW6 Ailoo Ram has hostile animus against accused persons at any point of time.

13. Testimony of PW5 Ludar Chand is corroborated with testimony of PW1 Dr. Yogita Thakur medical officer. PW1 Medical officer has specifically stated in positive manner that there was avulsed upper right lateral incisor and tenderness was also present. PW1 has specifically stated in positive manner that there was swelling with upper lip. PW1 has specifically stated in positive manner that as per x-ray report socket was empty with upper right lateral incisor. Testimony of PW1 is trustworthy, reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of PW1 Dr. Yogita.

14. Testimony of PW1 Dr Yogita Thakur is corroborated by PW2 Dr. Rakesh Negi. PW2 Medical officer has specifically stated in positive manner that there was small lacerated wound measuring 0.5-1 cm on upper lip of injured. PW2 specifically stated that on examination of injured Ludar Chand socket was bleeding and tooth was missing and there was swelling in the socket. Testimony of PW2 is also trustworthy, reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of PW2 Dr. Rakesh Negi.

15. Testimonies of PW1 Dr.Yogita Thakur and PW2 Dr. Rakesh Negi are also corroborated with documentary evidence i.e. x-ray report Ext PW1/A and MLC Ext PW2/A of injured Ludar Chand. FIR was lodged immediately by injured Ludar Chand and thereafter medical examination of injured was conducted at about 2 AM immediately.

16. Submission of learned Advocate appearing on behalf of revisionists that PW5 Ludar Chand and PW6 Ailoo Ram eye witness of incident contradicts each other and on this ground revision petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Court has 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 25th /26th June 2005 at about 12.15 AM night and testimonies of prosecution witnesses were recorded on dated 22.11.2005 and 9.1.2006 after a gap of sufficient time. It was held in case reported in C. Muniappan and others Vs. State of Tamil Nadu 2010 (9) SCC 567 that undue importance should not be attached to omission, contradiction and discrepancy which do not goes to the root of case. It was held that minor discrepancies are bound to occur in statement of witnesses in criminal cases when statement of prosecution witness is recorded after gap of sufficient time. Also see

Sohrab and another Vs. State of M.P. AIR 1972 SC 2020, see State of U.P. Vs. M.K. Anthony AIR 1985 SC 48, see Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat AIR 1983 SC 753, see State of Rajasthan Vs. Om Parkash AIR 2007 SC 2257. see 2009 (11) SCC 588 title Prithu Chand and another Vs. State of HP, see 2009 (9) SCC 626 title State of UP Vs. Santosh Kumar and others, see AIR 2009 SC 151 title State Vs. Saravanan and another, see AIR 1988 SC 696 title Appabhai and another Vs. State of Gujarat, see AIR 1999 SC 3544 title Rammi Vs. State of M.P, see 2000(1) SCC 247 title State of H.P. Vs. Lekh Raj and another, see 2004 (10) SCC 94 title Laxman Vs. Poonam Singh and others. It is also well settled law that concept of falsus in uno falsus in omnibus is not applicable in criminal trials. See AIR 1980 SC 957 title Bhe Ram Vs. State of Haryana. Also See AIR 1971 SC 2505 title Rai Singh Vs. State of Haryana**.**

17. Submission of learned Advocate appearing on behalf of revisionists that prosecution witnesses are interested witnesses and on this ground revision petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. PW6 Ailoo Ram is not interested witness and PW6 Ailoo Ram is not close relative of PW5 Ludar Chand injured. There is no evidence on record that PW6 Ailoo Ram has hostile animus against revisionists at any point of time. Testimony of PW6 is trustworthy, reliable and inspirers confidence of Court. There is no reason to disbelieve the testimony of PW6.It is well settled law that testimony of related witness can also be relied if the evidence of related witness is trustworthy, reliable and inspire confidence of Court. See AIR 2016 SC 1015 title State of Punjab Vs. Suraj Prakash. It is well settled law that conviction can be based on the testimony of solitary witness. See AIR 1973 SC 944 title Jose Vs. State of Kerla. See AIR 2010 SCW 4470 title Bipin Kumar Mondal Vs. State of West Bengal.

18. Submission of learned Advocate appearing on behalf of revisionists that injured himself driven maruti van in high speed due to which van of injured struck with electric pole and injured sustained injury on his body and on this ground revision petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. The plea of accused persons that injured sustained injury when vehicle of injured struck with electric pole is defeated on the concept of ipse dixit (Assertion made without proof).

19. Submission of learned Advocate appearing on behalf of revisionists that incriminatory evidence not put to revisionists when statement of revisionists recorded under Section 113 Cr.PC and on this ground revision petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused statement of accused persons recorded under Section 113 Cr.PC. It is held that all incriminatory evidence put to accused persons by learned Trial Court. It is held that no miscarriage of justice is caused to revisionists.

20. Submission of learned Advocate appearing on behalf of revisionists that no motive has been attributed to accused persons in present case and on this ground revision petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that when criminal act is proved by way of direct eye witness then motive looses its substance. It is held that motive is required to be proved in circumstantial criminal case only and motive is not required to be proved in direct eye witness case. It is well settled law that when there is direct evidence relating to criminal offence then question of motive becomes immaterial. See AIR 2010 SCW 5685 title Dharnidhar Vs. State of Uttar Pradesh. See AIR 2010 SCW 4470 title Bipin Kumar Mondal Vs. State of West Bengal. See AIR 1986 SC 1899 title State of Andhra Pradesh Vs. Bogam Chandraiah and another**.** See 1974 SC 1193 title Datar Singh Vs. State of Punjab**.** See AIR 2003 SC 539 title Yunish Vs. State of M.P. See AIR 2003 SC 2213 title Balram Vs. State of Punjab.

21. Submission of learned Advocate appearing on behalf of revisionists that revisionists be released by way of giving them benefit of Probation of offenders Act 1958 is also rejected being devoid of any force for the reasons hereinafter mentioned. It is not expedient in the ends of justice to give benefit of Probation of Offenders Act to revisionists because injured has lost his tooth due to injury inflicted by revisionists upon injured. Learned Sessions Judge Kullu has

already reduced sentence part in present case. It is not expedient in the ends of justice to release revisionists on Probation of Offenders Act 1958 in present case. In view of above stated facts it is held that it is not expedient in the ends of justice to interfere in the present case. In view of above stated facts point No.1 is answered in negative.

Point No.2(final order).

22. In view of findings on point No1 revision petition is dismissed. File of learned Trial Court and file of learned Sessions Judge Kullu along with certified copy of judgment be sent back forthwith. Revision petition is disposed of. Pending application if any also stands disposed of.

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

Chandan Jain. …Petitioner.

Versus

State of H.P. …Respondent.

CrMMO No. 151 of 2016
Decided on: 12.7.2016

Code of Criminal Procedure, 1973- Section 482- An FIR was registered against the petitioner for the commission of offence punishable under Section 20 of N.D.P.S. Act- challan was filed against him and the court framed the charge - it was contended that petitioner is real brother of proprietor of M/s Jain Medical Agency having wholesale drugs licence - he was entitled to sell, stock, exhibit or offer for sale or distribute medicines – held, that according to licence, sale shall be made under the supervision of competent person- it was licensed to stock or exhibit or to offer for sale or distribute the drugs in the shop No. 7 in Haryana - Agency was never authorized to distribute the medicines/drugs throughout the State of Himachal Pradesh- a prima facie case is made out against the petitioner- hence, FIR and consequent proceedings cannot be quashed- petition dismissed. (Para-2 to 8)

For the Petitioner : Ms. Jyotsna Rewal Dua, Sr. Advocate with Ms. Shalini Thakur, Advocate.
For the Respondent : Mr. Neeraj Sharma, Dy. A.G.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge (oral).

The present petition has been instituted under section 482 of the Code of Criminal Procedure for quashing of FIR No.65 dated 29.4.2013 registered at Police Station, Baddi, District Solan for offence under section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the "Act" for brevity sake) and also order dated 10.11.2014 framing the charge under section 21 of the Act, consequent charge sheet dated 10.11.2014 and all subsequent proceedings.

2. "Key facts" necessary for the adjudication of this petition are that FIR No. 65 dated 29.4.2013 was registered at Police Station, Baddi against the petitioner with the allegations that petitioner alongwith Baldev Singh son of Prem Singh, resident of Ambala City was found in possession of 60 boxes of Spasmo Proxyvon capsules having Batch No. JN10154 with manufacturing date of February, 2013. Total capsules were found to be 8640 containing Dicyclomine Hydrochloride 10 mg, Dextropropoxyphene Napsilate 100 mg and Acetaminophen 400 mg. Petitioner alongwith co-accused was also found to be in possession of two boxes of Microlit tablets having 100 packets each containing 100 tablets in a box. Total number of tablets

came to be 10000 having Batch No. BT1202005 with manufacturing date of February, 2012. Each tablet contained Diphenoxylate Hydrochloride 2.5 mg and Antropine Sulphate 0.025 mg. They were also found in possession of another 49 bottles each contained 100 tablets of Lomotil. Total number of tablets came to be 4900 having Batch No. 03L2064 with manufacturing date July, 2012. Each tablet contained Diphenoxylate Hydrochloride 2.5 mg and Atropine Sulphate 0.025 mg. They were also found in possession of 15 strips of tablets equilibrium. Total number of tablets came to be 150 having Batch No.J.M.T.13001 with manufacturing date January, 2013. Each tablet contained Chlordiazepoxide 10 mg. The recovered medicines were forwarded to State Forensic Science Laboratory, Himachal Pradesh for analysis. The report of State Forensic Science Laboratory is dated 13.5.2013. The quantitative analysis reveals as under:

> **"Spasmo Proxyvon-the test indicated the presence of Dextropropoxyphene Napsylate to the extent of 99.763 mg per capsule.**
>
> **Microlit-the test indicated the presence of Diphenoxylate Hydrochloride to the extent of 2.533 mg per tablet.**
>
> **Lomtil- the test indicated the presence of Diphenoxylate Hydrochloride to the extent of 2.487 mg per tablet.**
>
> **Equilibrium- the test indicated the presence of Chlordiazepoxide to the extent of 9.91 mg per tablet."**

3. Ms. Jyotsna Rewal Dua, learned Senior Advocate has vehemently argued that the petitioner is real brother of Ms. Chandni Jain daughter of Sh. Gulshan Jain, proprietor of M/s Jain Medical Agency, Shop No.7, Patel Nagar, Ambala City having wholesale drugs licences in Form 20-B and Form 21-B of Schedule 'A' of the Drugs and Cosmetics Rules, 1945. The licences issued in the name of M/s Jain Medical Agency were valid w.e.f. 18.8.2008 to 17.8.2013. Petitioner was entitled to sell, stock, exhibit or offer for sale or distribute these medicines by virtue of licences issued by the Food and Drugs Administration, Haryana under the Drugs and Cosmetics Rules, 1945. Investigation was completed and challan was put up in the court after completing all the codal formalities.

4. The charges were framed on 10.11.2014. According to order dated 10.11.2014, prima facie there were sufficient grounds to proceed against the accused persons for the commission of offence punishable under section 21 of the Act. Accused pleaded not guilty and claimed trial. The case was fixed for prosecution evidence on 15.1.2015. The charge framed against the accused dated 10.11.2014 is also placed on record. The licence was issued by the State Drug Controller, Haryana to Ms. Chandni Jain. According to the condition of licence issued in Form 20 (b) and 21 (b) of the Drugs and Cosmetic Rules, 1945, the sale shall be made under the supervision of competent person, Sh. Ajish Jain. M/s Jain Medical Agency was licensed to stock or exhibit or offer for sale or distribute by wholesale drugs in the premises situated at Shop No.7, Patel Nagar Amabala City. The firm, i.e. M/s Jain Medical Agency was never authorized to distribute the medicines/drugs throughout the State of Himachal Pradesh by way of authorization. The Special Power of Attorney dated 17.1.2013 is against the conditions of licence.

5. Ms. Jyotsna Rewal Dua has drawn the attention of the Court to various documents to substantiate that her clients were authorized to distribute the medicines/drugs. However, fact of the matter is that when the petitioner applied for bail, these documents were not annexed with the bail application. Thus, it is evident that these documents were procured after the bail application was rejected. In case the petitioner and co-accused were in possession of these documents, there was no reason that they have not placed the same on record at the time of seeking bail.

6. Prima facie case is made out against the petitioner and co-accused and framing of charge against them by the trial court is after due application of mind. There is neither any illegality nor any perversity in the order dated 10.11.2014.

7. Whether the drugs/medicines recovered from the petitioner falls within the ambit of the Narcotic Drugs and Psychotropic Substances Act, 1985 shall not be the subject matter of the trial.

8. Accordingly, in view of the analysis and discussion made hereinabove, there is no merit in the petition and the same is dismissed, so also the pending application(s), if any. It is made clear that the observations made hereinabove shall have no bearing on the merits of the main case.

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

Kashmir Singh s/o Lt. Sh. Phandi Ram ……Petitioner/Accused
Versus
State of H.P. & Others ……Non-petitioners

Cr.MMO No.4058 of 2013-G
Reserved on: 19th May, 2016
Date of Order: 12th July, 2016

Code of Criminal Procedure, 1973- Section 482- Petitioner was summoned by the trial Court for the commission of offences punishable under Section 504 and 506 of I.P.C.-aggrieved from the order, present petition was filed- held, that at the time of summoning of the accused, Court has to see, whether there are sufficient grounds to proceed against the accused or not- delay will be seen during the course of trial- complicated questions of law are also to be seen during the trial- merely because closure report was filed earlier is no ground to discharge the accused - petition dismissed. (Para-5 to 16)

Cases referred:

Popular Muthiah vs. State, 2006(7) SCC 296
B.S.S.V.V.Vishwandadha Maharaj vs. State of A.P. & Others, 1999 Criminal Law Journal SC 3661
Nagawwa vs. Veeranna Shivalingappa Konjalgi, AIR 1976 SC 1947
Chandra Deo Singh vs. Prokash Chandra Bose & Another, AIR 1963 SC 1430
Madan Razak vs. State of Bihar, AIR 2016 SC Weekly 122

For petitioner : In person
For Non-petitioner No.1 : Mr. R.K.Sharma, Dy. A.G.
For Non-petitioner No.2 : Mr. H. S. Rana, Advocate
Non-petitioner No.3 : None despite service
For non-petitioner No.4 : None despite service

The following order of the Court was delivered:

P.S. Rana, Judge

Present petition is filed under Section 482 Code of Criminal Procedure 1973 for quashing of summon order relating to criminal offence under Sections 504, 506 IPC dated 30.06.2012 passed by learned Judicial Magistrate 1st Class Court No.7 Shimla (H.P.) in FIR No. 4 of 2011 dated 03.01.2011.

Brief facts of the case:

2. Sh. Jiwan Lal Special Public Prosecutor Vigilance Headquarter Shimla (H.P.) flied criminal complaint against accused Kashmir Singh alleging therein that complainant Jiwan Lal and

accused Kashmir Singh at Hira Nagar Shimla are jointly constructing residential house and after completion of construction same would be divided as per draw of lot. It is alleged that some differences occurred between accused and complainant Jiwan Lal for procurement of certain articles of construction and finally it was agreed to appoint a person who would help in construction of house. It is further alleged that Sh. Kamal Saklani was appointed and thereafter both the complainant and accused paid him their due share of amount. It is further alleged by complainant Jiwan Lal that prior to completion of construction work and prior to division of residential house by way of draw of lot accused Kashmir Singh illegally tried to occupy best portion of building and thereafter complainant Jiwan Lal approached Civil Court. It is further alleged that learned Civil Judge Shimla granted ad interim injunction against accused Kashmir Singh on 16.12.2010 and due to holiday on 17.12.2010 ad interim injunction could not be served upon accused Kashmir Singh. It is further alleged that on 18.12.2010 when ad interim injunction was to be served upon accused Kashmir Singh then accused got irritated and misbehaved and abused the complainant Jiwan Lal in the presence of Court officials and police officials. It is further alleged that accused threatened the complainant to break his legs and also abused the complainant with derogatory and defamatory remarks. FIR No.4 dated 03.01.2011 was registered under Sections 504 and 506 IPC. Investigation was completed and investigation report under Section 173 Cr.PC filed before Judicial Magistrate. Learned Judicial Magistrate 1st Class Court No.7 Shimla (H.P.) on dated 30.06.2012 held that after perusal of the challan and other documents annexed with the challan there are sufficient grounds for proceeding against accused under Sections 504 & 506 IPC. Feeling aggrieved against summoning order present petition under Section 482 Code of Criminal Procedure filed by accused.

3. Court heard petitioner in person and learned Deputy Advocate General appearing on behalf of non-petitioner No.1 and learned Advocate appearing on behalf of non-petitioner No.2 and also perused the entire records carefully.

4. Following points arise for determination:

1) Whether petition filed under Section 482 Cr.PC is liable to be accepted as mentioned in memorandum of grounds of petition?

2) Final order.

Findings upon point No.1 with reasons:

5. Submission of petitioner that as per criminal complaint incident took place on 18.12.2010 and police station is at a distance of 200-300 meters from the place of incident and criminal complaint was filed on 20.10.2010 after inordinate delay and on this ground order of learned Trial Court dated 30.06.2012 for summoning the accused under Sections 504 and 506 IPC be set aside is rejected being devoid of any force for reasons hereinafter mentioned. It is held that delay in filing complaint would be explained by the prosecution during trial of the case. It is held that at the time of passing summoning order Court has to simply see sufficient grounds for proceeding against accused as per statements of prosecution witnesses and documents annexed with the investigation report filed under Section 173 Code of Criminal Procedure 1973.

6. Submission of petitioner that CD is neither placed on record nor supplied to accused when demanded under Right to Information Act and on this ground petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Court is of the opinion that accused has legal right for demand of all the documents annexed with the challan. Court has perused the original file of learned Trial Court. Two CDs are annexed with the challan file and learned Trial Court is under legal obligation to supply copy of CD to accused in accordance with law. It is held that copy of CD would be supplied to accused by learned Trial Court in accordance with law because two CDs are part and parcel of the challan filed by the investigating agency.

7. Submission of petitioner that words 'misbehave and abuse' do not fall within definition of Section 506 IPC and on this ground order of learned Trial Court summoning accused be quashed is rejected being devoid of any force for reasons hereinafter mentioned. It is proved on

record that learned Trial Court summoned accused under two criminal offences (1) 504 IPC, (2) 506 IPC. Section 504 IPC comprises of following ingredients: (1) Intentional insult (2) That insult must be such as to give provocation to the person insulted. (3) That accused must intend or know that such provocation would cause another to break the public peace or to commit any other offence. See **AIR 2014 SC 957 title Fiona Shrikhande vs. State of Maharashtra**. Even as per section 506 IPC prosecution is under legal obligation to prove that criminal intimidation was given by accused and threat was given by accused to cause death or grievous hurt. At the stage of summoning the accused learned Trial Court is under legal obligation to give findings whether there are sufficient grounds for proceeding against accused as per statements recorded by prosecution during investigation and as per documents annexed with challan.

8. Submission of petitioner that co-respondents No.3 & 4 prepared challan at the instance and influence of complainant Sh. Jiwan Lal with ulterior motive and malafide intention cannot be decided at this stage of the case because same is complicated issue of fact. It is well settled law that complicated issue of fact is always decided by learned Trial Court after giving due opportunity to both parties to lead evidence in support of their case.

9. Submission of petitioner that present complaint is registered against accused to pressurize the petitioner so that petitioner should abandon his share in the building and that accused should not reside in the residential building also cannot be decided at this stage of the case because same is complicated issue of fact and complicated issue of fact is always decided by the learned Trial Court after giving due opportunity to both parties to lead evidence in support of their case.

10. Submission of petitioner that call details collected from the BSNL should be summoned in the present case at this stage of case is rejected being devoid of any force for reasons hereinafter mentioned. It is held that accused is at liberty to file application before learned Trial Court for summoning of call details from the BSNL when case will be fixed for defence evidence by learned Trial Court.

11. Submission of petitioner that investigation in the present case was initially conducted by ASI Baldev Singh who has submitted cancellation report to SHO Police Station Boileauganj and thereafter HC Sushil Kumar on dated 26.02.2012 has again recommended closure of the case and on this ground petition filed under Section 482 Cr.PC be allowed is rejected being devoid of any force for reasons hereinafter mentioned. It is held that subsequent material facts can reopen criminal case in accordance with law. Accused is at liberty to summon ASI Baldev Singh and HC Sushil Kumar when case will be listed by learned Trial Court for defence evidence in order to prove his innocence. It is well settled law that further investigation can be conducted under Section 173(8) Code of Criminal Procedure 1973 relating to further oral or documentary evidence. It was held in case reported in **2006(7) SCC 296 title Popular Muthiah vs. State** that Court should not interfere with the statutory powers of investigation agency. See **1999 Criminal Law Journal SC 3661 title B.S.S.V.V.Vishwandadha Maharaj vs. State of A.P. & Others.**

12. Submission of petitioner that co-respondent No.2 with ulterior motive to defame the petitioner had also published the matter in daily newspaper and cooked a false and frivolous story against the petitioner also cannot be decided at the stage of case because same is complicated issue of fact and complicated issue of fact inter se parties would be decided by learned Trial Court after giving due opportunity to both parties to lead evidence in support of their case.

13. Submission of petitioner that allegations made in the complaint and evidence collected by the investigating agency during investigation oral as well as documentary did not prima facie constitute offence under Sections 504 & 506 IPC and on this ground petition be allowed is also rejected being devoid of any force for reasons hereinafter mentioned. Court has carefully perused the statement of Jiwan Lal placed on record. Sh. Jiwan Lal has specifically

stated in his statement that accused has threatened to kill him and also used abusive language against him. Court has also carefully perused the statement of Chander Mohan Sharma placed on record. Sh. Chander Mohan Sharma has specifically stated that accused had abused the complainant and also threatened the complainant to kill him. There is recital in the statement of Chander Mohan Sharma that accused threatened the complainant that he would break the legs and arms of complainant namely Jiwan Lal. Court has also carefully perused the statement of Mehboob Ali Khan placed on record. There is positive recital in the statement of Mehboob Ali Khan that Kashmir Singh Thakur had used abusive language and also threatened the complainant to kill him and threatened that he would break the legs and arms of complainant namely Jiwan Lal. Court has also carefully perused the statement of Kuldip Singh placed on record. There is recital in the statement of Kuldip Singh that accused had used abusive language to complainant and also threatened the complainant to kill him. Court has also carefully perused the statement of Kundan Lal placed on record. There is recital in the statement of Kundan Lal that accused had used abusive language to complainant and also threatened the complainant to kill him and threatened that he would break the legs and arms of complainant namely Jiwan Lal. Above stated statements alongwith two C.Ds and site plan are sufficient grounds for proceeding against accused under Sections 504 & 506 IPC.

14. It was held in case reported in **AIR 1976 SC 1947 title Nagawwa vs. Veeranna Shivalingappa Konjalgi** that at the stage of issuing process the Magistrate is mainly concerned with the allegations made in complaint and documents annexed in support of the complaint. It was held that Magistrate should satisfy whether there are sufficient grounds for proceedings against the accused or not under Section 204 Code of Criminal Procedure 1973. It was held that Magistrate should not enter into detailed discussion on merits or demerits of the case. It was held that accused has no locus standi and is not entitled to be heard whether process should be issued against him or not under Section 204 Code of Criminal Procedure 1973. Also see **AIR 1963 SC 1430 title Chandra Deo Singh vs. Prokash Chandra Bose & Another.** Also see **AIR 2016 SC Weekly 122 title Madan Razak vs. State of Bihar.**

15. Submission of petitioner that offence under Sections 504 & 506 IPC are non-cognizable offence and bailable offence and investigation by investigating agency is not permissible under law unless directed by Judicial Magistrate is also rejected being devoid of any force for reasons hereinafter mentioned. Section 506 IPC is amended by H.P. Government. The Governor Himachal Pradesh in exercise of powers vested in him under Section 10 of Criminal Law Amendment Act 1932 has declared offence under Section 506 IPC within Himachal Pradesh as cognizable criminal offence vide notification No.Home(C) F(8) 1/77 dated 09.03.1978. Police officer has authority to arrest the accused without any warrant under cognizable criminal case. In view of above stated facts and case law cited supra point No.1 is answered in negative.

Point No.2 (Final Order).

16. In view of findings upon point No.1 above present petition filed under Section 482 Code of Criminal Procedure 1973 is dismissed. Order of learned Trial Court dated 30.06.2012 is affirmed and it is held that there are sufficient grounds for proceeding against accused under Section 204 Code of Criminal Procedure 1973 qua criminal offence punishable under Sections 504 & 506 IPC. Observations made hereinabove will not effect merits of the case in any manner and will be strictly confined for disposal of petition filed under Section 482 Code of Criminal Procedure 1973. Parties are directed to appear before learned Trial Court on **29.07.2016.** Cr.MMO No. 4058/2013-G is disposed of. Pending application(s) if any also disposed of.

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

Mohan Lal ..Appellant
Versus
Sarv Dayal ..Respondent

RSA No. 228/2005
Reserved on July 11, 2016
Decided on: July 12, 2016

Specific Relief Act, 1988- Section 34- Plaintiff filed a civil suit for declaration pleading that late S was owner of the suit land, who was real brother of the plaintiff- he had not taken any loan from agricultural society and bank – his land was wrongly auctioned and mutation was wrongly attested in favour of the defendant- suit was dismissed by the trial Court- an appeal was preferred, which was also dismissed- held, in second appeal that revenue record shows that suit land was owned by S but his share was attached for Rs. 1451.82/- in favour of the society- share of S was auctioned on 17.1.1976 for 1451.82/-- it has been proved that plaintiff had obtained loan from agricultural society, which was not repaid and land was auctioned- land was ordered to be sold as per order of the Collector, who has not been arrayed as party- defendant is shown to be in possession since 1975-76- Court had correctly appreciated the evidence- appeal dismissed.
(Para-17)

For the Appellant : Mr. Dalip K. Sharma, Advocate.
For the Respondent : Mr. R.K. Sharma, Senior Advocate with Ms. Anita Parmar, Advocate.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge

This Regular Second Appeal has been instituted against judgment and decree dated 1.2.2005 rendered by the learned District Judge, Hamirpur, District Hamirpur, HP, in Civil Appeal No. 99 of 2003.

2. "Key facts" necessary for the adjudication of the present appeal are that the appellant-plaintiff (hereinafter referred to as 'plaintiff' for convenience sake) filed a suit for declaration stating therein that Late Sunder was the owner of the land comprised in Khata No. 17 min. Khatauni No. 22, Khasra No. 4, measuring 4 Kanal 18 Marla to the extent of 50/219 shares and Khasra No. 294/20 measuring 2 Kanal to the extent of 50/419 shares, situate in Tika Thamani, Manjhali, Mauza Lahdar, Tehsil Barsar, District Hamirpur, HP. Sunder was real brother of the plaintiff. Sunder had not taken any loan from agricultural society, Bhota and from any other bank. His land was wrongly auctioned vide auction dated 17.1.1976 in favour of the defendant and thereafter mutation No. 98 was also wrongly attested in favour of the defendant. The mutation was not binding upon plaintiff. Suit land was in his possession. Defendant never occupied suit land.

3. Suit was contested by the defendant. According to the defendant, in fact, Sunder had taken loan from agricultural society Bhota in lieu of which the land of Sh. Sunder was auctioned for a sum of Rs.1451.82 and the report regarding this sale was also made in the record of Patwari. Auction money was paid by the defendant and thereafter land was transferred to him to the extent of share of Sunder. Revenue record was correct. Issues were framed by the learned trial Court. He dismissed the suit on 11.9.2003. Plaintiff filed an appeal before District Judge, Hamirpur. He dismissed the same on 1.2.2005. Hence, this Regular Second Appeal.

4. The Regular Second Appeal was admitted on 12.5.2005 on the following substantial question of law:

"Whether the findings recorded by the learned trial court as affirmed by the learned first Appellate Court are dehors the evidence on record and against the documentary evidence produced by the plaintiff-appellant?

5. Mr. Dalip K. Sharma, Advocate, on the basis of substantial question of law, has vehemently argued that the learned Courts below have not correctly appreciated the oral as well as documentary evidence.

6. Mr. R.K. Sharma, learned Senior Advocate, has supported the judgments and decrees passed by the learned Courts below.

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

8. Mohan Lal (PW-1) has testified that he was owner-in-possession of the suit land. Earlier his brother Sunder was owner and after his death, plaintiff is in possession of suit land. Sunder has not taken any loan from agricultural society Bhota but the land of Sunder was wrongly put to auction and sale. Mutation No. 98 was wrongly sanctioned in favour of the defendant. Defendant started interfering in his possession and threatened to raise construction and cut trees. In his cross-examination, he has admitted that his brothers were having separate shares. He has admitted that defendant had deposited the auction money amounting to Rs.1451.82.

9. Gian Chand (PW-2) is the record keeper in the office of Deputy Commissioner, Hamirpur. He has proved the copy of sale deed Ext. PW-2/A.

10. Shiv Raj Singh (PW-3) proved signatures Ext. PW-3/A on sale deed.

11. Bhagat Ram (PW-4) has corroborated the version of PW-1.

12. Ajit Singh (PW-5) proved Ext. PW-5/A to the effect that as per report of agricultural society Bhota, Sunder was not a member of the society. He has not raised loan from society. In his cross-examination, he stated that the record was in Urdu and he could not tell whether Sunder had taken any loan or not.

13. Pritam Chand (PW-6) is the Secretary of CAS Adhar. He has proved certificate Ext. PW-6/A. According to him, Sunder has not taken any loan from the agricultural society Adhar.

14. Subhash Chand (PW-8) has proved the copy of mutation Ext. PW-8/A. He has also produced on record copy of revenue record i.e. Ext. P1, copy of Jamabandi for the year 1981-82, pertaining to land bearing Khasra no. 4 measuring 4 Kanal 18 Marla. There is a note in the remarks column of it that total share of Sunder has been purchased by Sarav Dayal. Ext. P-2 and Ext. P-3 are the Jamabandis for the years 1996-97 in which defendant has been shown as owner-in-possession in place of Sunder. Ext. P-4 to Ext. P-6 are the Jamabandis for the years 1991-92 and 1986-87 showing the defendant as owner-in-possession. Ext. P-7 is the Jamabandi for the years 1976-77. In the remarks column there is a note that the share of Sunder has been mutated in the name of Sarav Dayal. There is also another note in this *Jamabandi* that vide *Rapat* No. 299 dated 18.3.1986, share of Sunder was attached in favour of cooperative society for Rs.1451.82.

15. Defendant has appeared as DW-1. According to him, brother of the plaintiff had taken a loan and his land was auctioned on 17.1.1986. He had deposited Rs.1451.82 as per ordes of Deputy Commissioner in respect of land measuring 1 Kanal 11 Marla. At the time of auction Rup Singh Chowkidar and Sunder were present. Since then he is coming in possession of the suit land. Plaintiff had knowledge of the same. He never interfered in the possession of the plaintiff since he himself is in possession of the suit land. Plaintiff had filed the suit just to harass him.

16. Roop Singh (DW-4) has corroborated the version of the DW-1.

17. Defendant has placed on record, copy of mutation Ext. D-1 whereby suit land was mutated in favour of the defendant on the basis of auction in question. It is evident from the revenue record from the years 1976-77 that the suit land was owned by Sunder but his share was attached for Rs.1451.82 in favour of the society. There is *Rapat* No. 299 vide Ext. DW-2/A. Share of Sunder was auctioned on 17.1.1976 as per this report for Rs.1451.82. Share was purchased by defendant. Now as far as Ext. PW-5/A is concerned, it is not discernible in which capacity Ajeet Singh issued the certificate. He was neither President, nor Secretary of the society. He has not deposed that he is member of the Society. In his cross-examination, he has admitted that record was in Urdu and he could not state whether Sunder had obtained any loan or not. Ext. PW-6/A has been issued by Pritam Chand, Secretary Agricultural Society however, he has not brought any record to the Court. His statement is general. Defendant has conclusively proved that Sunder had obtained loan from agricultural society. He did not pay the same and his land was auctioned. Defendant has purchased the same. More particularly, land has been ordered to be sold as per order of the Collector. Plaintiff has not arrayed Collector as a party. There is no illegality in the proceedings of auction dated 17.1.1976. Revenue entries were made when Sunder was alive. Suit property was put to sale on 17.1.1976. Suit was filed in the year 2002. It was barred by limitation. Land of Sunder was attached in favour of the agricultural society for a sum of Rs.1451.82 as per Ext. DW-2/A. Document Ext. DW-3/C pertains to different loan. Defendant has been shown in possession of suit land as noticed since 1976-77 onwards. Learned Courts below have correctly appreciated the evidence, oral as well as documentary.

18. The substantial question of law is answered accordingly.

19. Accordingly, in view of the discussions and analysis made hereinabove, the present appeal has no merits 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 MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

M/s Durga Gram Udyog & Another. …Appellants

Versus

United India Insurance Company & Another. …Respondents

O.S.A. No. 1 of 2009
Judgment reserved on: 4.7.2016
Date of Decision: 12.7.2016.

Code of Civil Procedure, 1908- Section 96- Appellant No. 1 is a registered society under Societies Registration Act and owns brick kilns in village Basdehra- its stock and raw material were insured against the damage by flood, fire etc. - there were heavy rains resulting in floods- appellants suffered extensive damage - their stocks of coal, unfired bricks, labour huts etc. were washed away- intimation was given to the insurer but the claim was refuted- insurer pleaded that no loss was sustained by the appellants- suit was dismissed by the Court- held, that Patwari and Kanungo were not produced in evidence and the report prepared by them was not proved by the appellants- certificate does not prove the case of the appellants- statements of witnesses only establish that there was rainfall of 119.14 mm at Una but this fact does not establish the case of the appellants- surveyor had found that no loss was caused to the appellants- suit was rightly dismissed- appeal dismissed. (Para- 7 to 19)

For the Appellants: Mr.Rajneesh K. Lal, Advocate, vice Mr.Sanjeev Sood, Advocate.

For the Respondents: Mr. Ashwani K. Sharma, Senior Advocate with Mr.Nishant Kumar, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

Plaintiffs are the appellants whose suit for recovery of Rs.14,43,400/- by way of damages was dismissed by the learned Single Judge (for short trial Court) and aggrieved by the judgment and decree so passed have filed the instant appeal.

2. The main plank of the appellants' suit on which the entire edifice has been built is that they suffered extensive damage on account of floods due to heavy rains during the intervening night of 13/14th August, 1995, whereby its stocks of coal, unfired bricks, labour huts etc. to the tune of the aforesaid amount were washed away.

3. It was the pleaded case of the appellants that appellant No. 1 was a society registered under the Societies Registration Act, 1860 and owns brick kilns in village Basdehra, Tehsil Mehatpur, District Una. Its stock and raw material had been insured to the extent of Rs.26,00,000/- against the damage by flood, fire etc. with respondent No. 1. It was averred that during the intervening night of 13/14th August, 1995 there were heavy rains in Tehsil Una including the place where the brick kiln was situated, resulting in floods. The appellants suffered extensive damage on account of these floods, whereby its stocks of coal, unfired bricks, labour huts etc. were washed away. The appellants had promptly informed the respondents and on their asking had supplied all the documents so demanded, but despite this, its claim was refuted, that too on extraneous grounds, constraining it to file the instant suit.

4. The respondents contested the claim and pleaded that the appellants had concocted the story of damages, as the surveyor deputed by them did not find any loss being caused to the appellants as was otherwise being claimed by them.

5. Out of the pleadings of the parties, the learned trial Court settled the following issues:-

"1. Whether M/S Durga Gram Udyog Bricks Workers Welfare Association is not a juristic person and the suit filed in the name of plaintiff No. 1 is not maintainable? OPD.

2. Whether the terms and conditions of 'Fire Policy' have been breached on account of setting up of fraudulent claim based on misrepresentation and misdescription and thereby the contract of insurance has become voidable? OPD.

3. Whether the cover note dated 3.7.1995 was issued and premium accepted by a person authorized to do so on behalf of the Insurance Company? OPP.

4. Whether the Insurance Policy was not issued/ delivered to the plaintiff by the Insurance Company? If so, its effect? OPP.

5. What is the effect of the arbitration clause of policy of insurance and on this count, whether the present suit isnot maintainable? OPD.

6. Whether the plaintiffs are guilty of suppression of material facts and whether they have concocted and fabricated the documents, as alleged? If so its effect? OPD.

7. Whether the suit is within limitation? OPP.

8. Whether the plaintiff No. 2 is authorized and competent to file the present suit? OPP.

9. *Whether there were heavy rains and floods on 13.8.1995/ 14.8.1995 in the area of the brick kiln of the plaintiff? OPP.*
10. *Whether the plaintiffs had suffered any loss to the stocks of coal, infrastructure of the brick kiln, as alleged, on account of the floods? OPP.*
11. *What was the quantity of stocks of coal at the site, at the relevant time? OPP.*
12. *Whether the plaintiffs are entitled to any amount as compensation on account of loss sustained due to floods in the area of brick kiln, if so to what extent? OPP.*
13. *In the event of issue No. 10 being proved, whether the plaintiffs are entitled to claim any interest, if so at what rate, from which date and on what amount? OPP.*
14. *Relief."*

6. The learned trial court after recording the evidence and evaluating the same, dismissed the suit of the appellants vide judgment and decree dated 8.9.2008. Aggrieved by the aforesaid judgment and decree, the plaintiffs/appellants have filed the instant appeal, mainly on the ground that there is perversity in the findings recorded by the learned trial Court.

We have heard Mr.Rajneesh K. Lal, learned counsel for the appellants and Mr.Ashwani K. Sharma, Senior Advocate, assisted by Mr.Nishant Kumar, Advocate, for the respondents.

7. At the outset, we may observe that the case of the appellants hinges entirely upon issues No. 9 and 10 and can only succeed in case they are able to prove that there were heavy rains on the fateful day, on account of which they suffered huge losses, as the onus to prove these issues is heavily upon the appellants.

8. Learned counsel for the appellants has vehemently contended that the finding recorded by the learned trial Court, particularly on Issues No. 9 and 10 is perverse, in as much as, it not appreciated the statements of PW-6 Sh. Lachman Dass, PW-7 Dinesh Kumar and PW-8 Sh. Vinod Sharma in its right perspective, whereby these witnesses clearly proved that not only the area where the brick kiln of the appellants was situated was flooded, but even the stocks, coal and unfired bricks etc. lying there at the spot had been washed away, thereby causing heavy loss to the appellants.

9. Adverting to the evidence in support of these issues, we may firstly advert to the statement of PW-6, Sh.Lachman Dass Kaundal, who at the relevant time was Naib Tehsildar and deposed that Deputy Commissioner, Una had forwarded an application submitted by appellant No. 1 regarding issuance of certificate regarding damage caused to the appellants, pursuant to which he had issued certificate Ex. PW-6/A, which states that according to the report made by Patwari Halka and Girdawar Kanungo, the plaintiffs (appellants herein) suffered considerable loss on 14th August, 1995 on account of floods caused by heavy rains.

10. In cross-examination, this witness categorically stated that he himself had not visited the spot and had no personal knowledge about the damage and his certificate regarding the heavy rains was based upon the report submitted by Patwari Halka and Girdawar Kanungo. Relevant portion of his statement in cross-examination is revealing and is extracted below:-

> *"At present I am not in possession of the original application which was received by me through Deputy Commissioner as I am posted now out of Una. Record was summoned from me, but I have not brought the said record today. My certificate, Ex.PW-6/A is based on the reports obtained from Patwari Halqua and Girdawar Kanungo. I did not visit the spot myself. I have no personal knowledge about the damage and my certificate is based on the report received from the aforesaid officials. The report received from the aforesaid two officials was specific about the damage caused to the brick kiln of plaintiff No. 1 because of heavy rains. I am not*

in possession of the reports received from the aforesaid two officials, today. I have issued the certificate as per the orders of the Deputy Commissioner. I am not in possession of the office copy of this certificate. File and dispatch number is not mentioned in the said certificate. It is correct that at the relevant time I was holding the office of Naib Tehsildar, but certificate, Ex.PW-6/A, has been issued by me as Tehsildar….."

11. Indisputably, the two officials, i.e. Patwari and Kanungo have not been produced in evidence and even the report made by them, which forms the basis of Ex. PW-6/A, has also not been proved by the appellants. Evidently, even the report Ex. PW-6/A, besides generalizing the fact that damage has been caused does not show anything beyond that.

12. Sh. Dinesh Kumar, Secretary Nagar Panchayat Mehatpur appeared as PW-7 and proved on record certificate Ex. PW-7/A, which reads thus:-

"Pramanit kiya jata hai ki dinank 13/14.8.1995 ko bhari barsha ke karan va barh ke karan, logon ka va Nagar Panchayat, Mehatpur /Basdehra ka bahut nuksan huya hai. Logon ke bahut makan Dhwast hue hain." (Certified that on 13/14.8.1995 because of heavy rains, people and Nagar Panchayat, Mehatpur / Basdehra have suffered heavy losses. Lot of houses have been damaged)."

13. It is evident from the certificate that it does not in any manner establishes, much less prove the case of the appellants, as it states nothing about the damage allegedly suffered by them.

14. At this stage, Mr.Rajnish K. Lal, learned counsel for the appellants would place heavy reliance on the testimony of PW-8, Sh. Vinod Sharma, who was working as Junior Assistant/Observer in the Meteorological Department, D.C. Office, Una and had brought the record of the department pertaining to 13/14th August, 1995, which showed that the rainfall at Una on both these days was 119.4 mm. Though he stated that Mehatpur and Basdehra also falls within the same region, but in cross-examination he categorically admitted that the rainfall at both these places on the aforesaid dates had not been measured. He further admitted that in rainy season there may be rainfall at one place, but may not be so in the adjoining area.

15. The statement of this witness even if taken on its face value, only establishes that there was rainfall of 119.14 mm at Una, but then it does not carry the case of the appellants any further.

16. PW-15, Rameshwar Dutt is a resident of Village Basdehra and has stated that on the intervening night of 13/14th August, 1995, there were heavy rains and caused accumulation of large quantities of water in the Chos (seasonal streams) and the brick kiln of the appellants was washed away. He also makes a general statement of damage being caused to the brick kiln and the material lying on the spot on the fateful day. But then in cross-examination, this witness categorically states that he resides at Mehatpur, which at a distance of five kilometers from the place of occurrence and further states that he visited Basdehra only on 14th August, 1995, which establishes that he was not at spot on the fateful day.

17. In addition to the aforesaid, the other witness who has been examined by the appellants is one Sh. Subash Chand, who has been authorized to make a statement on behalf of the plaintiffs vide resolution Ex. PW-18/A. Though, this witness would claim that there were heavy rains on the night intervening 13/14th August, 1995, which resulted in heavy losses to the appellants, but then he in his cross-examination has clearly stated that no bricks are prepared during rainy season. He further admits that 12 to 14 labour sheds at the spot were lying unoccupied, as the labourers were not there.

18. As against the aforesaid evidence, respondents have examined DW-2 Sh. Sanjeev Duggal, Chartered Accountant, who in his assessment Ex. DW-2/B after visiting the spot had found that no loss had in fact been caused to the appellants. To the similar effect is the report

Ex. DW-3/A prepared by the Investigator, wherein it has been clearly mentioned that the claims lodged by the appellants was false.

19. This is the entire evidence led by the parties on the aforesaid issues and as already observed earlier the entire foundation of the appellants' case is dependent upon Issues No. 9 and 10 and therefore, once the edifice forming the foundation of the structure of the main case falls through, the other questions like the value and quantity of stocks actually lying on the spot etc. is only rendered academic and therefore, need not be gone into because even if findings on other issues is rendered in favour of the appellants, it will not lead their case any further.

20. In view of the aforesaid discussion, we find 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 SANDEEP SHARMA, J.

National Hydro Electric Power Corp. Ltd. ....Petitioner.

Versus

Karam Chand & Ors. ....Respondents

CWP No. 4971 of 2012
Reserved on : 05.7.2016
Date of Decision: 12.7. 2016.

Constitution of India, 1950- Article 226- Respondent filed a writ petition pleading that his land and house were acquired for the construction of Chamera Hydro Electric Power Project Stage-II, District Chamba- he had become houseless and was entitled to employment in terms of the scheme formulated by the State Government- Deputy Commissioner Chamba was directed to decide the representation of respondent no. 1- Deputy Commissioner, Chamba recommended the name of the respondent for employment - aggrieved from the order, present writ petition has been filed- held, that the oustees who have been deprived of their land are entitled to compensation in lieu of the acquisition of their land /house- scheme provided for the employment to the oustee or his family members- no material was placed on record that respondent no. 1 has house or land after the acquisition of the land- therefore, he is entitled to the benefit of employment as per scheme – the employment was provided to other oustees who were rendered homeless/landless - the Deputy Commissioner had rightly passed the order for providing suitable employment for respondent no. 1- writ petition dismissed. (Para 12-19)

For the petitioner: Mr. K.D. Shreedhar, Senior Advocate with Ms. Shreya Chauhan, Advocate.
For the respondents: Mr. I.D. Bali, Senior Advocate, with Ms. Prarthana Khachi, Advocate, for respondent No.1.
Mr. Rupinder Singh Thakur, Additional Advocate General for respondents No.2 to 4.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

By way of present writ petition filed under Section 226 of the Constitution of India, the petitioner-corporation has invoked extraordinary jurisdiction of this Court and has prayed for following reliefs:-

> ***"i)*** *That order of the dated 26.11.2011 (Annexure P-3) passed by the Deputy Commissioner in case titled 'Karam Chand Versus State of H.P.' may be quashed and set-aside.*
>
> ***ii)*** *Any other order, writ or direction may also be passed in view of facts and circumstances of the case.*
>
> ***iii)*** *The respondents may be burdened with the costs of the case."*

2. Perusal of order dated 26.11.2011, passed by the learned Deputy Commissioner suggests that while allowing the representation/petition filed by respondent No.1 in terms of judgment dated 2.5.2011, passed by the Division Bench of this Court in CWP No. 2714 of 2011, present petitioner-Corporation has been directed to consider the case of respondent No.1- and provide suitable job in the project to one of the family members of the respondent No.1.

3. Briefly stated facts as emerge from the record and necessary for the adjudication of the case are that respondent No.1 filed CWP No. 2714 of 2011, titled as Karam Chand v. State of HP and Ors., before this Court averring therein that he and his wife were owners in possession of the land and a house thereupon and measuring 12 biswances along with the house constructed thereupon, was acquired for the purpose of construction of Chamera Hydro Electric Power Project Stage-II, District Chamba. As per respondent No.1-(petitioner in CWP No. 2714 of 2011), Government of Himachal Pradesh had formulated a Resettlement and Rehabilitation Scheme (In short 'the Scheme') to protect the interest of the oustees affected owing to acquisition of land for construction of the aforesaid Project. As per respondent No.1, since he had become houseless after acquisition of his land and house, the petitioner-Corporation is/was under obligation to provide employment to him or one member of his family. Accordingly, Respondent No.1 filed representation to the authorities concerned for employment but despite repeated representations, no relief, whatsoever, was granted to him and, as such, he was compelled to file the aforementioned Petition (CWP No. 2714 of 2011). Perusal of judgment dated 2.5.2011 passed by the Division Bench of this Court in CWP No. 2714 of 2011 (AnnexureP2) suggests that the Deputy Commissioner, Chamba- Respondent No.4 was directed to decide the pending representation of respondent No.1 and take decision in accordance with law within one month from the date of production of copy of the judgment. Pursuant to the aforesaid judgment passed by the Division Bench of this Court, learned Deputy Commissioner Chamba, vide order dated 26.11.2011, passed a detailed order recommending the name of respondent No.1 for employment in the present Petitioner-Corporation. Vide order dated 26.11.2011, the learned Deputy Commissioner directed the present petitioner to consider the case of respondent No.1 and to provide suitable job/employment in the project either to respondent No.1 or to one of his family members.

4. Being aggrieved and dis-satisfied with the aforesaid order, the present petitioner approached this Court by way of present writ petition.

5. Documents available on record suggest that for the purposes of execution of Chamera-II Project, huge chunk of land was acquired by the present petitioner with the help and aid of the State of Himachal Pradesh by resorting to the provisions of the Land Acquisition Act, 1894. State of Himachal Pradesh with a view to mitigate the hardship caused to the affected oustees owing to acquisition of land formulated the scheme to settle the oustees affected on account of acquisition of their land for construction of the project. Clause 2 (i) of the Scheme defines the term 'oustees' or 'affected family' which is being reproduced herein below:-

> *"(2) In this scheme unless there is anything repugnant in the subject or context:*
>
> > *(i) Oustees or affected family means a land owner who has been deprived of his/her land, house or both on account of acquisition of his/her land for Chamera Hydro Electric Project Stage-II, Karian and is entitled to compensation in lieu thereof and includes his/her successors in interest."*

Part III of the aforesaid scheme specifically deals with issue of employment, which reads as under:-

> ***"Employment**:- one member of each affected family shall be eligible for employment in the Chamera HE Project Stage-II Karian, in the following manner:-*
>
> ***i)*** *One member of each affected family, who is absolute owner of land or house or both, whether male or female, as per entries of Revenue record and entered as separate family in the Panchayat Parivar Register as on the date of notification of Section 4 of the Land Acquisition Act, 1894.*
>
> ***ii)*** *In case of co-owners in the Revenue record one member of each affected family consisting of male owner or widow, who are entered as separate family in the Panchayat Parivar Register as on the date of notification of Section -4 of Land Acquisition Act, 1894. Un-married daughters and sons, minor daughters and sons, who are co-owners of land as per entries in Revenue record, shall be treated as family members of the widowed mother or any of the married elder brother as recorded in Panchayat Parivar Register.*
>
> ***iii)*** *Only one member of such affected family consisting of widow as co-owner with her only daughter or daughters as co-owner or sons and daughters, if they all recommend, only one member against all for employment in the Project and if they are entered as separate family in the Panchayat Parivar Register.*
>
> ***iv)*** *Only one member of such affected family consisting of only one or more than one daughter or son or sons and daughters as co-owners, if they all recommend one member against all, for employment in the Project and if they are entered as separate family in Panchayat Parivar Register.*
>
> ***v)*** *In case of such affected families who are co-owners as brothers and sisters and share of acquired land of each of such co-owners is one biswa or less and if they club their shares together with which quantum of acquired land becomes more than one biswa, only one member will be given employment against all such co-owners after their mutual consent.*
>
> ***vi)*** ***Provided further that***
>
> *No member of a family whose total land acquired is one biswa or less, married daughter or heirs of predeceased married daughter, who are recorded as co-owners in the revenue record with their brothers, sister or parents shall be eligible for employment in the Project provided they become landless or houseless. It is assumed that married daughter is already settled in the family of her husband and she is not to be rehabilitated by way of employment.*
>
> ***vii)*** *No member of affected family shall be eligible for employment if quantum of his acquired land is one biswa or less.*
>
> ***viii)*** *No person shall be eligible for employment in the Project, who is not covered as member of the concerned affected family in the Panchayat Parivar Register.*
>
> ***ix)*** *No family can give its right to employment to a member of some other family.*
>
> ***x)*** *No person or his family member shall be eligible for employment if he becomes owner of land by way of sale, gift, exchange etc. of land after the date of notification of Section-4 of Land Acquisition Act, 1894."*

Careful perusal of the aforesaid provision of the policy formulated by the State of HP suggests that apart from compensation as provided under Land Acquisition Act, effected persons were also

entitled to certain grants as well as employment. Part-XII of the Scheme, as referred above, provides that employment to one member of the each affected family in the Chamera Hydro Electric Power Project Stage-II, Karian (H.P.), shall be subject to the certain conditions. In the part-XII of the scheme, persons have been defined in various categories, who are entitled for employment being member of affected family, but clause-VI of Part-XII provides certain exceptions i.e no member of a family whose total land acquired is one biswa or less, married daughter or heirs of pre-deceased married daughter, who are recorded as co-owners in the revenue record with their brothers, sisters or parents shall be eligible for employment in the project provided they become landless or houseless" Clause–VIII of the scheme further provides that no member of affected family shall be eligible for employment if quantum of land acquired land is one biswa or less.

6. Respondent No.1 in the present case in terms of aforesaid scheme formulated by State of Himachal Pradesh filed representation claiming therein employment in the petitioner-Corporation being an oustee owing to acquisition of land for the purpose of Construction of the Project but requests for employment being an oustee was not considered by the petitioner-department compelling him to file writ petition as referred above.

7. The learned Deputy Commissioner in terms of judgment of Division Bench of this Court, held him entitled for employment, as has been discussed in detail above.

8. The present petitioner being aggrieved with the order passed by the earned Deputy Commissioner filed present petition. It has been specifically averred in the petition that impugned order being contrary to the facts and circumstances deserves to be quashed and set-aside. The petitioner has specifically submitted that Deputy Commissioner while passing impugned order has not considered the material, which was available with him, especially, the decisions taken vide Annexures P5 and P6, which were taken in presence of state authorities. The petitioner further averred that the provision of the scheme as relied upon by the Deputy Commissioner while passing impugned order were suitably amended vide decision taken on 18.11.2002 for grant of financial package and employment and, as such, impugned order deserves to be quashed and set-aside being contrary to the tripartite settlement arrived at between the petitioner-corporation, State Authority and oustees' Union. Moreover, it is also stated that list of the eligible oustees entitled to financial package was prepared by the State Government and correctness of the same was affirmed by the oustees' Union and petitioner-Corporation in terms of decision taken on 18.11.2012 deposited an amount of Rs. 3 crores with the State Government for disbursing the same to the eligible persons. The petitioner has also stated that deputy Commissioner while passing impugned order did not offer any opportunity of being heard to the petitioner-Corporation and as such, great injustice has been caused to the petitioner-corporation. It also emerges from the record that petitioner in terms of order dated 28.6.2012 passed by this Court filed a supplementary affidavit specifically answering the query of the Court "whether any person has been given employment under the Scheme after 2003 or not?" Perusal of the supplementary affidavit suggests that in terms of agreement of Rehabilitation and Settlement Scheme, District Revenue Authority and District Commissioner recommended the names of eligible persons for employment from time to time between 2001-2004 and the petitioner-Corporation on the basis of list, gave employment to certain persons, however, averments contained in supplementary affidavit also reveals that the petitioner has been insisting upon the Deputy Commissioner to send the consolidated and final list of eligible persons particularly in view of the fact that the project has already been commissioned in Year 2003 and the required strength of the staff has been reduced considerably. Further perusal of the supplementary affidavit available on record suggests that since none of the list approved and forwarded by the Deputy Commissioner recommended the name of respondent No.1 or any member of his family for employment, no occasion, whatsoever, arose for the petitioner to consider the name of respondent No.1 or his family member for suitable requirement in the project. The petitioner by way of supplementary affidavit also brought to the notice of this Court that employment given to the land oustees has been at the level of trainee helper/ trainee beldar

and, as such, claim of respondent No.1 claiming employment for his son, who is stated to be a software engineer, does not appear to be tenable and plausible. It is also stated that individuals with such qualification are eligible for employment in the supervisory/executive cadre, which is a central cadre and all posts of central cadre are filled up on the basis competitive examination. The petitioner categorically stated in the supplementary affidavit that it is not possible to give employment to respondent No. 1 in the supervisory/executive cadre and that too at Chamera-II Project. Pursuant to the notices issued by this Court in the instant case, respondent No.1 filed detailed reply to the averments contained in the writ petition refuting therein the contents of the writ petition. Respondents in their reply while refuting the claim of the petitioner cited examples of similarly situate persons, who have been provided employment in the project in terms of the Rehabilitation and Resettlement scheme on the recommendation of the ld. Deputy Commissioner Chamba. Respondent No.1 specifically refuted the claim of the petitioner-department that no employment, whatsoever, can be provided in the project in the wake of commissioning of the project. Respondent No.1 by way of reply denied the factum of depositing of Rs. 3 crores with the ld. Deputy Commissioner by the petitioner-Corporation in terms of tripartite settlement arrived on 18.11.2002, for want of knowledge. Respondents by way of reply also placed on record certain letters suggestive of the fact that similarly situated persons have been provided employment in the Project of the petitioner being oustees.

9. Mr. K.D. Shreedhar, Senior Advocate duly assisted by Ms. Shreya Chauhan, Advocate, vehemently argued that impugned order is not sustainable in the eye of law as same is not based upon the correct appreciation of the documentary evidence available on record. Mr. Shreedhar vehemently argued that ld. Deputy Commissioner had no authority, whatsoever, to pass impugned order, especially in the wake of decision arrived at meeting held on 18.11.2002 under the chairmanship of the Hon'ble Industry Minister of Himachal Pradesh, wherein it was decided to give alternative package in lieu of employment to the affected families @ Rs. 3 lakhs in case of Chamera-I and Rs. 2,50,000/- in case of Chamera-II. He forcefully contended that the then ld. Deputy Commissioner was also signatory to the aforesaid decision arrived on 18.11.2002 and as such, Deputy Commissioner had no authority, whatsoever, to pass impugned order. He also submitted that in terms of decision dated 18.11.2002, the petitioner- Corporation has already deposited an amount of Rs. 3 crores and relief, if any, in terms of aforesaid decision, can be granted to respondent No.1 by the State Government, not by the petitioner-Corporation. It is also contended on behalf of the petitioner –Corporation that at present, there is no possibility at all to provide employment to any family of the affected oustees because Project has been already commissioned and no manpower is required at this stage for handling of power Project. As per him, petitioner-Corporation had been repeatedly writing to the respondent-State to desist from recommending the names of family members of the oustees for employment and, as such, meeting was convened on 18.11.2002 to deliberate upon the issue of employment, if any, in the project. Since, there is no scope, whatsoever, for providing employment in the project, a conscious decision was taken on 18.11.2002, in the presence of Hon'ble Industry Minister, HP, the Deputy Commissioner Chamba as well as officials of the project corporation, wherein it was decided to give alternative package in lieu of the employment to the affected families, as has been discussed above. During arguments having been made by him, Mr. Shreedhar made this court to travel through Annexure P2 i.e. the proceedings at meeting held on 18.11.2002, to substantiate his aforesaid submissions and to further demonstrate that it was agreed that with the declaration of this package, no claim from any person regarding any employment in Chamera-I and Chamera-II would be taken under this package, rather, it would be obligatory on the part of the beneficiary families of Chamera-1 and Chamera-II getting this alternative package to file an affidavit to withdraw the court cases, if any, pertaining to land compensation etc. before actual release of payment. Mr. Shreedhar, strenuously submitted that now the petitioner-corporation cannot be compelled to give employment to the members of affected persons/oustees, especially, when there is no work available with the corporation. He forcefully contended that any direction to make available employment in the project at this stage will cause huge financial burden on the public exchequer.

10. On the other hand, Mr. I.D. Bali, Senior Advocate duly assisted by Ms. Prarthana Khachi, Advocate, appearing on behalf of respondent No.1 supported the order passed by learned deputy Commissioner and submitted that the petitioner-corporation is bound to provide employment to one of the family member of respondent No.1, who is an oustee, in terms of order passed by learned Deputy Commissioner, Chamba. Mr. Bali, vehemently argued that respondent has been made to run from pillar to post by the petitioner-corporation for employment despite there being specific Resettlement and Rehabilitation scheme for the oustees of Chamera-I and Chamera-II Project owned/controlled by the Petitioner-corporation. During arguments having been made by him, he invited attention of this Court to Annexure P1 i.e. the scheme formulated by the State of Himachal Pradesh for protecting the interest of the oustees. He made this Court to travel through Chapter-XII of the scheme which deals with the employment to the oustee and member of his/her family. Mr. Bali also invited attention of this Court to the various annexures annexed by respondent No.1 to demonstrate that similar situate persons have been given employment by the petitioner-Corporation and great discrimination has been caused to respondent No.1. Mr. Bali forcefully contended that decision, if any, taken on 18.11.2002, is not binding on the respondent since same appears to be taken contrary to the provisions of the scheme formulated by State of Himachal Pradesh, which specifically provides for the employment to one of the family member of the oustees.

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

12. It is undisputed that as per scheme (Annexure P1), the persons who are oustees on account of acquisition of their land/house etc. for the construction of Project, are entitled to compensation in lieu of the acquisition of their land/house. Part -XII of the aforesaid scheme specifically provides for the employment to the oustees. As per this chapter, one member of the each affected, would be offered employment in the Chamera Project, Karian, District Chamba subject to the conditions, which have been reproduced above. Clause-VII of Chapter-XII also provides certain exceptions to the provisions. Clauses-1 to IV contained in Chapter-XII deals with the employment. Clause VII of chapter -XII provides that no member of affected family would be eligible for employment if land acquired is one biswa or less.

13. It is also not disputed that 00-00-12 bigha in total, land of the respondents was acquired by the petitioner-corporation at the time of construction of the project. Careful perusal of the Annexure P4 also suggests that one khasra No. 810/1 measuring four biswas was also acquired by the petitioner corporation. Perusal of Annexure P-4 also suggests that respondent namely Karam Chand received an amount of Rs. 12,71,396/- on account of compensation in lieu of land as well as house acquired for the purpose of construction of project. It also emerges from Annexure P4 that respondent also received amount of Rs. 1,15,000/- (Rs. 80,000+35,000/-) under the scheme under the head of additional grants. Facts and details narrated hereinabove, clearly establish that land/house of the respondent was acquired by the petitioner-corporation for construction of project and due and admissible compensation was paid to respondent No.1. Now question which remains to be decided by this Court is whether respondent was also entitled to employment in terms of the scheme or not?

14. The Govt. of Himachal Pradesh issued a scheme for resettlement and rehabilitation for the persons, who became oustees on account of acquisition of their house/land etc for construction of Chamera Project. Bare perusal of the instructions contained in the scheme suggests that only one member of such family, whose land is more than one biswa, acquired for project would be entitled for service to one member of his family. It is also provided in the scheme that in case, a person who becomes houseless as per Para-VI of the scheme, would also be entitled for service of one member of his family whose land is measuring more than one biswa. Apart from above, persons who lost their land which was less than one biswa for construction of project has been also held entitled for employment of one of the member of the family in the project. Perusal of Annexure P4, as discussed above, clearly suggests that 00-00-12 bigha land along with constructed house situated on Khasra No. 810/1 was acquired by the

petitioner for construction of project but Petitioner Corporation has not placed on record any revenue record to demonstrate that respondent had not become houseless and landless after the acquisition of his aforementioned land of the respondent. Petitioner only stated in the petition that 7 biswas of land of respondent No.1 was acquired along with his shop, house constructed thereupon and five biswas of land acquired along with the house and due and admissible compensation was granted to them under Land Acquisition Act but no documents whatsoever, have been placed on record suggestive of the fact that after acquisition of the land described hereinabove, respondent No.1 had not become houseless and landless. To the contrary respondent No.1 have specifically stated in the reply that after acquisition of the land as mentioned above, he became houseless and landless and, as such, he became entitled to the employment in terms of the scheme. Though, no revenue record whatsoever, has been made available by the petitioner corporation to persuade this Court that after acquisition of land i.e. less than one bigha, respondent No.1 had not become houseless and landless but it emerges from the impugned order passed by the ld. Deputy Commissioner Chamba that respondent No.1 had become houseless and landless after the acquisition of the aforesaid land and, as such, he was entitled to the benefit of employment in terms of the scheme referred above. In this regard, it would be apt to reproduce Para 11 and Para 12 of the order passed by the Deputy Commissioner, which reads as follows:-

> *"11. That the perusal of the revenue record as well as the other certificates issued by the competent authorities and the record from the relief and rehabilitation office shows that petitioner had made several representations to the concern authorities for settlement of the claim of the petitioner for providing employment to one member of his family in the project but the authorities did not consider and turned down the case of the petitioner for providing employment to one member of the family under the pretext that land acquired is less than one Biswa. Hence, the case of the present petitioner was not recommended and considered for the employment of one member of the family of the petitioner to respondent No.3.*
>
> *12. After going through the record of relief and rehabilitation office, R&R Scheme issued by the Financial Commissioner (Revenue) HP and after hearing both parties and their counsels, I am of the considered view that when the land was acquired, that the petitioner was owner in possession of the land alongwith other co-sharers who constitute a separate family of land comprised in Khata No. 193 khatauni No. 206 khasra No. 13 land measuring 11-19 bighas to the extent of 16/956 measuring 12 biswansi alongwith the house constructed over the land. Therefore, he has become houseless and landless after the acquisition of the aforesaid land. Therefore, part-III of the rehabilitation scheme clause-VI specifically provides that employment to the one member of the family of the petitioner has to be provided, if he becomes houseless and landless."*

It is ample clear from the paras reproduced hereinabove that Deputy Commissioner perused the revenue record and thereafter came to the conclusion that respondent No.1 after acquisition of his land has became houseless and landless. Hence, in view of the specific finding returned by the ld. Deputy Commissioner that too on the basis of revenue record, contention put forth on behalf of the petitioner-corporation that respondent No.1 is not entitled to employment in terms of scheme, does not appear to be tenable and deserves to be rejected.

15. Apart from above, bare perusal of the supplementary affidavit filed by the petitioner-corporation in terms of order dated 28.6.2012 passed by this Court itself suggests that petitioner corporation has been providing employment to the oustees on recommendations of ld. Deputy Commissioner. In this regard, it would be profitable to reproduce Paras 3 and 4 of the supplementary affidavit, which read as follows:-

> *"3. That according to the terms of agreement and Rehabilitation & Resettlement Scheme 1998, the District Revenue Authority/Deputy Commissioner is to recommend the name of eligible persons for employment. The notification under*

section 4 of the Land Acquisition Act, 189 for acquisition of and for Chamera H.E. Project Stage-II was issued on 11.7.2000 and rehabilitation & Resettlement Scheme 1998, was made applicable for the resettlement and rehabilitation to the land oustees. As per the Scheme the Deputy Commissioner has been recommending the names of eligible persons for employment between 2001-2004. In the intervening period the petitioner corporation has been insisting upon the Deputy Commissioner to send a consolidated and final list of eligible persons particularly in view of the fact that the project had already been commissioned in November, 2003 and the required strength of staff at the project had reduced considerably. A copy of letter dated 28.10.2005 is annexed herewith as Annexure P-9. The last such list was sent by the Deputy Commissioner on 11.8.2004, recommending 14 land oustees for employment. These land oustees were given employment in the year 2006 after necessary approval was conveyed by the corporate office on 5.4.2006. The details of recommendation made and employment provided to land oustees are given below:-

SL. No.	**Date**	**Description**
1.	*20.02.2001*	*The 1st list of 08 land oustees on recommendation of D.C. Chamba was sent to RO, Banikhet vide letter No. NH/CH-II/Confd./PS/2001/65 dated 20.02.2001 seeking approval for providing employment.*
2.	*02.03.2001*	*Corporate office accorded approval vide letter No. PSC-III/44/177 dated 02.03.2001. Subsequently 08 persons were appointed after codal formalities.*
3	*19.08.2002*	*The Dy. Commissioner, Chamba again sent the 2nd List of 16 land oustees vide letter No. RRO/CBA/EMP/CHEP-II/2002/216 dated 19.08.2002 for providing employment. The list was sent to C.O. for approval.*
4.	*29.07.2003*	*The corporate office accorded approval vide letter No. PSC-III/44/2673 dated 29.7.2003. Subsequently, 16 persons were appointed after codal formalities.*
5.	*11.02.2004*	*The 3rd list of 15 land oustees duly recommended by DC, Chamba was sent to C.O. vide letter No. NH/CH-II/P&A/E-28/2004/1660-61 dated 11.2.2004 seeking approval for providing employment.*
6.	*20.08.2004*	*The Corporate Office accorded approval vide letter No. NH/P&A/PSC-III/44/128 dated 20.8.2004. Subsequently 15 persons were appointed after codal formalities.*
7.	*11.08.2004*	*The 4th List of 14 land oustees duly recommended by DC Chamba was sent to C.O. vide letter No. NH/CH-II/P&A/E-*

		28/2004/11100-11101 dated 11-8-2004 seeking approval for providing employment.
8.	*5.04.2006*	*The Corporate Office accorded approval vide letter No. NH/HR/PSC-III/44 dated 05.04.2006. Subsequently, 13 persons were appointed after codal formalities.*
9.	*30.6.2005*	*The 5th list of 1 land oustee was recommended by DC, Chamba on 30.6.2005. Accordingly after getting approval from Corporate Officer, employment was given on 13.10.2006.*

Copies of all above mentioned letters containing the detail of persons whose names have been recommended by the Deputy Commissioner are annexed herewith as AnnexureP-10 to P-19.

4.That none of the list approved and forwarded by the Deputy Commissioner recommended the name of respondent No.1 or any member of his family for employment and as such there was no occasion for the petitioner to consider respondent No.1 or his family member for suitable employment."

Careful perusal of the aforesaid submissions having been made on behalf of the petitioner by way of supplementary affidavit are clearly suggestive of the fact that till year, 2005, petitioner corporation has been accommodating family members of oustees by way of offering employment in terms of scheme. In para 4 as reproduced above, petitioner-corporation stated that since in none of the list approved by the Deputy Commissioner, name of respondent No.1 was recommended, there was no occasion for them to consider the name of respondent No.1 or his family member for suitable employment, meaning thereby, name of respondent No.1 could not be considered by the petitioner-corporation since it was not recommended by the Deputy Commissioner. But now fact remains that Deputy commissioner vide impugned order has recommended the name of respondent No.2 for employment and as such, petitioner corporation is now bound in terms of order passed by the Deputy Commissioner as well as provisions contained in the scheme, referred above, to provide employment to respondent No. 1 or any member of his family.

16. Besides above, respondent No.1 in his reply has annexed documents suggestive of the fact that similarly situate persons have been offered employment by the petitioner in terms of the scheme and there is no rebuttal, whatsoever, to the contentions raised by the respondent in his reply as well as in the rejoinder to the supplementary affidavit filed by the corporation. Hence, in the absence of specific rebuttal to the material contained in the reply as well as rejoinder to the supplementary affidavit, this Court is bound to accept the same to be correct,

17. Now, adverting to the another contention put forth by the petitioner-corporation that no appointment, if any, can be granted to respondent No.1 after decision taken by the authorities concerned on 18.11.2002, wherein a conscious decision has been taken to grant financial package in lieu of the employment. Perusal of Annexure P-5, proceedings of the minutes of the meeting held on 18.11.2002, suggests that some decision was taken by the authorities concerned in the presence of Hon'ble Industry Minister, State of Himachal Pradesh, the then Deputy Commissioner Chamba to give alternative package of Rs. 3 lacks in case of Chamera-I and Rs. 2.5 lacks in case of Chamera-II to the affected persons in lieu of the employment. It also emerge from the perusal of the minutes of meeting that it was agreed that with the declaration of this package, no claim in Chamera-II would be entertained under this package. But petitioner-Corporation apart from placing the minutes of meeting held on 18.11.2002 has not made available on record any document issued by authorities pursuant to the decision taken in

meeting on 18.11.2002 informing affected parties qua aforesaid decision. Admittedly, in meeting held on 18.11.2002, decision to provide alternative package in lieu of employment to the affected families was taken by the concerned authorizes but there is no document on record suggestive of the fact that aforesaid decision was made public at any point of time. Rather, documents available on record suggest that even after passing of this order, petitioner corporation pursuant to the recommendations made by the Deputy Commissioner Chamba, offered employment to the various persons as emerge from the supplementary affidavit filed by the petitioner-corporation itself. Documents made available on record by the petitioner-corporation as well as respondents itself suggest that petitioner-corporation has been offering employment to the family members of the oustees till October, 2006, meaning thereby, decision taken in meeting on 18.11.2002 was never given effect to by the petitioner-corporation. Perusal of proceedings of meeting held on 18.11.2012 (Annexure P-5) itself suggests that with declaration of the package as discussed in meeting, no claim from any person regarding employment in Chamera-I or Chamera-II would be entertained but as has been observed above, there is no document made available on record by the petitioner-corporation suggestive of the fact that any package pursuant to decision taken in the meeting held on 18.11.2002 was ever declared and as such, this Court is unable to accept the contention put forth in this regard on behalf of the petitioner. Careful perusal of the documents available on record suggests that respondent No.1 is entitled to employment in terms of the scheme framed by the respondent–State for oustees of Chamera Project. Even the petitioner-Corporation has nowhere refuted the claim of the petitioner for employment on the basis of provisions contained in the scheme, rather, stand of the petitioner has been that at no point of time Deputy Commissioner recommended the name of respondent No.1 for employment and as such they had no occasion whatsoever, to consider his name for employment in terms of the scheme. But fact remains that when Deputy Commissioner, failed to recommend the name of respondent No.1 for employment, respondent No. 1 approached this Court and Division Bench of this court directed the Deputy Commissioner to consider the representation of respondent No.1 and decide the case accordingly. Now once, Deputy Commissioner on the basis of revenue record has concluded that respondent No.1 after acquisition of land has become houseless/landless, petitioner cannot be allowed to defeat the claim of respondent No.1 in the garb of decision taken by authorities in the meeting held on 18.11.2002, which admittedly was never made public and petitioner-corporation had been offering appointments in terms of scheme till year, 2006.

18. As far as another contention put forth by the petitioner-corporation that no opportunity was granted to them by the learned Deputy Commissioner while passing impugned order also deserves to be rejected outrightly because careful perusal of the impugned order clearly suggests that at the time of passing order dated 26.11.2011 by Deputy Commissioner, counsel on behalf of NHPC was present who invited the attention of the Deputy Commissioner to clause 7 of the part-III of the Scheme. At this stage, it may also be noticed that impugned order passed by Deputy Commissioner suggests that counsel representing the NHPC before him never raised plea with regard to decision, if any, taken in the meeting held on 18.11.2002, where decision was taken to provide alternative package to the affected persons in lieu of the employment. Hence, it is ample clear that at the time of passing impugned order, Deputy Commissioner had afforded an opportunity of being heard to the counsel representing the NHPC, who drew attention of the Court to the certain provisions of the scheme but nowhere mentioned qua the decision taken by the authorities in the meeting held on 18.11.2002.

19. Consequently, in view of the detailed discussion made hereinabove, this Court sees no illegality and infirmity in the impugned order dated 16.11.2011 passed by the learned Deputy Commissioner in terms of judgment rendered by this Court in CWP No. 2714 of 2011 titled “Karam Chand V. State of HP and Ors.” and accordingly present petition is dismissed being devoid of any merit and petitioner corporation is directed to provide suitable employment to respondent No.1 or his family member in terms of the recommendation made by the Deputy Commissioner. However, at this stage, it may be clarified that respondent No.1 or his family member would be entitled to appointment/employment as per the requirement of the petitioner-

corporation and respondent No. 1 shall have no right to claim employment, if any, on the basis of his qualification.

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

Smt. Radha Devi and others ...Petitioners
Versus
Ram Singh ...Respondent

Cr. Revision No. 203/2015
Reserved on: June 21, 2016
Decided on: July 12, 2016

Code of Criminal Procedure, 1973- Section 125- Petitioner No. 1 is legally wedded wife of respondent- one daughter and son were born from the marriage- respondent treated petitioner No. 1 with cruelty and demanded dowry- matter was brought to the notice of Pardhan and Pardhan got the same compromised - complaint under Protection of Women from Domestic Violence Act, 2005 was filed- petitioner no. 2 was beaten by respondent- petitioner No. 1 was thrown out of matrimonial home- trial Court granted maintenance of Rs. 2,000/- per month to petitioner No. 1 and Rs. 5,000/- to petitioners No. 2 and 3- respondent filed a revision, which was allowed and the maintenance awarded to petitioner No. 1 was set aside- held in revision, respondent has admitted that he had not paid any maintenance despite order of the Courts- he was not looking after the petitioner - it is the duty of the parents to ensure good education to the children- respondent had maltreated the petitioners- he is employed in a factory and it can be presumed that his income is not less than Rs. 15,000/-- petitioners were forced to reside separately- Court has to take into consideration the status of the parties- order passed by Sessions Judge set aside- petitioner No. 1 held entitled to the maintenance of Rs. 2,000/- per month. (Para-9 to 14)

Cases referred:

Badshah v. Urmila Badshah Godse 2014(1)SCC 188
Shamima Farooqui v. Shahid Khan 2015(5) SCC 705
Bhuwan Mohan Singh v. Meena 2015(6) SC 353

For the Petitioners : Mr. Bimal Gupta, Senior Advocate with Ms. Kusum Chaudhary.
For the Respondent : Mr. Onkar Jairath, Advocate.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge

The present petition has been instituted against Order dated 1.4.2015 rendered by the learned Sessions Judge, Solan, District Solan, HP in Case No. 20-S/10 of 2013.

2. "Key facts" necessary for the adjudication of the present petition are that the petitioners filed an application under Section 125 CrPC for grant of maintenance allowance before Additional Chief Judicial Magistrate, Kasauli, District Solan, HP. According to the averments made in the application, petitioner No.1 is the legally wedded wife of respondent. Marriage was solemnised on 21.4.2003 as per Hindu rites and customs. Petitioner No.1 resided with the respondent in his house at Village Hara Mehta Post Office Goayala, Tehsil Kasauli, District Solan, HP. One daughter Kirti was born on 1.3.2004 and son Nitish was born on 25.7.2007. After

marriage, behaviour of respondent towards petitioner No.1 turned hostile and he started causing physical and mental cruelty upon the petitioner No.1 and demanded dowry from her. She was also accused of giving birth to a female child. She was constrained to bring the matter to the notice of Pradhan, Gram Panchayat, Dhakrayana on 28.5.2005. Matter was compromised on 15.6.2005. Thereafter, respondent alongwith his parents tried to burn petitioner No.1 with kerosene oil on 24.12.2005. Petitioner No.3, Nitish fell seriously ill in February, 2008. Respondent did not take him to the doctor. Petitioner No.1 even reported the matter to the Protection Officer and also filed a complaint under Prevention of Women from Domestic Violence Act against the respondent in the Court of ACJM Kasauli. Same was compromised on 20.4.2009. Behaviour of respondent remained hostile. Petitioner No.2 was mercilessly beaten up by the respondent and her tooth was broken on 4.3.2012. Respondent has thrown out the petitioner No.1 from matrimonial house. She had no source of income. Petitioner No.2 was studying in 4th standard and petitioner No.3 was studying in Nursery class in St. Thomas School. Respondent was working in a factory and his monthly income was Rs.15,000/- . He has also got plenty of property. His total income from all sources was Rs.45,000/- per month. She prayed for a sum of Rs.10,000/- per month as maintenance. It is in these circumstances that the application was filed.

3. Application was contested by the respondent. Factum of marriage has been admitted. It was denied that he treated petitioner No.1 with cruelty. According to him, petitioner No.1 was working in a factory and drawing a salary of Rs.8,500/- per month. He was not earning Rs.45,000/- per month as alleged.

4. Issues were framed by the learned ACJM. He allowed maintenance of Rs.2,000/- per month to petitioner No.1 and maintenance of Rs.1500/- each per month, to petitioners No.2 and 3. Petitioners were also held entitled to litigation expenses amounting to Rs.2,200/-. Respondent filed a revision petition before Sessions Judge against Order dated 6.9.2013. Learned Sessions Judge, allowed the revision partly and maintenance allowance allowed by the ACJM Kasauli to the petitioner No.1, was set aside. Maintenance awarded to petitioners No.2 and 3 was upheld. Hence, this petition.

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

6. Petitioner No.1 has led her evidence by way of filing affidavit Ext. PW-1/A. She has also produced on record receipt of fees of Master Nitish Ext. PW-1/D and Ext. PW-/E, stationery receipts for Rs.180/-, Ext. PW-1/F, Rs.777/- Ext. PW-1/G, House Rent receipt for March 20012 to January 2013 vide Ext. PW-1/H-1 to Ext. PW-1/H-11, school fees receipt of Nitish Ext. PW-1/J-1 to Ext. PW-1/J-10, fee of Kirti Ext. PW-1/K-1 to Ext. PW-1/K-10, copy of *Rapat* mark A, medical mark B, list of jewellery Mark C, notice mark D and Mark C. According to the averments as made in the affidavit, marriage of petitioner was solemnised in 2003. She was harassed for bringing more dowry. Daughter was born in 2004. Respondent used to abuse her and administer beatings to her after the birth of the daughter. She filed a complaint before Panchayat on 28.5.2005. Matter was compromised on 15.6.2005. Respondent and his family members tried to put her on fire on 15.6.2005. Son was born in 2007. Petitioner No.3 fell ill. He was not taken to the doctor by the respondent. She was also abused by respondent and his father before the Doctor. She has also filed a petition before Protection Officer in the year 2009. She also filed a complaint against respondent under Prevention of Women from Domestic Violence Act, before ACJM Kasauli. She was forced to compromise the same. In 2011, respondent was paid Rs.40,000/- by her parents. Rs.70,000/- was paid in the month of January, 2012. Daughter was beaten up by respondent. Her tooth was broken. He was not looking after the children. One complaint was also pending before ACJM Kasauli under the Prevention of Women from Domestic Violence Act. Respondent was earning Rs.15,000/- per month. Total income of respondents was Rs.45,000/- per month. In her cross-examination, she admitted that they were living together at Barotiwala. She was ready and willing to live in the village. A Government school was situate in the village of respondent. She was not ready and willing to teach her children in the government

school. She denied the suggestion that respondent has not administered beatings to her daughter. She denied the suggestion that she alongwith her brother had beaten up the respondent. She denied the suggestion that respondent had no source to pay maintenance. She denied the suggestion that she was working in private company.

7. Joginder Singh Thakur, Manager, M/s TDS Placement Baddi has appeared as RW-1. According to him, petitioner No.1 was drawing salary of Rs.5,000/- as per Ext. RW-1/B and Ext. RW-1/B. He admitted in his cross-examination that salary of petitioner No.1 for the month of June 2013 was Rs.4106/-.

8. Respondent also led his evidence by way of filing affidavit Ext. RW-2/A. According to him, petitioner has left his company without sufficient reason. She was working in a factory and was earning Rs.8,500/- per month. He was beaten up by the family members of the petitioner No.1. They were influential persons. He was forced to leave the job in the factory. He was unemployed at the time of filing affidavit. Compromise was arrived at between the parties on 20.4.2009. He was providing maintenance to the petitioners. Government school was situate near his house and he persuaded the petitioner No. 1 to get admission of children in that school where qualified teachers were employed. Petitioner No.1 was living with her parents without consent or permission of the respondent. In his cross-examination, he admitted that he was a B.Com. His marriage was solemnised with petitioner No.1 in 2003. They lived together in the village for one year. He admitted that petitioner No. 1 has lodged complaint against him in the Panchayat on 28.5.2005. He also admitted that he asked the petitioner to withdraw the same. He was not aware that on 24.12.2005 an attempt was made to put petitioner No.1 on fire. He was not aware that petitioner had filed a complaint against him but admitted that matter was compromised. He denied that he has beaten up petitioner No.1. They lived separately during 2007-09. Children were with petitioner No.1. He has not paid any maintenance to the petitioners. Entire expenditure was borne by the parents of petitioner No.1. He also admitted that complaint was filed by the petitioner No.1 before Protection Officer. He was summoned by the Protection Officer. He agreed to take petitioner No.1 to his house on 3.3.2009. However, he has not taken her to his house. A case was filed against him under the Prevention of Women from Domestic Violence Act. Thereafter matter was compromised. He has agreed to take children to Nalagarh. They remained at Nalagarh for one year and thereafter at Barotiwala. He denied that Rs.60,000/- was paid to him by his in-laws. He has never beaten up his daughter. He denied Mark A, report and Mark B medical. He again admitted that since March, 2012, he has not paid maintenance to the petitioners. He was not aware that in which class, his daughter was studying. He admitted that expenditure of his daughter towards education was Rs.3,000-4,000/- per month and of the son was Rs.2,000-3,000/- per month. He admitted that the expenditure towards books was Rs.2577/-. He also admitted that Ext. PW-1/B and Ext. PW-1/C were admission charges and Ext. PW-1/D and Ext. PW-1/E was school fees. He also admitted the receipts Ext. PW-1/J-1 to Ext. PW-1/J-10 and Ext. PW-1/K-1 to Ext. PW-1/K-10. He also admitted that petitioner No.1 had got children admitted in the school and was also incurring other expenses for maintaining petitioners No.2 and 3. He has also admitted that his children had no source of income. He was not aware that his wife was running household by borrowing money from her parents. He also admitted that despite order of the Court he has not paid any maintenance to the petitioners. He denied that he was earning Rs.30,000/- per month from agricultural land.

9. Marriage between the petitioner No.1 and respondent was solemnised in the year 2003. They stayed together for some time but respondent started harassing the petitioner No.1 and forced her to bring more dowry. He used to give beatings to petitioner No.1. Matter was brought to the notice of Panchayat. However, petitioner was forced to compromise the matter. Petitioner No.1 was constrained to file a complaint before Protection Officer. Respondent was summoned. Petitioner No.1 was compelled to file complaint against respondent under Prevention of Women from Domestic Violence Act. He had agreed to look after the family. However, fact of the matter is that respondent, in his cross-examination has admitted that he has not paid any

maintenance despite the orders of the Court. He was not looking after the petitioners. It is petitioner No.1 who is looking after the children. She is bearing all the expenditure of petitioners No.2 and 3. They have been admitted in a public school. It is the duty of the parents to ensure that their children get education in the best school. Respondent could not force petitioner No.1 to get the children admitted in a government school. Respondent and his family members have also tried to put petitioner No.1 on fire. Respondent had been maltreating the petitioners. He has even the audacity to beat his daughter mercilessly. Report was filed. Child was medically examined. Petitioner No. 1 was also forced to bring Rs.60,000/- to be paid to the respondent. Respondent has admitted that his wife was bearing all the expenses of her two school going children including admission fee, clothes etc. Respondent is B.Com. He is employed in a factory. It can safely be presumed that his income is not less than Rs.15,000/-. He has regular income from the agricultural land. Respondent has not denied the statement made by the petitioner No.1 that respondent is earning Rs.45,000/- per month. Petitioner No.1 has been forced to borrow money from her parents. Petitioners were forced to live separately. Petitioner No.1 is the legally wedded wife of the respondent. Petitioners No.2 and 3 are the children of the respondent. Respondent is an able bodied person. He was capable of earning. It can not be believed that he is unemployed. Learned ACJM has only awarded Rs.5,000/- per month to the petitioners. Learned Sessions Judge has erred in law by setting aside the maintenance of Rs.2,000/- per month awarded to petitioner No.1. Though the petitioner No. 1 has denied that she was employed in a factory. However, fact of the matter is that even if she was employed and getting Rs.5,000/- per month, this amount is not sufficient to maintain her and her two children. Respondent has himself admitted that the total expenditure of his daughter was Rs.3,000-4,000/- per month and that of son was Rs.2,000-3,000/- per month. The Court has to take into consideration status of the parties while determining the maintenance. Maintenance amount should be fixed taking into consideration that it is sufficient for the wife and children to live in a reasonable comfort. Only Rs.2,000/- was awarded by the learned ACJM to petitioner No.1 and that too has been set aside by the learned Sessions Judge without due application of mind. Moreover, while determining amount of maintenance, same is not required to be proved like mathematical puzzle. Some guess work is also permissible. Maintenance is to be allowed after taking into consideration all the facts and circumstances of the case and behaviour of the parties. Section 125 CrPC is a measure of social justice. It is enacted to protect the destitute women and children. Respondent can not be permitted to take the plea that he is unemployed. He is an able bodied person. He is a B.Com. There is evidence that he is working in a factory. He is getting income from agricultural land. He is in possession of sufficient means. It is not his case that he is suffering from any disease etc.

10. There is sufficient material on record to prove that the respondent has harassed petitioner No.1 for bringing insufficient dowry. She was forced to live separately. Respondent has failed to maintain the petitioners and has not even paid arrears as ordered by the Court.

11. Their Lordships of the Hon'ble Supreme Court in **Badshah v. Urmila Badshah Godse** reported in 2014(1)SCC 188 have held that Section 125 CrPC is a social justice legislation. Distinct approach is required to be adopted while dealing the cases under this provision. Their lordships have held as under:

> "14. Of late, in this very direction, it is emphasized that the Courts have to adopt different approaches in "social justice adjudication", which is also known as "social context adjudication" as mere "adversarial approach" may not be very appropriate. There are number of social justice legislations giving special protection and benefits to vulnerable groups in the society. Prof. Madhava Menon describes it eloquently:
>
> "It is, therefore, respectfully submitted that "social context judging" is essentially the application of equality jurisprudence as evolved by Parliament and the Supreme Court in myriad situations presented before courts where unequal parties are pitted in adversarial proceedings and where courts are called upon to dispense equal justice. Apart from the social- economic inequalities accentuating

the disabilities of the poor in an unequal fight, the adversarial process itself operates to the disadvantage of the weaker party. In such a situation, the judge has to be not only sensitive to the inequalities of parties involved but also positively inclined to the weaker party if the imbalance were not to result in miscarriage of justice. This result is achieved by what we call social context judging or social justice adjudication."

15. Provision of maintenance would definitely fall in this category which aims at empowering the destitute and achieving social justice or equality and dignity of the individual. While dealing with cases under this provision, drift in the approach from "adversarial" litigation to social context adjudication is the need of the hour."

12. Their Lordships of the Hon'ble Supreme Court in **Shamima Farooqui v. Shahid Khan** reported in 2015(5) SCC 705 have held that retirement of husband from service cannot be sole consideration for High Court for further reduction of a nominal amount of maintenance awarded by family court. It is further held that the sustenance does not mean bare survival and it gains more weightage when children are also with wife. Quantum should be adequate so as to enable wife to live with dignity, similar to standard with which she would have lived in her matrimonial home. In this context, status and strata become relevant. Their lordships have held as under:

"14. Coming to the reduction of quantum by the High Court, it is noticed that the High Court has shown immense sympathy to the husband by reducing the amount after his retirement. It has come on record that the husband was getting a monthly salary of Rs.17,654/-.

The High Court, without indicating any reason, has reduced the monthly maintenance allowance to Rs.2,000/-.

In today's world, it is extremely difficult to conceive that a woman of her status would be in a position to manage within Rs.2,000/- per month. It can never be forgotten that the inherent and fundamental principle behind Section 125 CrPC is for amelioration of the financial state of affairs as well as mental agony and anguish that woman suffers when she is compelled to leave her matrimonial home. The statute commands there has to be some acceptable arrangements so that she can sustain herself. The principle of sustenance gets more heightened when the children are with her. Be it clarified that sustenance does not mean and can never allow to mean a mere survival. A woman, who is constrained to leave the marital home, should not be allowed to feel that she has fallen from grace and move hither and thither arranging for sustenance. As per law, she is entitled to lead a life in the similar manner as she would have lived in the house of her husband. And that is where the status and strata of the husband comes into play and that is where the legal obligation of the husband becomes a prominent one. As long as the wife is held entitled to grant of maintenance within the parameters of Section 125 CrPC, it has to be adequate so that she can live with dignity as she would have lived in her matrimonial home. She cannot be compelled to become a destitute or a beggar. There can be no shadow of doubt that an order under Section 125 CrPC can be passed if a person despite having sufficient means neglects or refuses to maintain the wife. Sometimes, a plea is advanced by the husband that he does not have the means to pay, for he does not have a job or his business is not doing well. These are only bald excuses and, in fact, they have no acceptability in law. If the husband is healthy, able bodied and is in a position to support himself, he is under the legal obligation to support his wife, for wife's right to receive maintenance under Section 125 CrPC, unless disqualified, is an absolute right..

16. Grant of maintenance to wife has been perceived as a measure of social justice by this Court. In Chaturbhuj v. Sita Bai, 2008 2 SCC 316, it has been ruled that:-

"Section 125 CrPC is a measure of social justice and is specially enacted to protect women and children and as noted by this Court in Captain Ramesh Chander Kaushal v. Veena Kaushal, 1978 4 SCC 70 falls within constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution of India.

It is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves. The aforesaid position was highlighted in Savitaben Somabhai Bhatiya v. State of Gujarat, 2005 3 SCC 636."

This being the position in law, it is the obligation of the husband to maintain his wife. He cannot be permitted to plead that he is unable to maintain the wife due to financial constraints as long as he is capable of earning.

17. This being the position in law, it is the obligation of the husband to maintain his wife. He cannot be permitted to plead that he is unable to maintain the wife due to financial constraints as long as he is capable of earning.

19. From the aforesaid enunciation of law it is limpid that the obligation of the husband is on a higher pedestal when the question of maintenance of wife and children arises.

When the woman leaves the matrimonial home, the situation is quite different. She is deprived of many a comfort. Sometimes the faith in life reduces. Sometimes, she feels she has lost the tenderest friend. There may be a feeling that her fearless courage has brought her the misfortune. At this stage, the only comfort that the law can impose is that the husband is bound to give monetary comfort. That is the only soothing legal balm, for she cannot be allowed to resign to destiny. Therefore, the lawful imposition for grant of maintenance allowance."

13. Their Lordships of the Hon'ble Supreme Court in **Bhuwan Mohan Singh v. Meena** reported in 2015(6) SC 353 have held that sustenance does not mean animal existence but signifies leading life in similar manner as she would have lived in house of her husband. Husband has a bounden duty to enable wife to live life with dignity according to their social status and strata. Their lordships have held as under:

"2. Be it ingeminated that Section 125 of the Code of Criminal Procedure (for short "the Code") was conceived to ameliorate the agony, anguish, financial suffering of a woman who left her matrimonial home for the reasons provided in the provision so that some suitable arrangements can be made by the Court and she can sustain herself and also her children if they are with her. The concept of sustenance does not necessarily mean to lead the life of an animal, feel like an unperson to be thrown away from grace and roam for her basic maintenance somewhere else. She is entitled in law to lead a life in the similar manner as she would have lived in the house of her husband. That is where the status and strata come into play, and that is where the obligations of the husband, in case of a wife, become a prominent one. In a proceeding of this nature, the husband cannot take subterfuges to deprive her of the benefit of living with dignity. Regard being had to the solemn pledge at the time of marriage and also in consonance with the statutory law that governs the field, it is the obligation of the husband to see that the wife does not become a destitute, a beggar. A situation is not to be maladroitly created whereunder she is compelled to resign to her fate and think of life "dust unto dust". It is totally impermissible. In fact, it is the sacrosanct

> duty to render the financial support even if the husband is required to earn money with physical labour, if he is able bodied. There is no escape route unless there is an order from the Court that the wife is not entitled to get maintenance from the husband on any legally permissible grounds.."

14. Accordingly, the present petition is allowed. Order dated 1.4.2015 rendered by the learned Sessions Judge, Solan, District Solan, HP in Case No. 20-S/10 of 2013 setting aside the maintenance allowed by ACJM Kasauli to petitioner No.1, is set aside. Maintenance awarded by the learned Sessions Judge, to petitioners No.2 and 3 is upheld. Petitioner No.1 is held entitled to a maintenance of Rs.2,000/- per month. Respondent is directed to deposit the entire arrears of maintenance due from him with the Registry of this Court within four weeks from today.

Pending applications, if any, are also disposed of.

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

Shri Rajnish Sonkhla. …Petitioner

Versus

Indian Oil Corporation Ltd. …Respondent

CWP No. 7084 of 2010
Judgment Reserved on 7.7.2016
Date of decision: 12.7.2016

Constitution of India, 1950- Article 226- Respondent issued an advertisement for allotment of its retail outlet dealership, which was reserved for the Scheduled Caste category- petitioner applied and secured the highest position- S questioned the selection of the petitioner- respondent informed the complainant that the selection of the petitioner had been made in a fair and transparent manner in accordance with the guidelines and prescribed norms- the respondent vide letter dated 26.7.2010 abruptly cancelled the Letter of Intent- respondent received a mail dated 25.11.2005 from the Head Office, wherein it was mentioned that the advertisement under "Corpus Fund Scheme", where interviews were yet to be conducted, should be cancelled- land had not been procured till the time of interview and it was decided to cancel the Letter of Intent- feeling aggrieved from the order, present petition has been preferred- held, that the respondent itself had been supporting and justifying the selection of the petitioner- all administrative orders are to be considered prospective in nature and when a policy decision is required to be given retrospective operation, it must be stated so expressly or by necessary implication- case of the petitioner was considered as per the terms and conditions of advertisement and LOI has also been issued - the benefit accrued in favour of the petitioner cannot be unilaterally withdrawn by the respondent only on the ground of change of criteria- petition allowed and the order/communication dated 26.7.2010, whereby the Letter of Intent issued in favour of the petitioner was ordered to be cancelled, set aside- respondent Corporation directed to award the retail outlet dealership in question to the petitioner. (Para- 4 to 10)

<u>Cases referred:</u>

Mohinder Singh Gill Vs. The Chief Election Commissioner, New Delhi (1978) 1 SCC 405
Kusumam Hotels Private Limited Vs. Kerala State Electricity Board and others, (2008) 13 SCC 213

For the Petitioner: Mr. Ramakant Sharma, Senior Advocate with Ms.Soma Thakur, Advocate.

For the Respondent: Mr.K.D. Sood, Senior Advocate with Mr.Sanjeev Sood, Advocate, for the respondent.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J.

Aggrieved by the cancellation of Letter of Intent (for short 'LOI') for proposed retail outlet of Indian Oil Corporation at Ajhouli More, District Una, H.P., the petitioner has filed this petition, claiming therein the following reliefs:-

> *"(i) That the order/communication dated 26th July, 2010 (annexure P-4) passed by the respondent may be quashed and set aside.*
>
> *(ii) The records of the case be summoned.*
>
> *(iii) The respondent-Corporation be directed to award the retail outlet dealership at location Ajhouli More, District Una, H.P. under the category of Scheduled Caste, Marketing Plan: SRMP 2003-05 to the petitioner in pursuance to the Letter of Intent dated 20th February, 2008 (annexure P-2).*
>
> *(iv) That the damages be awarded in favour of the petitioner and against the respondent."*

The facts in brief may be noticed.

2. On 28.1.2005, respondent issued an advertisement for allotment of its retail outlet dealership at location Ajhouli More, District Una and the same was reserved for the Scheduled Caste category. As the petitioner fulfilled all the conditions of eligibility criteria, he accordingly applied and was interviewed by the respondent on 15.12.2006, wherein he secured the highest position. However, in the year 2007 one Sh. Suresh Chander questioned the selection of the petitioner by filing a complaint with the respondent. The respondent by their letters dated 5.3.2007, 25.4.2008 and 26.10.2006 (Annexures P-6 to P-8) informed the complainant that the selection of the petitioner had been made in a fair and transparent manner strictly in accordance with the guidelines and prescribed norms. During the integrum, even Letter of Intent was issued in favour of the petitioner vide letter dated 20.2.2008. However, the respondent vide letter dated 26.7.2010 (annexure P-4) abruptly cancelled the aforesaid LOI, constraining the petitioner to file the instant petition for the reliefs as already set out herein above, on various grounds taken in the memo of writ petition.

3. The respondent contested the petition by filing reply, wherein the factual matrix has not been denied. But it has been averred that though the petitioner was empanelled as No. 1 candidate in the interviews held on 15.12.2006, pursuant to which Letter of Intent dated 20.2.2008 had also been issued in his favour, but thereafter it transpired that there was a mail dated 25.11.2005 from the Head Office, wherein it was mentioned that the advertisement of the location under "Corpus Fund Scheme", where interviews were yet to be conducted should be cancelled. It was further averred that as per the policy of the respondent, interviews of any location rooted under Corpus Fund were to be conducted only after procurement of land had been made for setting up of the retail outlet. Whereas in the location in question, which was advertised under the Corpus Fund Scheme category, land had not been procured till the time of interview and therefore, it was decided to cancel the Letter of Intent, so issued in favour of the petitioner. It was further claimed that the Letter of Intent merely expressed an intention to enter into a contract with the petitioner, but the same did not in any manner create a binding legal relationship between the petitioner and the respondent at this stage and therefore, the respondent was fully justified in cancelling the Letter of Intent.

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

4. It is evident from the letters Annexures P-6 to P-8 (supra) that till as long as 26.10.2009, the respondent itself had been supporting and justifying the selection of the petitioner. It is only on 26.7.2010 that abruptly the LOI in favour of the petitioner was cancelled, that too, without any apparent reason as would be evident from the contents of letter, relevant extract whereof reads thus:-

> *"Please refer to the Letter of Intent issued in your favour vide out letter No. SML/LOI/Ajouli More dated 20.02.2008 for proposed Retail Outlet Dealership at location Ajhouli More, Distt. Una (HP).*
>
> *The matter was perused and found that the selection was not in line with the laid down selection guidelines. Accordingly we are hereby cancelling the subject Letter of Intent.*
>
> *The above is being issued without any prejudice and is in the interest of the Corporation."*

5. Though, learned counsel for the respondent would try to justify and offer explanation for passing of the order. But, then there can be no gainsaying that every decision of an administrative or executive nature must be a composite and self-sustaining one, in that it should contain all the reasons which prevailed on the official taking the decision to arrive at his conclusion. It is beyond cavil that an Authority cannot be permitted to travel beyond the stand adopted and expressed by it in the impugned action. If precedent is required for this proposition it can be found in the celebrated decision of the Hon'ble Supreme Court titled ***Mohinder Singh Gill Vs. The Chief Election Commissioner, New Delhi (1978) 1 SCC 405***, of which the following paragraph deserves extraction:-

> *"8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose J. in Gordhandas Bhanji (1952) 1 SCR 135: Public orders publicly made, in exercise of statutory authority cannot be construed in the light of Explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do.*
>
> *Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.*
>
> *Orders are not like old wine becoming better as they grow older."*

6. In addition to the aforesaid, it is not even in dispute that the advertisement in question was issued on 28.1.2005 i.e. earlier to the mail dated 25.11.2005 and it is settled law that all administrative orders ordinarily are to be considered prospective in nature and when a policy decision is required to be given retrospective operation, it must be stated so expressly or by necessary implication. Reference in this regard can conveniently be made to the decision of Hon'ble Supreme Court in ***Kusumam Hotels Private Limited Vs. Kerala State Electricity Board and others, (2008) 13 SCC 213***, wherein it was held that the statute or a direction issued there under is presumed to be prospective only unless retrospectivity is indicated expressly or by necessary implication. Relevant observation reads thus:-

> *"36. The law which emerges from the above discussion is that the doctrine of promissory estoppel would not be applicable as no foundational fact therefor has been laid down in a case of this nature. The State, however, would be entitled to alter, amend or rescind its policy decision. Such a policy decision, if taken in public interest, should be given effect to. In certain situations, it may have an impact from*

a retrospective effect but the same by itself would not be sufficient to be struck down on the ground of unreasonableness if the source of power is referable to a statute or statutory provisions. In our constitutional scheme, however, the statute and/or any direction issued thereunder must be presumed to be prospective unless the retrospectivity is indicated either expressly or by necessary implication. It is a principle of the rule of law. A presumption can be raised that a statute or statutory rule has prospective operation only."

7. That apart, a valuable right in favour of the petitioner was already accrued when not only his case was considered as per the terms and conditions as prevailing on the date of the advertisement, but thereafter even LOI has also been issued in his favour, that too as far back as on 20.2.2008 and therefore, the benefit accrued in favour of the petitioner cannot be unilaterally withdrawn by the respondent, that too, only on the ground of change of criteria, which otherwise is not applicable to the instant case. The respondent is in fact estopped from questioning, much less cancelling the LOI already issued in favour of the petitioner.

8. Now adverting to the contents of letter dated 24.11.2005 received through mail dated 25.11.2005, it would be noticed that in terms of Annexure-II dealing with resitement of dealerships/ distributorships, clause 3 thereof reads thus:-

"3. In fresh cases, with effect from 27.10.2005, OMCs should acquire land before advertising for the selection of dealers eligible under the Corpus Fund Scheme. In such cases, a change of location at LOI stage shall not be permitted."

9. Evidently, the instant case could not have otherwise been considered as a fresh case as admittedly the advertisement already stood issued and published much earlier to this on 28.1.2005. In such circumstances, therefore, even if at all the terms and conditions of the letter dated 24.11.2005 have any application, the same would only be applicable prospectively w.e.f. 27.10.2005.

10. In view of the aforesaid discussion and for all the reasons stated herein above, I find merit in this petition and consequently the same is allowed and accordingly the order/communication dated 26.7.2010, whereby the Letter of Intent issued in favour of the petitioner was ordered to be cancelled, is quashed and set aside and the respondent Corporation is directed to award the retail outlet dealership in question to the petitioner.

The petition stands disposed of, so also the 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.

Rulda Ram …..Petitioner.

Versus

State of Himachal Pradesh and another …..Respondents.

CWP No.4158 of 2009.
Judgment reserved on : 21.06.2016.
Date of decision: July 12, 2016.

Constitution of India, 1950- Article 226- Grievance of the petitioner is that respondents have failed to abide by their undertaking that no building/mini secretariat will be built on the land and that it shall be used as a playground by the Government Senior Secondary School, Manali – petitioner and three other persons had earlier filed a writ petition, which was disposed of in view of undertaking- another writ petition was filed, in which application for impleadment was filed by

the petitioner, which was allowed- subsequently writ petition was dismissed as withdrawn- held, that Court had directed the respondents to use the land in the best public interest and the State Government had proposed to construct a Cultural Centre in addition to multi level parking over the land- petitioner had also filed a contempt petition in which Deputy Commissioner had stated that he had complied with the orders passed by the High Court and Contempt petition was dismissed- interim orders were not vacated but were discharged- respondents had complied with the orders passed by the Court and whatever had been done, cannot be undone- petition dismissed. (Para-9 to 20)

For the Petitioner : Mr.Ajay 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.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

By medium of this petition, the following reliefs have been prayed for:-

"i) That a writ of Certiorari may very kindly be issued and impugned in action on the part of the respondents as is conveyed to the petitioner vide letter dt.25.3.2009 under Right to Information Act, 2005, may very kindly be quashed and set aside.

ii) That a writ of Mandamus may very kindly be issued thereby directing the respondents to adhere to the mandate of this Hon'ble Court as given in Civil Writ Petition No.563/2002 and correct the revenue records accordingly and further to handover the possession of the school ground to the school authorities, in the interest of law and justice."

2. The subject-matter of the petition is property commonly known as 'potato ground' situate at Manali and the grievance of the petitioner is that despite having given an undertaking before this Court that no building/mini secretariat shall be built on this piece of land and the same shall be allowed to be used as a playground by the Government Senior Secondary School, Manali, (for short 'School'), the respondents have not adhered to the said undertaking constraining him to file the instant petition.

3. The petitioner alongwith three other persons had earlier approached this Court by medium of writ petition No.563 of 2002 wherein they had prayed for confining the use of the property as a playground or other educational related activities of the school and restraining the respondents from changing the use and nature of the land in any manner whatsoever which were not related to the school curriculum.

4. On 14.10.2003, the then learned Advocate General placed on record a communication received by him from the Principal Secretary (Education) and on the basis of the said communication, the petition being CWP No.563 of 2002 was disposed of in the following terms:-

"When this case was taken up today, Shri M.S. Chandel, learned Advocate General placed on record original communication received by him from the Principal Secretary (Education), to the Government of Himachal Pradesh, Shimla. Its contents are extracted hereinbelow:-

"Subject: CWP No.563/2002-Rulda Ram Vs. State of H.P. and Ors.

Sir,

I am directed to refer to the above mentioned Civil Writ Petition which is pending disposal in the Hon'ble High Court of Himachal Pradesh.

In this regard, it has been decided that no Government Building/Mini Secretariat shall be built on the piece of land which is in the possession of Education Department and the same has been allowed to be used as a playground by the Government Senior Secondary School at Manali, District Kullu, Himachal Pradesh.

You are, therefore, requested kindly to apprise the Hon'ble High Court of the same accordingly.

Yours faithfully,

Sd/-

Deputy Secretary (Edu.)

to the Govt. of Himachal

Pradesh.

In view of what has been extracted hereinabove, nothing survives in this writ petition, which is accordingly disposed of.

Interim order, if any, shall stand vacated and pending application, if any, shall also stand disposed of."

5. However, on the same subject-matter another petition being CWP No.528 of 2003 was preferred by one Raj Chauhan and during the course of proceedings various orders came to be passed from time to time by this Court and the same were also complied with and given effect to by the respondents. The petitioner on coming to know about the aforesaid petition himself filed an application for being impleaded as a party and the same was allowed and the petitioner was permitted to intervene in the matter. This petition, however, came to be withdrawn by the petitioner therein on 08.05.2008.

6. Now the grievance of the petitioner is that once the writ petition being CWP No.528 of 2003 had been withdrawn, then all that was done in compliance to the directions (termed to be interim directions by the petitioner) was required to be undone as the interim orders were no longer in operation and had been ordered to be discharged.

7. The respondents have filed their joint reply wherein it has been averred that no doubt an order on the basis of the instructions imparted by the respondents on 14.10.2003 came to be passed by this Court in CWP No.563 of 2002, but it was in compliance to the subsequent orders passed by this Court in CWP No.528 of 2003 that the property has been put to an entirely different use than the one recorded in the aforesaid order i.e 14.10.2003.

8. It is further averred that on 06.05.2005 this Court had specifically directed the respondents "to use the land in the best public interest", pursuant to which the space near the Civil Hospital and Judicial Complex was immediately made under the control of Deputy Commissioner, Kullu, and thereafter the State Government had proposed to construct a Cultural Centre in addition to multi level parking over this land. It is lastly averred that though the writ petition being CWP No.528 of 2003 was dismissed as not pressed, however, as the earlier orders passed by this Court had already been complied with, the same cannot now be undone.

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

9. At the outset, we may note that the petitioner alongwith the instant writ petition had also filed a COPC No.415 of 2014 complaining violation of the judgment dated 14.10.2003 in CWP No.563 of 2002 on the ground that entry rapat No.179/5-12-06 had been made whereby the land in question had been mutated in the name of the HRTC.

10. The Deputy Commissioner, Kullu, was arrayed as respondent, who in his defence has stated that the entire exercise undertaken by him was in compliance to the directions passed from time to time in CWP No.528 of 2003 and this action had otherwise been questioned by the petitioner by filing CWP No.4158 of 2009 and, therefore, the contempt petition was misconceived and consequently not maintainable.

11. The question which arose for consideration in those contempt proceedings was that as to whether the Deputy Commissioner could be held guilty of the contempt of Court when admittedly he had acted in compliance and in furtherance of the orders passed by this Court. This question was answered by observing thus:-

> *"11. Tested on the touchstone of the guidelines and parameters as laid down by the Hon'ble Supreme Court in* ***Ram Kishan's case*** *(supra), we are unable to agree with the submissions of the petitioner that the respondent has deliberately and willfully disobeyed the orders passed by this Court. The proposal to raise a multi level parking or transferring the land in the name of the Transport Department has been done only because there was a direction passed to this effect by this Court in CWP No.528 of 2003. The respondent of his own has not done any act which can be said to be amounting to willful or deliberate violation of the orders passed by this Court. Once the action of the respondent cannot be construed to be intentional, conscious, calculated or deliberate and done intentionally so as to disobey the orders passed by this Court, he cannot be prosecuted or punished under the Contempt of Courts Act. Surprisingly, even till the year 2009 when the petitioner filed CWP No.4158 of 2009, he did not find the action of the then Collector-cum-Deputy Commissioner to be contemptuous, then why the petitioner has now chosen to target the present incumbent is not forthcoming."*

12. Further, it is not even disputed by the petitioner that whatever has been done at the site and whatever decisions have been taken from time to time were infact in compliance to the directions passed by this Court in CWP No.528 of 2003. His only grievance, as observed earlier, is that once the petition was withdrawn, then all the interim orders had lost their efficacy and now whatever had been done in pursuance to those interim orders was required to be undone by the respondents.

13. To say the least, we find this submission to be rather strange and unfounded. Once, the petitioner was permitted to intervene in CWP No.528 of 2003 and even otherwise when the State was respondent in both the cases, then obviously this Court was already aware and alive to the earlier orders passed in CWP No.563 of 2002 and being fully conscious still chose to pass various orders from time to time which were otherwise required to be complied with by the respondents.

14. In addition to the aforesaid, it would also be noticed that CWP No.528 of 2003 had not been dismissed on merits, but had simply been dismissed as withdrawn. Moreover, even the interim orders were not ordered to be vacated, but were only ordered to be discharged as is evident from the orders passed on 08.05.2008 which read thus:-

> *"Counsel for the petitioner does not press this petition. Accordingly, the Writ Petition is dismissed as not pressed, so also the pending applications. Interim order is discharged. Consequence to follow."*

15. In Black's Law Dictionary, Tenth Edition, "discharge" mean "A*ny method by which legal duty is extinguished*". The necessary consequences of the interim orders being only discharged and not vacated, in such peculiar circumstances, would only mean extinguishing the respondents' further legal duty to further comply with the orders passed in CWP No.528 of 2003, but that in no manner can be construed as having the effect of nullifying the judicial orders already made.

16. Needless to add that the approach of the Court in such like matters has to be both practical as also pragmatic. It is more than settled that no one can be penalized for no fault of his and, therefore, no fault can be found with the action of the respondents in their having complied with the orders subsequently passed by this Court in CWP No. 528 of 2003.

17. In such like situation, the Court has further to bear in mind that it is the respondents whose position is extremely vulnerable and precarious and in case the arguments raised by the petitioner are taken to its logical end then the respondents without any fault on their part will be obliged to choose between the devil and deep sea i.e. either to comply with the earlier orders passed in CWP No. 563 of 2002 and thereby disobey the orders subsequently passed in CWP No.528 of 2003 and vice-versa. This cannot be and was never the intent of the orders that were subsequently passed in CWP No.528 of 2003.

18. It is entirely a different matter that the petitioner in CWP No.528 of 2003, all of a sudden, chose to withdraw the petition but that cannot be a ground for hauling up the respondents or finding fault in their actions that too only because they complied with the orders passed by this Court which they otherwise were obliged and mandated to do so. Even otherwise, the petitioner after having actively participated in the proceedings in CWP No.528 of 2003 cannot indirectly question the orders that were not only passed but had also been implemented in his presence.

19. It is too late in the day and the clock cannot be reversed. That apart, it is not a case where the respondents themselves have retracted or violated their undertaking and commitment as reflected in the order dated 14.10.2003 passed in CWP No.563 of 2002 (supra). But, it is only on account of the subsequent orders passed by this Court from time to time that has compelled the respondents to change their position to the one which was earlier committed by them. It is, therefore, preposterous to contend that the respondents should now undo all that has been done in compliance to the lawful orders of the Court.

20. In view of what has been discussed above, we find that the petitioner's stand is only litigious and cantankerous and the petition has been filed only to harass the respondents whose only fault is to have complied with the lawful orders passed by this Court from time to time that too in a petition wherein the petitioner himself was permitted to intervene.

21. Having said so, the petition is sans merit and the same is accordingly dismissed. Pending application, if any, also stands 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
Dile Ram …….Respondent.

Cr. Appeal No. 550 of 2010.
Reserved on: July 08, 2016.
Decided on: July 12, 2016.

N.D.P.S. Act, 1985- Section 20- A telephonic information was received that accused, owner of tea shop, was indulging in trade of charas- a raid was conducted during which a plastic bag containing 1 kg. 500 grams charas was found- accused was tried and acquitted by the trial Court- held, in appeal that normal discrepancies are bound to occur due to errors of memory, lapse of time and mental disposition- insignificant matters do not affect core of prosecution case - evidence of police officials cannot be discarded merely on the ground that they are police officials and interested in the prosecution-seals were found intact and they were tallied with the seal

impression - prosecution has proved that the charas was recovered from the shop of the accused - judgment of the trial Court set aside and accused convicted under Section 20 of N.D.P.S. Act. (Para-17 to 20)

Cases referred:
State of Uttar Pradesh vs. Naresh and others, (2011) 4 SCC 324
Gangabhavani vs. Rayapati Venkat Reddy and others, (2013) 15 SCC 298
Madhu alias Madhuranatha and another vs. State of Karnataka, (2014) 12 SCC 419

For the appellant: Mr. M.A.Khan, Addl. AG
For the respondent: Mr. Hardeep Verma, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

The State has come in appeal against the judgment dated 9.8.2010, rendered by the learned Special Judge, Mandi, H.P., in Sessions Trial No. 40/2007, 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 Act), has been acquitted.

2. The case of the prosecution, in a nut shell, is that on 24.5.2007, Insp. Shamsher Singh, Insp. Balbir Singh, HC Desh Raj and others were present at Thalaut. At about 7:00 PM, Insp. Shamsher Singh received telephonic information that accused, owner of tea shop at Aut was indulging in trade of charas at his shop and that if raid was conducted immediately, charas in large quantity could be recovered. Insp. Shamsher Singh recorded the information and sent the same through Const. Sanjay Kumar to DSP Vigilance, Mandi. Rest of the police party came in their vehicle to Aut. They reached Aut at 7:17 PM. Devender Kumar and Bhushan Kumar were associated as independent witnesses. At about 7:30 PM, the party reached the shop of the accused. He was found all alone in his shop. His shop was searched. Behind the fridge, a plastic bag was found in which another plastic bag and inside that bag, charas in the form of sticks and discs was found. It weighed 1 kg. 500 grams. Two samples of 25 grams each were separated. The sample parcels and bulk parcel were sealed with seal "T" and taken into possession. One of the samples was sent for chemical analysis. It was found to be charas. 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 ten 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, Addl. Advocate General has vehemently argued that the prosecution has proved its case against the accused. On the other hand, Mr. Hardeep Verma, Advocate, has supported the judgment of the learned trial Court dated 9.8.2010.

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 Const. Lal Singh testified that on 24.5.2007 he was driving government vehicle No. HP-33A-0405 from Mandi to Thalaut and was accompanied by Insp. Shamsher Singh, Insp. Balbir Singh and other police party of vigilance. Insp. Shamsher Singh received information at about 7:00 PM on his mobile about the possessing and sale of narcotic by accused at his tea shop at Aut bazaar. As the place was far away from the Court, Insp. Shamsher Singh sent letter Ext. PW-1/A to DSP Vigilance, Mandi through Const. Sanjay Kumar. Thereafter, all the vigilance

officials went towards Aut at the shop of accused. After reaching Aut, Insp. Shamsher Singh constituted the raiding party and local witnesses Devinder Kumar and Bhushan Kumar along with him were associated in the raiding party. The shop of the accused was gheraoed. The accused was present at the spot. He was informed by Insp. Shamsher Singh about the search of his shop and one written notice Ext. PW-1/B was prepared and read over to the accused. Accused gave his written consent Ext. PW-1/C on Ext. PW-1/B that he wanted to get the search of his shop conducted by the police party present on the spot. The search of the shop of the accused was conducted and during search one fridge was found lying in the shop. One polythene bag was found hidden behind this fridge and the same was found tied at its top. Its colour was white and "Bhola Crockery House" was written on that bag. The knot of the poly bag was opened and another polythene bag was found in it over which "Exclusive Dhoti" was written. This bag was also tied with knot at its top. The knot was opened and charas in the shape of sticks and coins was recovered. It weighed 1 kg. 500 grams. Two samples of 25 grams each were separated and each sample was put in poly packets and both these packets were sealed with seal impression of "T" at 6 places each. NCB form in triplicate was filled in at the spot by Insp. Shamsher Singh. The remaining charas weighed 1400 grams which was put in same poly bag and covered by cloth piece and also sealed with seal impression "T" at 9 places. In his cross-examination, he admitted that there were about 150-200 shops at Aut bazaar and many shops remained opened up till 9-9:30 PM. Insp. Shamsher Singh received secret information at 7:00 PM. A raiding party immediately proceeded towards Aut bazaar. The offices of Naib Tehsildar and Range Forest Officer are situated at Aut.

7. PW-2 Devender Kumar deposed that he was private transporter at Aut. He did not go to the shop of the accused along with the police officials. Nothing was recovered from the shop of the accused in his presence. He was declared hostile and cross-examined by the learned Public Prosecutor. In his cross-examination, he admitted his signatures on Ext. PW-1/C, PW-1/D, PW-1/E, PW-1/H and PW-1/L. All these documents were written in Hindi. The outer cover of parcels Ext. P-2 and P-9 were also signed by him. He admitted categorically that he has signed all the seizure memos and parcels. He denied the suggestion that the contraband Ext. P-10 was kept behind the fridge by the accused in his shop. He denied that charas Ext. P-9 was found in bag Ext. P-10 in the shop of the accused in his presence. Volunteered that charas was produced before him in the Rest House.

8. PW-3 Bhushan Kumar deposed that he was also transporter at Aut. All the proceedings were conducted at Rest House, Aut. Nothing was recovered in his presence from the shop of the accused. He was declared also hostile and cross-examined by the learned Public Prosecutor. In his cross-examination, he admitted his signatures on memos Ext. PW-1/B, PW-1/C, PW-1/E, PW-1/H, PW-1/L and parcels Ext. P-1, P-2 and P-8.

9. PW-4 Hem Raj deposed that he was owner of shop No. 13. Shop No. 11 and 12 belonged to accused. The shops were allotted to them by the Deputy Commissioner, Mandi.

10. PW-5 LHC Gian Chand deposed the manner in which the shop of the accused was searched after receiving secret information. Insp. Shamsher Singh reduced it into writing under Section 42 (2) of the Act and sent the same through Const. Sanjay Kumar to DSP Vigilance, Mandi. In his cross-examination, he deposed that the police party had reached the Aut bazaar at 7:15 PM sharp. There were many people, the number of which he could not tell who were taking tea and snacks in the shop of accused.

11. PW-7 Const. Sanjay Kumar deposed that on 24.5.2007, he along with Insp. Shamsher Singh, Insp. Balbir and others had gone for traffic duty. When they reached at Thalaut, secret information was received on the mobile of Insp. Shamsher Singh that accused running a tea stall at Aut bazaar was indulging in procuring and selling of charas. Raiding party was constituted and information was handed over to him for giving it to DSP Vigilance, Mandi. He handed over the same to DSP Vigilance, Mandi. On 31.5.2007, one sealed parcel sealed with seal "T" at six places marked as A-1 along with sample seals "S" & "T", NCB form in triplicate and

other related documents were handed over to him for depositing in FSL Junga vide RC No. 9/2007. He deposited the same with FSL, Junga on 1.6.2007.

12. PW-8 HC Kuldeep Singh, deposed that on 25.5.2007, Insp. Shamsher Singh deposited with him the case property. It was sent to FSL Junga through Const. Sanjay Kumar.

13. PW-9 DSP Gurdev Sharma, deposed that on 24.5.2007 he received report under Section 42(2) of the Act written by Insp. Shamsher Singh through LHC Gian Chand, over which he made endorsement Ext. PW-9/A. On the basis of this information, FIR Ext. PW-9/B was registered. Insp. Shamsher Singh handed over to him three parcels containing sample charas and one bulk parcel, sample parcels marked as A-1 and A-2 sealed with seal "T" at 6 places and bulk parcel sealed with seal "T" at 9 places along with NCB form in triplicate, attachment form, search and seizure memos. He resealed the sample parcels with seal "S" at two places and the bulk parcel with seal "S" at 9 places. He handed over the case property to Insp. Shamsher Singh who deposited it with MHC of the Police Station in his presence.

14. PW-10 Insp. Shamsher Singh deposed that he received secret information on his mobile that accused was indulged in trading of charas at his tea stall. This information was reduced into writing and sent to DSP Vigilance, Mandi through Const. Sanjay Kumar. He along with other officials reached at Aut at about 7:15 PM when they met Devender Kumar and Bhushan Kumar. They reached at the shop of the accused. Accused was present in his shop. The shop was searched. The contraband was recovered. It weighed 1 kg. 500 grams. Two samples of 25 grams each were separated. All the codal formalities were completed on the spot. In his cross-examination, he deposed that they reached Thalot at about 4:14 PM. They laid nakka at Thalout from 4:14 PM to 7:15 PM. He denied the suggestion that no information was received by him. He reached Aut at about 7:15 PM. Independent witnesses met him there. In his further cross-examination, he admitted that when the raiding party reached, there was huge rush in the shop of the accused and 10-15 persons were taking snacks in his shop.

15. What emerges from the appraisal of the statements of the witnesses discussed hereinabove is that PW-10 Insp. Shamsher Singh received secret information. It was reduced into writing and sent to DSP Vigilance, Mandi through Const. Sanjay Kumar. Thereafter, raiding party was constituted. The shop of the accused was searched. Charas was recovered from the shop of the accused. All the codal formalities were completed at the spot. The case property was produced before PW-9 DSP Gurdev Sharma. He resealed the same. The same was deposited with the MHC of the Police Station. The MHC of the Police Station sent the same to FSL Junga through Const. Sanjay Kumar.

16. Independent witnesses, PW-2 Devender Kumar and PW-3 Bhushan Kumar, though were declared hostile, but they have admitted their signatures on various seizure memos and parcels. The statements of PW-2 Devender Kumar and PW-3 Bhushan Kumar cannot be discarded in their entirety. The statements of the official witnesses inspire confidence. Section 50 of the Act was also not required to be complied with for the simple reason that the contraband was recovered from the shop of the accused and not from his person.

17. The learned trial Court has given undue importance as to whether Baldev was also member of the raiding party at the time when the shop of the accused was searched or not. The minor contradictions, whether the police party has reached Aut at 7:15 PM or 7:30 PM has not in any manner prejudiced the case of the accused. All the witnesses cannot be expected to narrate the facts in a parrot like manner. There is bound to be some discrepancy in the timings due to passage of time.

18. The learned trial Court has also given undue weightage that PW-5 LHC Gian Chand and PW-10 Insp. Shamsher Singh in their examination-in-chief have deposed that accused was all alone in his shop but in their cross-examination they have deposed that 10-15 persons were present in his shop. It is also a minor contradiction.

19. Their lordships of the Hon'ble Supreme Court in the case of ***State of Uttar Pradesh vs. Naresh and others,*** reported in ***(2011) 4 SCC 324,*** have held that normal discrepancies are bound to occur due to normal errors of observation, errors of memory due to lapse of time and due to mental disposition. Trivial matters which do not affect core of prosecution case should not be made a ground on which evidence is rejected in its entirety. Their lordships have held as follows:

> "18. The High Court has given undue importance to the minor contradictions in the statement of Subedar (PW.1) and Balak Ram (PW.5) as one of them had stated that the I.O. reached the place of occurrence at 10.15 p.m. and another has stated that he reached about mid night. The incident occurred in mid October 1979. This is the time when the winter starts and in such a fact-situation no person is supposed to keep record of exact time particularly in a rural area. Everybody deposes according to his estimate. More so, the statement had been recorded after a long lapse of time. Therefore, a margin of 1-1/2 hours remained merely a trivial issue.
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> 30. In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety.The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence.
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> > "Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility."
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> Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited. [Vide: State Represented by Inspector of Police v. Saravanan & Anr., AIR 2009 SC 152; Arumugam v.State, AIR 2009 SC 331; Mahendra Pratap Singh v. State of Uttar Pradesh, (2009) 11 SCC 334; and Dr. Sunil Kumar Sambhudayal Gupta & Ors. v. State of Maharashtra, JT 2010 (12) SC 287].
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> 31. The High Court has also fallen into error in giving significance to a trivial issue, namely, that in respect of the morning incident all the accused had not been named in the complaint/NCR."

20. Their lordships of the Hon'ble Supreme Court in the case of ***Gangabhavani vs. Rayapati Venkat Reddy and others,*** reported in ***(2013) 15 SCC 298,*** have held that in case there are minor contradictions in the depositions of the witnesses the same are bound to be ignored as the same cannot be dubbed as improvements and it is likely to be so as the statement in the court is recorded after an inordinate delay. In case the contradictions are so material that the same go to the root of the case, materially affect the trial or core of the prosecution case, the court has to form its opinion about the credibility of the witnesses and find out as to whether their depositions inspire confidence. Their lordships have held as follows:

"12. Thus, the position of law in cases where there is a contradiction between medical evidence and ocular evidence stands crystallised to the effect that though the ocular testimony of a witness has greater evidentiary value vis-à-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved.

CONTRADICTIONS IN EVIDENCE:

13. In State of U.P. v. Naresh, (2011) 4 SCC 324, this Court after considering a large number of its earlier judgments held:

> "In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence.
>
> Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility."

Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited."

A similar view has been re-iterated by this Court in Tehsildar Singh & Anr. v. State of U.P., AIR 1959 SC 1012; Pudhu Raja & Anr. v. State, Rep. by Inspector of Police, JT 2012 (9) SC 252; and Lal Bahadur v. State (NCT of Delhi), (2013) 4 SCC 557).

14. Thus, it is evident that in case there are minor contradictions in the depositions of the witnesses the same are bound to be ignored as the same cannot be dubbed as improvements and it is likely to be so as the statement in the court is recorded after an inordinate delay. In case the contradictions are so material that the same go to the root of the case, materially affect the trial or core of the prosecution case, the court has to form its opinion about the credibility of the witnesses and find out as to whether their depositions inspire confidence."

21. Their lordships of the Hon'ble Supreme Court in the case of ***Madhu alias Madhuranatha and another vs. State of Karnataka,*** reported in ***(2014) 12 SCC 419,*** have held that minor discrepancies on trivial matters which do not affect the core of the case of the prosecution must not prompt the Court to reject the evidence in its entirety. Irrelevant details which do not, in any way, corrode the credibility of a witness should be ignored. The court has to examine whether evidence read as a whole appears to have a ring of truth. The Court is not supposed to give undue importance to omissions, contradictions and discrepancies which do not go to the heart of the matter. Their lordships have further held that the evidence of police officials

cannot be discarded merely on the ground that they belong to the police force and are either interested in the investigation or in the prosecution. There can be no prohibition to the effect that a policeman cannot be a witness or that his deposition cannot be relied upon if it inspires confidence. Their lordships have held as follows:

> "15. It has been canvassed on behalf of the appellants that there are discrepancies and contradictions in the depositions of witnesses like the timings when deceased was seen last with the appellants and the distances of places etc. do not tally. Thus, their evidence cannot be relied upon.
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> 16. In Rohtash Kumar v. State of Haryana, JT 2013 (8) SC 181, this Court considered the issue of discrepancies in the depositions. It is a settled legal proposition that while appreciating the evidence of a witness, minor discrepancies on trivial matters which do not affect the core of the case of the prosecution must not prompt the court to reject the evidence in its entirety. Therefore, irrelevant details which do not in any way corrode the credibility of a witness should be ignored. The court has to examine whether evidence read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinize the evidence, more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witnesses and whether the earlier evaluation of the evidence is shaken, so as to render it unworthy of belief. Thus, the court is not supposed to give undue importance to omissions, contradictions and discrepancies which do not go to the heart of the matter, and shake the basic version of the prosecution witness. A similar view has been re-iterated in State of U.P. v. M.K. Anthony, AIR 1985 SC 48; State rep. byInspector of Police v. Saravanan & Anr., AIR 2009 SC 152; and Vijay @ Chinee v. State of M.P., (2010) 8 SCC 191.
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> 17. Learned counsel for the appellants has vehemently argued that in some of the recoveries, though a large number of people were available, but only police personnel were made recovery witnesses. Thus, the whole prosecution case becomes doubtful.
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> 18. The term 'witness' means a person who is capable of providing information by way of deposing as regards relevant facts, via an oral statement, or a statement in writing, made or given in Court, or otherwise. In Pradeep Narayan Madgaonkar & Ors. v. State of Maharashtra, AIR 1995 SC 1930, this Court dealt with the issue of the requirement of the examination of an independent witness, and whether the evidence of a police witness requires corroboration. The Court held that though the same must be subject to strict scrutiny, however, the evidence of police officials cannot be discarded merely on the ground that they belong to the police force and are either interested in the investigation or in the prosecution. However, as far as possible the corroboration of their evidence on material particulars should be sought.(See also: Paras Ram v. State of Haryana, AIR 1993 SC 1212; Balbir Singh v. State, (1996) 11 SCC 139; Kalpnath Rai v. State (Through CBI), AIR 1998 SC 201; M. Prabhulal v. Assistant Director, Directorate of Revenue Intelligence, AIR 2003 SC 4311; and Ravinderan v. Superintendent of Customs, AIR 2007 SC 2040).
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> 19. Thus, a witness is normally considered to be independent unless he springs from sources which are likely to be tainted and this usually means that the said witness has cause to bear such enmity against the accused so as to implicate him falsely. In view of the above, there can be no prohibition to the effect that a policeman cannot be a witness or that his deposition cannot be relied upon if it inspires confidence.

20. This Court in Laxmibai (dead) Thr. L.Rs. & Anr. v. Bhagwantbuva (dead) Thr. L.Rs. & Ors., AIR 2013 SC 1204 examined a similar issue and held:

> "Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory provisions enshrined in Section 138 of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination in chief, and the scope of this provision stands enlarged by Section 146 of the Evidence Act, which permits a witness to be questioned, inter-alia, in order to test his veracity. Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him, is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses. (See: Khem Chand v. State of Himachal Pradesh, AIR 1994 SC 226;State of U.P. v. Nahar Singh (dead) & Ors., AIR 1998 SC 1328; Rajinder Pershad (Dead) by L.Rs. v. Darshana Devi (Smt.), AIR 2001 SC 3207; and Sunil Kumar & Anr. v. State of Rajasthan, AIR 2005 SC 1096)".

22. PW-9 DSP Gurdev Sharma has categorically deposed that he resealed the sample parcels with seal "S" at two places and the bulk parcel with seal "S" at 9 places. It is evident from Ext. PW-10/G, report of the Forensic Science Laboratory that one parcel bearing six seals of "T" and resealed with two seals of "S" has reached FSL, Junga on 31.5.2007. It was carried to Junga by Const. Sanjay Kumar. The inner and outer seals were found intact and tallied with the seal impression sent by the SHO on form NCB-I. The contraband was found to be charas. The prosecution has proved that the charas was recovered from the shop of the accused and the accused is liable to be convicted under Section 20 of the ND & PS Act.

23. Accordingly, the appeal is allowed. The judgment of acquittal rendered by the learned trial Court in Sessions trial No. 40 of 2007, dated 9.8.2010 is set aside. The accused is convicted under Section 20 of the ND & PS Act. The accused be heard on quantum of sentence on 18.7.2016. The Registry is directed to prepare and sent the production warrant to the quarter concerned. Bail bonds are cancelled.

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

State of H.P. ....Petitioner

Versus

Smt.Lajja Devi ....Respondent

CWP No.4395 of 2009.

Judgment Reserved on: 01.07.2016

Date of decision: 12.07.2016

Constitution of India, 1950- Article 226- Respondent was engaged as Beldar on daily wages in 1998 and continued to work till 7th July, 2005- she was retrenched- a reference was made to the Labour Court who concluded that respondent was entitled to reinstatement with 50% back wages- aggrieved from the award, present writ petition was filed- held, that State Government is aggrieved by the award of 50% back wages on the ground of financial difficulty- however, financial difficulty is no ground to set aside the award- work was available with the Department- workmen junior to the respondent were retained in violation of the provision of the Act- petition dismissed. (Para-12 to 20)

Cases referred:

Raghubir Singh vs. General Manager, Haryana Roadways, Hissar, 2014(6) SLR 6 (S.C.)
Vismay Digambar Thakare vs. Ramchandra Samaj Sewa Samiti and Others, (2012)3 SCC 574

For the Petitioner: Mr.Rupinder Singh Thakur, Additional Advocate General with Mr.Rajat Chauhan, Law Officer.
For the Respondent: None.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

The petitioner-State being aggrieved and dis-satisfied with the award dated 31.3.2009 passed by Labour Court-cum-Industrial Tribunal, Dharamshala, H.P. *(for short `Labour Court')* preferred the present writ petition under Article 226/227 of the Constitution of India and has prayed for following relief(s):-

> ***"(a) That 50% wages awarded vide judgment passed by the Labour Court-cum-Industrial Tribunal in Reference No.580/2008 decided on 31.3.2009, may kindly be quashed and set aside.***
>
> ***(b) The relevant record be called from Labour Court-cum-Industrial Tribunal for perusal***
>
> ***(c) The cost of petition may kindly be awarded to the petitioners.***
>
> ***(d) Any other writ, order or direction as this Hon'ble Court may deem, just and proper in the peculiar facts and circumstances of the case may kindly be passed."***

2. Key facts, as emerged from the record, necessary for the adjudication of the present case are that the respondent-workman was engaged as daily waged Beldar in 1998 in Dharampur Division and as such she continued to work till 7th July, 2005.

3. Thereafter, authority specified by the Government (Chief Engineer, HPPWD (B&R) Central Zone, Mandi) vide letter dated 17.6.2005, exercising the powers of Specified Authority conferred on him vide Government Notification No.Sharm(A) 4-1/2005 dated 14.2.2005, accorded the permission for retrenchment of workmen specified in the application for permission dated 18.4.2005 for 997 Beldars, 35 Nos.Masons, 55 Nos. Blacksmiths on the principle of `First come Last Go'.

4. Accordingly, in view of the aforesaid order passed by the Authority concerned, all the workmen including the present respondent were issued retrenchment notice alongwith three months wages. Respondents were also paid one month wages under clause-A of sub-section (1) of Section 25N of the Industrial Disputes Act, 1947 *(for short `Act')*.. Accordingly, on July 8, 2005 services of the respondent-workman alongwith other workmen were terminated by giving her a retrenchment notice under Section 25N of the Act.

5. Respondent-workman feeling aggrieved and dis-satisfied with the retrenchment order, issued by the present petitioner-State, raised Industrial Dispute, whereupon Labour Commissioner vide order dated 12.3.2009 made a reference to the Learned Presiding Judge, Labour Court to adjudicate the said dispute. Learned Labour Court, Dharamshala, upon this Reference No.588/2008, vide award dated 31.3.2009 held the respondent-workman entitled to reinstatement in the same capacity in which she was working at the time of retrenchment of her services. Learned Tribunal below, apart from reinstatement, also held workman entitled to benefit of continuity of service from the date of her retrenchment i.e. July 8, 2005. Learned Labour Court, on the basis of material made available on record, also concluded that the respondent-workman is entitled to reinstatement with 50% back wages and continuity of service from the date of her unlawful retrenchment with further direction to the present petitioner to compute 50% back wages on the basis of the last drawn wage or the minimum wages permissible under the Minimum Wages Act, whichever is higher, till the date of reinstatement of the respondent-workman.

6. The present petitioner-State, being aggrieved and dis-satisfied with the impugned award dated 31.3.2009, whereby present respondent-workman was held entitled to 50% back wages from the date of her un-lawful retrenchment i.e. 8th July, 2005, approached this Court by way of instant writ petition.

7. Careful perusal of the averments contained n the writ petition, especially relief claimed by the petitioner, suggests that the petitioner-State is only aggrieved to the extent whereby the respondent-workman has been held entitled to 50% back wages from the date of her retrenchment till its payment. Since no specific challenge, whatsoever, has been laid to that part of award wherein respondent-workman has been held entitled to the reinstatement with continuity of service from the date of her retrenchment, this Court need not look into that aspect of the matter. Moreover, petitioner-State has specifically stated in the writ petition that respondent-workman stand re-engaged w.e.f. 15.9.2009 by them and the impugned award is being assailed to the extent of granting of 50% back wages in favour of the respondent-workman. Hence, in view of the position stated hereinabove, this Court while dealing with the present petition only needs to ascertain/adjudicate that whether the award dated 31.3.2009 passed by the learned Labour Court holding respondent-workman entitled to 50% back wages from the date of retrenchment is sustainable or not in view of the grounds taken by the petitioner-State in the writ petition.

8. Close scrutiny of the grounds taken by the petitioner-Department, while challenging the impugned award, suggests that the petitioner-State is aggrieved with the order of the Tribunal below holding the respondent-workman entitled to 50% back wages from the date of her retrenchment. As per petitioner-State, implementation, if any, of the impugned award of the Tribunal would be caused administrative as well as financial hardship to the State of Himachal Pradesh because, if the benefit, granted by the learned Labour Court to the respondent-workman, is extended to her, all other similarly situate persons i.e. 1087 workmen would claim the same benefit and in that process huge financial hardship would cause to the State of Himachal Pradesh. Petitioner-State also stated that there will be approximately liability of Rs.seven crores, if the benefit, as extended in the case of the petitioner, is also claimed by the similarly situate person. The petitioner-State also submitted that learned Tribunal below, while awarding 50% back wages to the respondent-workman, has not applied uniform yardsticks and has acted on its own whims and fences. It is specifically averred in the writ petition that in Reference No.145/2002, titled: Raj Kumar & Others vs. E.E. Bilaspur, decided on 28.4.2009, learned Labour Tribunal though held the workman entitled to reinstatement with continuity of service but no benefit of back wages was granted to the workman. Petitioner-Department also contended that learned Tribunal below failed to appreciate that respondent-workman did not lead any evidence on record to demonstrate that she remained un-employed during the period of her retrenchment from the services and as such any order holding the respondent-workman entitled to 50% back wages from the date of retrenchment i.e. 8th July, 2005 till date of award of

compensation deserves to be rectified in accordance with law being unreasonable, unjustified, inappropriate and dis-proportionate. Petitioner-State also averred that fact remains that respondent-workman never worked during the retrenched period with the petitioner-Department and as such any order passed by the learned Tribunal below holding her entitled for 50% back wages qua that period is against the well settled principle of law i.e. `No Work No Pay'.

9. In the aforesaid background, petitioner-State approached this Court by way of present writ petition for redressal of their grievance.

10. Shri Rupinder Singh Thakur, learned Additional Advocate General, appearing on behalf of the petitioner-State, vehemently argued that the impugned award dated 31.3.2009 passed by learned Labour Court, Dharamshala is not sustainable in the eye of law as the same is against basic principle of law. He also contended that bare perusal of the impugned award itself suggests that it is not based upon the proper appreciation of the evidence made available on record. Rather, same appears to be passed on the basis of sympathies with the respondent-workman. He forcefully contended that there is nothing on record to suggest that during retrenched period respondent was not gainfully employed somewhere else and as such learned Tribunal has fallen into grave error in holding the respondent-workman entitled for 50% back wages for the retrenched period. During argument having been made by him, he also invited the attention of this Court to Annexure P-4, i.e. Reference No.145/2002, titled: Raj Kumar and Others vs. E.E., Bilaspur to demonstrate that in identical cases learned Tribunal issued order of reinstatement with the benefit of continuity of service but no back wages, whatsoever, were paid to the workman in those cases and as such learned Tribunal has not applied uniform yardsticks while deciding the case of the similarly situate persons. He also contended that if order passed by learned Tribunal is allowed to sustain, it would cause great financial hardship to the petitioner-State because other similarly situate persons would also claim amount as has been granted to the present respondent-workman by the Tribunal below.

11. At this stage it may be noticed that none has put in appearance on behalf of the respondent. Perusal of the order sheet dated 16.5.2016, attached with the Court case file, suggests that nobody has ever put in appearance on behalf of the respondent-workman after issuance of notices on 3.12.2009. Vide order dated 16.5.2016 this Court had issued actual date hearing notice returnable for 17.6.2016. Perusal of order dated 17.6.2016 suggests that sole respondent stands served for 17.6.2016 but on that date also nobody put in appearance on behalf of the respondent. Today, when the matter was taken up for hearing, despite repeated pass overs, none has come present on behalf of the respondent and as such Court was compelled to hear the matter, in the absence of the learned counsel for the respondent-workman, finally on merits on the basis of the record made available.

12. As has been observed above, petitioner-State is only aggrieved with that part of the award dated 31.3.2009, passed by the learned Labour Court below, whereby respondent-workman has been held entitled to 50% back wages from the date of retrenchment i.e. 8th July, 2005, meaning thereby petitioner-State is not aggrieved with the order of reinstatement that too with the benefits of continuity of service from the date of her retrenchment i.e. 8th July, 2 005.

13. Further perusal of the writ petition itself suggests that respondent-workman stands re-engaged w.e.f. 15.9.2009 with benefit of continuity of service and as such this Court need not to go into the validity of award dated 31.3.2009 passed by the learned Labour Court as far as issue of reinstatement with benefit of continuity service is concerned. At this stage, after perusing the grounds taken by the petitioner-State while assailing the impugned award dated 31.3.2009, this Court has no hesitation to conclude/observe that respondent has not raised any legal grounds, whatsoever, to assail the impugned award dated 31.3.2009, whereby respondent-workman has been entitled to 50% back wages from the date of retrenchment. Petitioner-State, instead of setting up some legal grounds to assail the impugned award, has made an attempt to gain sympathy of the Court by stating that implementation, if any, of the impugned award would cause great financial hardship to the State of Himachal Pradesh. But this Court is of the view

that financial hardship, if any, cannot be a ground to disentitle the respondent-workman from the relief, which she is/was otherwise entitled under the provisions of law. Moreover, it is not understood that when the petitioner-State have accepted the reinstatement order that too with the benefit of continuity of service, on what grounds they have approached this Court praying for modification of the award dated 31.3.2009. Once findings of the Labour Court to the effect that the respondent-workman is entitled to reinstatement with continuity of service is accepted by the petitioner-State and same is implemented by re-engaging the respondent-workman, no ground, whatsoever, is available to the petitioner-State for not paying 50% back wages to the respondent-workman. At this stage, this Court is of the view that once learned Labour Court came to the conclusion that the respondent-workman is entitled to reinstatement that too with the benefit of continuity of service, respondent-workman has been rightly held entitled to the payment of 50% back wages because benefit of continuity of service, if any, could only be granted by the Court when it stands proved on record that during the period of retrenchment, work was available with the petitioner-department and the respondent-workman was prevented by the petitioner-department from doing work.

14. Another ground raised by the petitioner-State in the writ petition is that since workman had not worked during the said retrenched period in the petitioner-department and had also accepted the retrenchment compensation for four months wages, deserves to be rejected out rightly by this Court solely for the reason that learned Labour Court, while holding respondent-workman entitled for reinstatement, concluded that *"petitioner retrenchment can, therefore, be safely held to be illegal in view of the abovementioned provisions of Section 25N of the Act".* Rather, the learned Tribunal, while passing award dated 25.3.2009, has categorically concluded that there is violation of Sections 25(F, M, N, G and H), hence the petitioner-State cannot be allowed, at this stage, to rake-up the issue of payment of retrenchment compensation, if any, in the absence of specific challenge to that part of the award/findings returned by learned Tribunal below in its award dated 31.3.2009. However, to deal with the aforesaid averments raised in the grounds as well as arguments having been made on behalf of the petitioner-State, it would be apt to reproduce following portion of the award passed by the learned Tribunal below:-

> *"17. The petitioner in paragraph 4 of her statement of claim alleged that the workmen namely Subhash Chand, Shashi Kant, Bidhi Chand, Ranjeet Singh, Balak Ram, Dalip Singh, Dharampal and others, who were junior to her, were unlawfully retained in service by the respondent at the time her services were dispensed with and the respondent thus violated the principle of "Last Come First Go" as contemplated under Section 25G of the Act. In reply, the respondent in paragraph 4 averred:*
>
> > *"That the contents of this para partly admitted, and it is submitted that some junior daily wages workers are working in Dharampur Division due to non availability of seniority of workers were transferred from other Division/Sub-Division. The case/ seniority has scrutinized again when above facts came to the notice. However, the retrenchment notice to above juniors have also been served who are surplus to the requirement."*
>
> *18. This reply of the respondent lends assurance only to the petitioner's allegation that certain workmen, who were junior to her, were retained in service at the time her services were dispensed with by the respondent.*
>
> *19. Further, the petitioner in her affidavit specifically alleged that the workman namely Shashi Kant S/o Bihari Lal, who was engaged on January 1, 2000, was junior to her and retained in service at the time her (petitoner) services were terminated. The respondent's witness Naresh Kumar Sharma, Executive Engineer, HPPWD Division, Dharampur, in his cross-examination as RW1, however, denied the petitioner's suggestion that certain workmen junior to her (Petitioner) were retained in service at the time of termination of her services, but admitted to having prepared the seniority list/year-wise mandays chart in respect of the*

workman namely Shashi Kant S/o Bihari Lal, Ex.PW-1/B, according this said witness, is a true copy of the seniority list/year-wise, mandays chart issued by him. This document is demonstrative of Shashi Kant having been engaged as daily waged Beldar in Dharampur Division of HPPWD in the month of January, 2000 and his being in the employ of the respondent till November, 2008. In another seniority list Ex.RW1/C adduced in evidence by the respondent, Shashi Lal S/o Bihari Lal, who figures at serial No.646, is shown to have been engaged on 6.4.1999. So he is indubitably junior to the petitioner. The said seniority list is also indicative of the said workman having been retained in service at the time the petitioner was retrenched. The respondent thus on his own showing lent credence to the petitioner's allegation that the workman Shashi Kant (Shashi Lal) who was junior to her, was retained in service at the time her services were dispensed with. In retrenching the petitioner, the respondent is thus proved to have violated the provisions of Section 25G of the Act.

20. The petitioner's Authorised Representative contends that the respondent had violated the provisions of Section 25H of the Act as well, because Mamta Devi w/o Hans Raj, who was engaged by the respondent as daily, waged Beldar in 2000 and retrenched along with the petitioner, was later re-engaged in 2007 without giving the petitioner an opportunity to offer herself for re-employment.

21. Per contra, the Ld.Dy.D.A. argues that Mamta Devi having been engaged on compassionate grounds after the demise of her husband, who was also working in HPPWD, the respondent cannot be said to have violated the provisions of Section 25H of the Act. This contention, to my thinking, appears to be holding water in view of the seniority list Ex.RW1/C which is indicative of Mamta Devi having been re-engaged on compassionate grounds. In view of her having been re-engaged on compassionate grounds, the petitioner's pleadings being non-existent in her allegation of Mamta Devi having been re-engaged after her retrenchment and this allegation of her not being the subject matter of the reference on hand, it is difficult to hold that the respondent had violated the provisions of Section 25H of the Act.

22. Since in retrenching the petitioner, the respondent is proved to have violated the provisions of Sections 25F and 25G of the Act, the petitioner is entitled to reinstatement in the same capacity as in which she was working at the time her services were dispensed with. Besides, she is entitled to continuity of service from the date of her retrenchment (July 8, 2005). Her claim of being entitled to regularization with the policy of the State Government is, however, not being adjudicated upon, for the same is not the subject matter of the reference.

23. The petitioner in paragraph 15 of her statement of claim averred that she was not gainfully employed anywhere after the termination of her services, and that she was still unemployed. In substantiation of this claim she in her affidavit inter alia deposed that after her illegal retrenchment she was not gainfully employed anywhere and was still unemployed. There being no rebuttal to this deposition of her, her claim deserves acceptance and is accepted. In view of the facts and circumstances of the case, the petitioner, to my mind, is entitled to 50% back-wages from the date of her unlawful retrenchment. The issue under discussion is accordingly held in her favour and against the respondent."

15. Careful perusal of the aforesaid portion of the award passed by learned Tribunal clearly suggests that at the time of retrenchment of the respondent-workman, work was available with the petitioner-Department and workmen junior to the present respondent-workman were unlawfully retained in the service by the petitioner-Department at the time of illegal retrenchment of the respondent-workman in violation of the provisions of Section 25-G of the Act. Rather careful perusal of para-19 of the award, as reproduced hereinabove, suggests that learned Tribunal below had an occasion to peruse the Ex.PW-1/B i.e. the mandays chart, produced by

the department at the time of hearing of the case by the Tribunal, wherein it transpired that the persons junior to the respondent-workman were retained in service by the petitioner-State at the time of retrenchment of the respondent-workman. Further perusal of the documents made available to the learned Tribunal below reveals that the persons engaged as daily waged Beldar in 2007, who were retrenched alngwith the respondent-workman, were retained again by the petitioner-Department in 2007 without giving respondent-workman an opportunity of re-employment.

16. It is crystal clear from the facts duly substantiated on the record by the documents that at the time of retrenchment of respondent-workman, work was available with the petitioner-department, and junior persons to him were retained while retrenching her from the service, hence it can be safely concluded that at the time of retrenchment of respondent-workman, sufficient work was available with the department and respondent-workman was prevented by the department itself from rendering service, if any, with the department.

17. Reliance is placed on the judgment of the Hon'ble Apex Court in ***Raghubir Singh vs. General Manager, Haryana Roadways, Hissar, 2014(6) SLR 6 (S.C.),*** wherein the Court held:

> ***"39.*** *Now, it is necessary for this Court to examine another aspect of the case on hand, whether the appellant is entitled for reinstatement, back wages and the other consequential benefits. In the case of* ***Deepali Gundu Surwase V. Kranti Junior Adhyapak Mahavidyalaya (D. Ed) and Ors., (2013)10 SCC 324: [2013(6) SLR 642 (SC),*** *this Court opined as under:-*
>
> > ***"22. The very idea of restoring an employee to*** *the position which he held before dismissal or removal or termination of service implies that the employee will be put in the same position in which he would have been but for the illegal action taken by the employer. The injury suffered by a person, who is dismissed or removed or is otherwise terminated from service cannot easily be measured in terms of money. With the passing of an order which has the effect of severing the employer employee relationship, the latter's source of income gets dried up. Not only the concerned employee, but his entire family suffers grave adversities. They are deprived of the source of sustenance. The children are deprived of nutritious food and all opportunities of education and advancement in life. At times, the family has to borrow from the relatives and other acquaintance to avoid starvation. These sufferings continue till the competent adjudicatory forum decides on the legality of the action taken by the employer. The reinstatement of such an employee, which is preceded by a finding of the competent judicial/quasi judicial body or Court that the action taken by the employer is ultra vires the relevant statutory provisions or the principles of natural justice, entitles the employee to claim full back wages. If the employer wants to deny back wages to the employee or contest his entitlement to get consequential benefits, then it is for him/her to specifically plead and prove that during the intervening period the employee was gainfully employed and was getting the same emoluments. Denial of back wages to an employee, who has suffered due to an illegal act of the employer would amount to indirectly punishing the concerned employee and rewarding the employer by relieving him of the obligation to pay back wages including the emoluments.*
> >
> > *23. A somewhat similar issue was considered by a three Judge Bench in Hindustan Tin Works Pvt. Ltd. v. Employees of Hindustan Tin Works Pvt. Ltd. (supra)......The relief of reinstatement with continuity of service can be granted where termination of service is found to be invalid. It would mean that the employer has taken away illegally the right to work of the workman contrary to the relevant law or in breach of contract and simultaneously deprived the*

workman of his earnings. If thus the employer is found to be in the wrong as a result of which the workman is directed to be reinstated, the employer could not shirk his responsibility of paying the wages which the workman has been deprived of by the illegal or invalid action of the employer. Speaking realistically, where termination of service is questioned as invalid or illegal and the workman has to go through the gamut of litigation, his capacity to sustain himself throughout the protracted litigation is itself such an awesome factor that he may not survive to see the day when relief is granted. More so in our system where the law's proverbial delay has become stupefying. If after such a protracted time and energy consuming litigation during which period the workman just sustains himself, ultimately he is to be told that though he will be reinstated, he will be denied the back wages which would be due to him, the workman would be subjected to a sort of penalty for no fault of his and it is wholly undeserved. Ordinarily, therefore, a workman whose service has been illegally terminated would be entitled to full back wages except to the extent he was gainfully employed during the enforced idleness. That is the normal rule. Any other view would be a premium on the unwarranted litigative activity of the employer. If the employer terminates the service illegally and the termination is motivated as in this case viz. to resist the workmen's demand for revision of wages, the termination may well amount to unfair labour practice. In such circumstances reinstatement being the normal rule, it should be followed with full back wages..... In the very nature of things there cannot be a strait-jacket formula for awarding relief of back wages. All relevant considerations will enter the verdict. More or less, it would be a motion addressed to the discretion of the Tribunal. Full back wages would be the normal rule and the party objecting to it must establish the circumstances necessitating departure. At that stage the Tribunal will exercise its discretion keeping in view all the relevant circumstances. But the discretion must be exercised in a judicial and judicious manner. The reason for exercising discretion must be cogent and convincing and must appear on the face of the record. When it is said that something is to be done within the discretion of the authority, that something is to be done according to the Rules of reason and justice, according to law and not humour. It is not to be arbitrary, vague and fanciful but legal and regular.....

24. *Another three Judge Bench considered the same issue in* ***Surendra Kumar Verma v. Central Government Industrial Tribunal-cum-Labour Court, New Delhi (supra)*** *and observed: Plain common sense dictates that the removal of an order terminating the services of workmen must ordinarily lead to the reinstatement of the services of the workmen. It is as if the order has never been, and so it must ordinarily lead to back wages too......In such and other exceptional cases the court may mould the relief, but, ordinarily the relief to be awarded must be reinstatement with full back wages. That relief must be awarded where no special impediment in the way of awarding the relief is clearly shown. True, occasional hardship may be caused to an employer but we must remember that, more often than not, comparatively far greater hardship is certain to be caused to the workmen if the relief is denied than to the employer if the relief is granted."*
(Emphasis supplied by this Court)" ***(pp.23-25)***

18. In the aforesaid background, this Court sees no illegality, whatsoever, in the order passed by the learned Labour Court, whereby respondent-workman has been held entitled to 50% back wages from the date of retrenchment i.e. 8th January, 2005. Another contention put forth on behalf of the petitioner-department that respondent-workman had not placed on record any document suggestive of the fact that during retrenchment period she was not gainful

employee also deserves outright rejection because record suggests that respondent-workman issued notice stating therein that after planning illegal retrenchment, she was not gainful employee anywhere and she was still unemployed. Since, no reply rebutting the aforesaid deposition made by the workman was filed by the petitioner-department, learned Tribunal below rightly accepted the aforesaid submissions having been made on behalf of the respondent-workman.

19. Reliance is also placed on the judgment of the Hon'ble Supreme Court in ***Vismay Digambar Thakare vs. Ramchandra Samaj Sewa Samiti and Others, (2012)3 SCC 574,*** wherein the Court held:

> ***"3.*** *Only to recapitulate the line of arguments advanced before us we may mention that learned counsel for the appellant had placed reliance upon the decisions of this Court in* ***U.P. State Brassware Corpn. Ltd. v. Uday Narain Pandey, (2006) 1 SCC 479, Reetu Marbles v. Brabhakant Shkla, (2010) 2 SCC 70, and Metropolitan Transport Corporation v. V. Venkatesan, (2009) 9 SCC 601,*** *to contend that back wages could be awarded to the appellant even in the absence of a specific assertion by the appellant to the effect that he was not gainfully employed during the period he remained out of service. It was argued by learned counsel for the appellant on the strength of the above decisions that back wages could range between 25% to 60%.*
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> ***4.*** *On behalf the respondent-Institution, reliance was placed upon the decision of this Court* ***Kendriya Vidyalaya Sangathan & Anr. v. S.C. Sharma, (2005) 2 SCC 363,*** *in an attempt to demonstrate that unless there was a specific assertion that the appellant was not gainfully employed during the period he remained out of service, no back wages could be awarded in his favour.*
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> ***5.*** *It is not necessary for us to pronounce upon the rival contentions urged by learned counsel for the parties. We say so because the matter was mentioned before us on 28th February, 2012 by the learned counsel for the parties. It was submitted on behalf of the respondent-school and the Simiti that they were willing to pay to the appellant a sum of Rupees one lakh in full and final settlement of the claim made by him towards back wages. Mr. Manish Pitale, learned counsel for the appellant submitted on instructions that the appellant was ready and willing to accept the said amount in satisfaction of his claim.*
>
> ***6.*** *The parties having agreed to a solution, we see no reason why the same cannot be made a basis for disposal of this appeal in modification of the order passed by the High Court. We accordingly, allow this appeal but only in part and to the extent that the appellant shall be paid by respondents No.1- Samiti and No.2- Institution jointly and severally a sum of Rupees one lakh towards back wages in full and final settlement of the claim of the appellant on that account. The payment shall be made to the appellant within a period of three months from today failing which the amount shall start earning interest @ 10% p.a. from the date of this judgment till actual payment. The parties to bear their own costs."* ***(pp.575-576)***

20. Consequently, in view of the detailed discussion made hereinabove, this Court sees no illegality and infirmity in the impugned award dated 31.3.2009 passed by learned Presiding Judge, Labour Court-cum-Industrial Tribunal, Dharamshala and as such the same is up-held and present petition is dismissed being devoid of any merit.

21. All the interim orders are vacated. All miscellaneous applications are 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 Himachal Pradesh. …Appellant.

Versus

Pawan Kumar and others … Respondents.

Cr. Appeal No 286 of 2009.
Reserved on 27.6.2016.
Decided on: 12. 7.2016.

Indian Penal Code, 1860- Section 498-A and 306- Deceased was married to P- she told her parents after one year that she was being ill-treated for not bringing sufficient dowry- she was sent to her matrimonial home after advising in-laws to mend their behavior – however, there was no change in their behavior – Pardhan was taken to the house of the accused and the in-laws of the deceased assured not to repeat such behavior in future- deceased was brought in burnt condition in the hospital - she was referred to Shimla but she died on the way- accused were acquitted by the trial Court- held, in appeal that compromise was effected between the parties but no allegations of physical abuse was made against the husband- no allegation of demand of dowry was made- no evidence was placed on record to show that deceased was subjected to cruelty after this compromise- no independent witness was associated to establish that deceased was being subjected to cruelty and harassment by the accused- no specific act was mentioned on the part of accused which can be termed to be an act of abetment to commit suicide- trial Court had rightly acquitted the accused- appeal dismissed. (Para-21 to 33)

Cases referred:

Madivallappa V. Marabad and others Vs. State of Karnataka, (2014) 12 Supreme Court Cases 448

Sangara Bonia Sreen Vs. State of Andhra Pradesh, 1997 (4) Supremet

For the appellant. : Mr. Mr. Vikram Thakur, Dy. Advocate General with Mr. J.S. Guleria, Assistant Advocate General.

For the respondents: Mr. Anoop Chitkara, Advocate with Mr. Hoshiar Kaushal, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.

By way of present appeal, the State has challenged the judgment passed by the Court of learned Sessions Judge, Hamirpur in Sessions Trial No. 16 of 2008 dated 21.11.2008 vide which the learned Trial Court has acquitted the accused for commission of offences punishable under Sections 498-A and 306 of Indian Penal Code (in short 'IPC').

2. In brief, the case of the prosecution was that a telephonic information was received from Medical Officer, Regional Hospital, Hamirpur on 24.4.2008 at 17.10 hours, which was duly registered vide Daily Diary Ext. PW6/A to the effect that Sushma Devi (hereinafter to be referred as 'deceased') wife of Pawan Kumar (in short 'accused') had been brought to hospital with burn injuries. The police was requested to come to the hospital and take further action in accordance with law. Sub Inspector Guler Chand and HC Charanjit Singh went to the hospital where HC Charanjit Singh moved an application Ext. PW12/B for getting the deceased medically examined and he sought opinion from the doctor as to whether she (deceased) was fit to make statement or not. Dr. Sunita Dalodha, PW12, examined deceased, vide MLC Ext. PW11/B and referred her to IGMC, Shimla vide discharge slip Ext.PW12/A. She also expressed her opinion that deceased was not fit to make any statement. Thereafter, Braham Dass, father of deceased

came to hospital and made statement under Section 154 Cr.P.C., Ext. PW1/A, to the effect that his daughter Sushma Devi was married with accused Pawan Kumar in the year 2001 and after about one year when she visited her parental house she told them that her husband-Pawan Kumar, mother-in-law, Matti Devi, father-in-law, Nikka Ram, brother-in-law, Ajit Kumar and sister-in-law Kanta Devi used to ill-treat her for not bringing sufficient dowry and also subjected her to cruelty. Braham Dass sent his daughter back to the matrimonial house after advising the in-laws that they should mend their behaviour. However, deceased continued complaining that there was no change in their behaviour, therefore, he took Pradhan, Balwant Singh, to the matrimonial house of deceased where Pradhan, Pritam Chand was also present. The in-laws of deceased assured that they would not repeat such behaviour in future. However, their such behaviour continued and on 24.2.2008 at around 6:00 p.m., he came to know from Hans Raj on telephone that Sushma Devi had been brought to hospital at Hamirpur in burnt condition. He further stated that by the time he reached the hospital, deceased had been referred to Shimla. It was reported that accused persons had burnt his daughter.

3. On the basis of this statement, case was registered under Sections 498-A, 323 and 324 read with Section 34 IPC against the accused. During the course of investigation, ASI Subhash Chand took into possession copy of compromise deed Ext. PW1/B dated 5.1.2006, vide memo Ext. PW1/C. The burnt clothes of deceased were also taken into possession from her bed room.

4. In the meanwhile, Sushma Devi died on the way to Shimla. On the application of the investigating officer, post-mortem of the dead body was conducted. The matter was thereafter investigated and the accused persons were arrested and challan was prepared against them for having committed offences punishable under Sections 498-A and 306 IPC. As a prima-facie case was found against the accused, accordingly they were charged for commission of offences punishable under Section 498-A and 306 IPC. The accused pleaded not guilty and claimed to be tried.

5. In order to substantiate its case, prosecution, in all, examined 12 witnesses.

6. Father of deceased Braham Dass appeared as PW1 and stated that deceased (his daughter) was married to accused-Pawan Kumar in December, 2001. Relation between his daughter and her husband remained cordial for about one year and thereafter accused persons started torturing the deceased on demand of dowry and they demanded Rs. 2.00 lacs which allegedly was the expenditure incurred by them at the time of the marriage of accused. He also deposed that his daughter used to inform him telephonically about mental and physical harassment which was meted out to her by the accused. He also deposed that in December, 2005, deceased was beaten up and at that time he along with his brother, Hans Raj and sister-in-law Simro had gone to the matrimonial house of deceased and brought her to his own house and also moved an application to the police. Police had called the accused persons. PW-1, his brother Hans Raj and Pradhan, Balwant along with his daughter went to the police station Hamirpur and Pradhan Pritam Chand was also present there from the side of accused. Deceased had sustained injuries on her face and accused persons admitted their fault in presence of all and the matter was compromised. Deceased was sent to her matrimonial house. Accused had undertaken not to indulge in such behaviour again. However, as per PW1, they did not mend their way and thereafter as and when he went to their house he found that accused persons were abusing his daughter and him also. On 24.4.2008 at about 5:30 p.m., he received unfortunate news of his daughter having sustained burn injuries. He also stated that on 17.4.2008 there was a marriage in his relation at village, Anu and deceased had gone to attend the marriage, where he (PW1) was also present. Deceased complained to him there that she was apprehending danger to her life from accused persons. However, he pacified her where husband of deceased was also present. He also invited them to come to his house but they did not come. In his cross-examination, he has stated that he did not disclose the factum of Rs. 2.00 lac demanded by accused persons to the police. He also admitted that he had not disclosed this fact to the police that whenever he visited the house of accused persons they used to abuse him. He has also admitted that he had not

disclosed to the police that on 17.4.2008 when his daughter met him in the marriage, she told him that she was apprehending danger to her life from the accused persons. He has clarified that he was puzzled at the time of death of his daughter. Thereafter he stated that he did not tell anyone about the alleged torture of his daughter except Pradhan Pritam Chand but Pradhan Pritam Chand did not visit the house of accused persons to advise them because he used to tell him (PW1) that accused persons also abused him.

7. PW2, Simro Devi is the aunt of deceased. She has corroborated the case of prosecution and has stated that whenever deceased used to visit her father's house, she used to say that accused used to taunt her for not bringing dowry. She also deposed that once deceased had come with severe injuries on her face and she told that her mother-in-law had caused injuries to her. She also told her that other accused persons had also given beatings to her. She has further deposed that subsequently the matter was compromised vide Ext. PW1/B. She also deposed that once when deceased had come to her house on account of death of family member, at that time deceased disclosed to her that all accused persons used to beat her. In her cross-examination, she has stated that she did not inform the police about the visit of deceased at the time of death of family member. She also stated that she had not advised the accused persons against the said alleged treatment meted out by them to the deceased. She thereafter stated that she did not remember as to whether she told the police or not that accused used to demand Rs. 2.00 lacs from the deceased. She was also confronted with her statement (Ext.DA) made to the police where it was not so recorded.

8. PW3, Leela Devi, aunt of deceased has also supported the case of prosecution and stated that accused persons used to physically torture the deceased on account of dowry.

9. PW4, Balwant Singh, stated that in the year 2001 he was Up-Pradhan of Gram Panchayat, Bhumpal. On 16.12.2005 PW1, Braham Dass, had come to his house and told him that his daughter was beaten up by her husband, father-in-law and mother-in-law. He advised PW1, Braham Dass, to report the matter with the police. On 4.1.2006, police called accused persons to the police station and he also went there. He further deposed that he had seen severe injuries on the face and eyes of the deceased. The in-laws and husband of deceased admitted their guilt in presence of all and assured that they would not indulge in such behaviour again. On this, a compromise was reduced into writing and the same was signed by him, Pritam Chand Pradhan of accused side, deceased as well as by accused also. Thereafter, deceased accompanied the accused persons to her house. In his cross-examination, he has stated that he had told to the police in Ext.DB that deceased had sustained injuries on her face and over her eyes. However, when the said witness was confronted with the document, it revealed that he had not made such statement before the police.

10. HC, Charanjit Singh, has deposed as PW5 to the effect that he had partly investigated the case and collected the MLC of deceased from hospital. He has also deposed that burnt clothes of deceased were taken into possession from her house by the investigating officer in his presence, vide memo Ext. PW5/A.

11. PW6, HC Vijay Parkash, has deposed with regard to Medical Officer Regional Hospital, Hamirpur having informed him on telephone that deceased was brought to hospital in burnt condition. He has also deposed with regard to deposit of the case property.

12. PW7, Vijay Singh, has deposed that he deposited the case material handed over to him with FSL, Junga and after depositing the same, he handed over the original RC to MHC.

13. PW8, Rajinder Kumar, deposed that he conducted the search of the house of accused and took into possession one stove, one plastic canny containing one liter kerosene oil, one match box cover and other articles.

14. PW9, Inspector Anjni Jaswal, prepared final report and presented the same in the Court.

15. PW10, Dr. Ashok Kaushal, had conducted the post-mortem of deceased.

16. PW11, ASI, Subhash Chand, has stated that he remained as ASI in Police Station Sadar, Hamirpur and had conducted the investigation of this case. He has also deposed that he got conducted the post-mortem of the dead body of deceased and prepared the site plan and also recorded the statements of the witnesses. He deposed that the statements of the witnesses were recorded as per their versions.

17. PW12, Dr. Sunita Galodha, deposed that she was posted as Medical Officer in Regional Hospital, Hamirpur and on 24.4.2008 at about 5:30 p.m. deceased was brought by her husband and mother-in-law after changing her clothes with the history of accidental stove burns. She further deposed that the police was accordingly informed. The patient was restless with pain. Pulse was feeble and was not countable. She also deposed that the patient was referred to IGMC, Shimla.

18. These are the relevant witnesses whose testimonies are relevant for the purpose of adjudication of the present appeal.

19. On the basis of material produced on record by the prosecution, the learned Trial Court came to the conclusion that the prosecution had not been able to prove the charges against the accused. Feeling aggrieved by the said judgment passed by the learned Trial Court, the present appeal has been filed by the State.

20. We have heard learned counsel for the parties and also gone through the records of the case as well as the judgment passed by the learned Trial Court.

21. 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. The accused have been charged under Sections 498-A and 306 read with Section 34 I.P.C. As per Section 498-A, whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine. As per this section, "cruelty" means any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman. Further "cruelty" also means harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

22. It has come in the statement of PW1 father of the deceased that earlier also deceased was beaten up by accused persons and the matter was reported to the police where a compromise had taken place. The compromise has been placed on record Ext. PW1/B. A perusal of the said compromise demonstrates that the said compromise was entered into between the parties on the following terms:-

(a) Father-in-law, Nika Ram and mother-in-law of the deceased accept that they had ill-treated their daughter-in-law and had also physically abused her and they admit their fault. They undertake that hereinafter they will not indulge in verbal abuse or physical assault of their daughter-in-law today itself i.e. 6.1.2006. They are taking their daughter-in-law to their house along with them and they will keep their daughter-in-law properly and in case some untoward incident takes place with her then they will responsible for the same.

(b) Husband, Pawan Kumar, accepted that when the incident took place he was not in his house and that he also accepted that deceased was physically abused but he stated that hereinafter in future such mistake shall not be repeated.

(c) In-laws of the deceased stated that from the date of compromise they take the responsibility of the deceased and if anything untoward happened with her then they will responsible for the same.

(d) Deceased agreed that she will remain at her matrimonial house and she will treat all with love and affection.

23. This agreement was arrived at between the parties on 6.1.2006. It has been signed by accused Nika Ram, Panwar Kumar, Braham Dass and Sushma Devi (deceased). A perusal of the contents of said compromise will demonstrate that there is no allegation of physical abuse against the husband. Further apparently there is no reference of any demand of dowry etc. in the terms of the settlement of the said agreement which was entered into between the parties. The terms on which the agreement was entered into, inter alia, were that the accused (in-laws of the deceased) shall treat her properly and will not verbally abuse her or physically ill-treat her. It was further undertaken by the accused that the deceased shall be taken to her matrimonial house and she will be treated properly and in case any untoward incident happens then they will be responsible for the same.

24. This compromise is dated 6.1.2006. The deceased committed suicide on 24.4.2008. The prosecution has not placed any material on record to substantiate that the deceased was subjected to any kind of physical torture etc. or any demands of dowry were ever made from her after the execution of the compromise. The prosecution has not associated any independent witness to substantiate the allegations that the deceased was physically abused and harassed by the accused.

25. Now in this background, when we peruse the deposition of the prosecution witnesses, the same will reveal that PW1, Braham Dass, father of the deceased has stated that after the marriage of his daughter, the relations between the husband and wife were cordial for one year and thereafter accused started torturing her and started demanding dowry from her. Demands were also made of Rs. 2.00 lacs, that is, the amount which had been incurred on the marriage of accused-Pawan Kumar with the deceased. He has also stated that on 17.4.2008 there was a marriage in their relations at Anu and deceased had also attended the marriage and told him that she apprehended danger to her life from the accused persons. According to PW1, Braham Dass, deceased's husband was also present with her and he asked both of them to visit him on the next day but they did not come. In his cross-examination he has categorically stated that he did not disclose the factum of Rs. 2.00 lacs being demanded by the accused persons to the police or to anyone else. He has also stated that he did not disclose to the police that on 17.4.2008 his daughter met him in a marriage ceremony at Anu and stated that she had danger to her life from the accused persons. He has also stated that he had not disclosed the factum of his daughter being tortured by the accused to anyone except Pradhan, Pritam Chand. Incidentally, Pritam Chand has not been examined as a witness by the prosecution. Pritam Chand, Pradhan of the Gram Panchayat was also one of the witnesses to the compromise entered into in the month of January, 2006 between deceased and the accused persons. Further, a perusal of the contents of FIR, Ext.PW1/A, will demonstrate that there is no mention in the same about the alleged demand for an amount of Rs. 2.00 lacs or that on 17.4.2008 the deceased had met PW1 and expressed apprehension about danger to her life from the accused persons. Besides father of deceased, the prosecution has also examined Smt. Simro Devi (PW2) and Smt. Leela Devi (PW3) who are aunts of the deceased. Both these witnesses have deposed in the Court that after her marriage, Sushma Devi (deceased) used to visit her parental house and she used to tell them that accused used to taunt her for not bringing dowry. In fact, PW2 has stated that once the deceased had come with severe injuries on her face to her house she told that her mother-in-law has caused injuries to her. Thereafter, the matter was compromised vide Ext. PW1/B and deceased was sent to her matrimonial house. PW3, Leela Devi, has stated that she had arranged the marriage between accused and the deceased and after marriage deceased told her that accused persons taunted her for not bringing dowry. As per her, she used to tell the sister of Pawan that father of the deceased was a poor person and her parents should not torture the

deceased for dowry. She has also stated that once all accused persons gave beatings to deceased and she was having injury all over her face and the matter was reported with the police and the same was compromised into between the parties. A perusal of the statement made by these two witnesses in the Court and their statements recorded under Section 161 of Cr.P.C. make one thing very apparent that they have not referred to any particular incident of cruelty meted out to the deceased by the accused after the date of compromise i.e. after 1.6.2006 uptill the date of her death. The contention of PW1 that on 17.4.2008 deceased had expressed apprehension about danger to her life from the accused has also not been corroborated by any other witness. All these three witnesses are closely related to the deceased and they are interested witnesses. Therefore, their statements have to be scrutinized very-very minutely in order to establish as to whether the same are trustworthy and whether the Court should rely upon the said testimonies to convict the accused persons keeping in view the fact that there is no mention in the FIR about the alleged demand of Rs. 2.00 lacs by the accused form the deceased and about deceased expressing her apprehension of danger to her life from the accused on 17.4.2008 to PW1, Braham Das. It is apparent that said witness has made improvements in his testimony when he has entered the witness box and these contradictions in the contents of FIR and the statement made by PW1 in the Court have not been satisfactorily explained by the prosecution.

26. The prosecution has also examined Balwant Singh Up Pradhan, Gram Panchayat, Bhumpal at the relevant time as PW4. In his deposition, he has stated in the Court that on 16.12.2005 PW1 had come to his house and informed him that his daughter was beaten up by the accused. He has further stated that he advised PW1 to report the matter with the police. On 4.1.2006 police called the parties to the police station and he also went there. He saw severe injuries on the face and on the eyes of the deceased. He further deposed that the accused admitted their guilt in the presence of all that they would not indulge in such behaviour again. Thereafter, the matter was compromised between the parties and the compromise was signed by him and Pritam Chand. A perusal of his statement recorded under Section 161 Cr.P.C. demonstrates that it is not recorded in the said statement that he saw injuries on the face and eyes of the deceased. This witness has been confronted with his statement recorded under Section 161 Cr.P.C. Besides this, this witness has also not deposed that after the date of compromise, the family of the deceased ever made complaint to the effect that the deceased was still being harassed by the accused. The prosecution has also not got recorded the testimony of any independent witness from the neighborhood of the deceased from where it could be proved that the deceased was subjected to any physical abuse by the accused before her unfortunate death.

27. The Hon'ble Supreme Court has held in **Madivallappa V. Marabad and others Vs. State of Karnataka**, (2014) 12 Supreme Court Cases 448, that in a case where no evidence is adduced to prove any particular act of cruelty or harassment to which the deceased was subjected to and where no complaint was made to the police about any such assault or harassment before the death of the deceased, the conclusion arrived at by the Trial Court that the prosecution story was not established beyond reasonable doubt was the correct view.

28. It has been held by the Hon'ble Supreme Court in ***Sangara Bonia Sreen Vs. State of Andhra Pradesh, 1997 (4) Supreme***t, that the basic ingredients of offence under Section 306 are (a) suicidal death and (b) abetment thereof. In our considered view, in order to attract the ingredients of abetment the intention of the accused to aid or instigate or abet the deceased to commit suicide is necessary.

29. It is a unique legal phenomenon in the Indian Penal Code that the only act, the attempt of which alone will become an offence, is suicide. The person who attempts to commit suicide is guilty of the offence under Section 309 IPC, whereas the person who committed suicide cannot be reached at all. Section 306 renders the person who abets the commission of suicide punishable for which the condition precedent is that, suicide should necessarily have been committed. Thus, the crux of the offence under Section 306 itself is abetment. In other words, if there is no abetment there is no question, the offence under Section 306 comes into play.

30. Hereinafter, we shall apply these principles to the facts of the present case. A close scrutiny of the statements of the prosecution witnesses will demonstrate that none of them have mentioned any explicit act on account of the accused which can be termed to be an act of abetment on their behalf which led deceased Sushma Devi to commit suicide. On the basis of the statements of the prosecution witnesses who were also interested witnesses, it cannot be said that the prosecution was successful in demonstrating and proving that the accused had committed any act which could be termed to be an act of abetment towards the commission of suicide by deceased Sushma Devi.

31. In order to substantiate the charge under Section 306 I.P.C., it has to be established that the death by commission of suicide was desired object of the abettors and with that in view they must have instigated, goaded, urged or encouraged the victim in commission of suicide. The instigation may be by provoking or inciting the person to commit suicide and this instigation may be gathered by positives acts done by the abettors or by omission in the doing of a thing. Thus, the acts or omission committed by the abettors immediately before the commission of suicide are vital. In the present case, we are afraid that the prosecution was not able to substantiate any of the above ingredients. The prosecution could not prove any act of provocation or incitement or omission or commission on the part of the accused, vide which they had instigated the deceased to commit suicide.

32. The prosecution has not been able to establish any intention of the accused to aid or instigate or abet the deceased to commit suicide. Therefore, it cannot be said that the judgment passed by the learned Trial Court whereby the accused have been acquitted is either perverse or the acquittal of the accused by the learned Trial Court has amounted to travesty of justice.

33. Thus, we conclude by holding that the prosecution has failed to establish beyond reasonable doubt that the accused were guilty of the offences alleged against them. We have gone through the judgment passed by the learned Trial Court at length. The learned Trial Court after due deliberation and due application of mind has come to the conclusion that the prosecution could not bring home the guilt against the accused persons beyond reasonable doubt. We find no reason to disagree with the said conclusion arrived at by the learned Trial Court. According to us also, the accused persons are entitled to the benefit of doubt as the prosecution has failed to prove beyond reasonable doubt the guilt of the accused. Therefore, we uphold the findings recorded by the learned Trial Court and the appeal is dismissed being without any merit. Bail bonds, if any, furnished by the accused are discharged.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Shri Asgar Ali Saiyad .....Appellant.
Vs.
Sh. Krishan Chand .....Respondent.

RSA No.: 223 of 2007
Reserved on: 07.07.2016
Date of Decision: 13.07.2016

Code of Civil Procedure, 1908- Section 100- Plaintiff filed a suit for recovery of Rs. 50,000/- paid by him to the defendant- suit was decreed by the trial Court- an appeal was preferred, which was dismissed- held that High Court should not disturb the concurrent findings of fact in second appeal unless it is shown that the findings recorded by the Court are perverse being based on no evidence or that no reasonable person could have come to the conclusion drawn by the court on

the basis of evidence on record - defendant had taken a plea which was not taken before the trial Court or before the Appellate Court which is not permissible - appeal dismissed. (Para-7 to 17)

Cases referred:
Vishwanath Agrawal Vs. Sarla Vishwanath Agarawal (2012) 7 Supreme Court Cases 288
Satya Gupta Vs. Brijesh Kumar (1998) 6 Supreme Court Cases 423

For the appellant: Mr. S.D. Gill, Advocate.
For the respondent: Nemo.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. **:**

By way of the present appeal, the appellant is assailing the judgment and decree passed by the Court of learned District Judge, Sirmaur District at Nahan in Civil Appeal No. 42-CA/13 of 2006 dated 09.11.2006 vide which, learned first appellate Court has dismissed the appeal filed by the present appellant and upheld the judgment and decree passed by the Court of learned Civil Judge (Junior Division), Court No. 2, Paonta Sahib, District Sirmaur in Civil Suit No. 37/1 of 2003 dated 30.08.2005.

2. This appeal was admitted on 30.11.2007 on the following substantial question of law:

> *"Whether both the Courts below are justified in holding that appellant/defendant has not paid the decreetal amount before the filing of the suit."*

3. Facts, in brief, necessary for adjudication of the present case are that respondent/plaintiff (hereinafter referred to as 'plaintiff') filed a suit for recovery of Rs.50,000/- alongwith interest against the appellant/defendant (hereinafter referred to as 'defendant') on the ground that on 12.02.1998, defendant approached him and requested that he was in need of Rs.50,000/- for his business of transportation and on his request, the plaintiff agreed to advance him a loan of Rs.50,000/- and for the said purpose, the plaintiff issued a cheque for an amount of Rs.50,000/- dated 12.02.1998, which money the defendant agreed to pay back alongwith interest @ 20% per annum till the entire amount was repaid. As per the plaintiff, the defendant had agreed to pay interest on the loan amount latest by 7th day of each month and also promised that he will pay the entire amount in lump sum after expiry of six months, failing which, the loan amount alongwith interest shall be recoverable from his moveable and immoveable property. A pronote to this effect was executed at Nahan on 12.02.1998 on a stamp paper of Rs.10/- in the presence of one Shri Sarwan Kumar and Bhagel Singh. This pronote was duly attested by Notary Public, Nahan, namely Smt. Usha Aggarwal and the defendant was identified before the said Notary Public by Shri R.L. Garg, Advocate. Defendant issued a cheque dated 12.02.1998 for an amount of Rs.55,000/- in favour of the plaintiff as security, but the same was subsequently cancelled by the defendant. The cheque issued by the plaintiff in favour of the defendant was duly encashed by him. On 02.04.1998, defendant paid an amount of Rs.5000/- to the plaintiff vide cheque drawn upon State Bank of India, Nahan. On 03.02.2000, defendant executed one more pronote of Rs.50,000/- in lieu of previous pronote, in which he admitted having received an amount of Rs.50,000/- and having issued a cheque in favour of the plaintiff as security of the loan amount. This pronote was written at Paonta Sahib on 03.02.2000 in the presence of one Shri Sarwan Kumar and Ran Bhaj Sharma and was duly attested by Notary Public Shri Satish Gupta, Advocate. The plaintiff presented the said cheque in the State Bank of India, ADB Branch Paonta Sahib on 10.11.2000, but the same was dishonoured on the ground of insufficient funds. He on various occasions requested the defendant to pay back the amount with interest which he had lent to the defendant, but the defendant avoided the payment of the said amount. The plaintiff in these circumstances issued a legal notice to the defendant which was not received by

the defendant willfully. Therefore, in these circumstances, the plaintiff filed a suit for recovery alongwith interest.

4. In his written statement, the defendant denied the case of the plaintiff and stated that the plaintiff had taken various blank cheques from the defendant alongwith signatures on simple, judicial and stamp papers and some written papers and the same were misused by the plaintiff. According to the defendant, the amount in fact pertained to an investment having been made in verbal partnership business of a vehicle in January 1998 and when the business could not incur profits, the plaintiff manipulated false evidence by taking benefit of his position of being in police department to fleece money from the defendant. Thus, he denied the claim of the plaintiff.

5. In the replication, the plaintiff reiterated the case as put forth in the plaint and denied the factum of any partnership business having been entered into by him with the defendant or that the plaintiff was in possession of blank cheques etc. of the defendant which were misused by him.

6. On the basis of pleadings of the parties, learned trial Court framed the following issues:

1. *Whether the plaintiff is entitled to recover the suit amount as alleged? OPP.*
2. *Whether the suit is not maintainable? OPD.*
3. *Whether the suit is time barred? OPD*
4. *Whether the plaintiff has taken various blank cheques from defendant and is misusing the same?*
5. *Relief.*

7. On the basis of evidence produced on record by the respective parties, the following findings were returned on the said issues by the learned trial Court:

Issue No. 1:	Yes.
Issue No. 2:	No.
Issue No. 3:	No.
Issue No. 4:	No.
Relief:	Suit of plaintiff is decreed as per operative part of judgment.

8. Thus, the learned trial Court decreed the suit of the plaintiff in the following terms:

> *"It is ordered that suit of the plaintiff succeeds and is hereby decreed for recovery of Rs.50,000/- alongwith costs and future interest at the rate of 6% per annum from the date of filing this suit till the realization of entire decreetal amout."*

9. It was held by the learned trial Court that the plaintiff was able to prove that he had lent an amount of Rs.50,000/- to the defendant by cheque which was duly withdrawn by him and the plaintiff also proved the issuance of two promotes as well as cheques by the defendant in his favour in the presence of witnesses which were duly attested by the Notaries. Learned trial Court further held that the defendant in fact in his deposition had admitted his signatures on the pronote and other documents, but his plea was that these signatures were obtained from him on blank papers. Learned trial Court further held that this contention of the defendant that he had not taken any money from the plaintiff and the said monetary transaction was with regard to a partnership business and further there were blank cheques and blank documents of his with the plaintiff which were being misused by the plaintiff, was not substantiated by the defendant by placing any cogent and trustworthy material on record. On the other hand, learned trial Court held that plaintiff by leading his own evidence has duly proved the execution of two promotes Ex.

PW2/A and Ex. PW2/D as well as cheques Ex. PW2/B and Ex. PW2/E. PW-5 Usha Aggarwal and PW-6 Sarvan Kumar have also proved the execution of pronote Ex. PW2/A. Learned trial Court further held that the pronote dated 03.02.2000 Ex. PW2/D also stood proved by witness Sarvan Kumar as well as Notary Public, who attested the same, i.e. PW-3 S.K. Gupta, Advocate. Learned trial Court further held that it cannot be assumed that all the persons were deposing against the defendant as he was trying to portray and on the basis of material on record it held that the plaintiff was entitled for recovery of Rs.50,000/- alongnwith costs and future interest @ 6% per annum.

10. Feeling aggrieved by the said judgment and decree passed by the learned trial Court, the defendant filed an appeal, which was dismissed by the learned District Judge, Sirmaur vide judgment dated 09.11.2006. Learned Appellate Court held that though the defendant denied the plaintiff's case in totality as was evident from the written statement, but at the same time, it was also his case that various blank cheques had been signed by him which were in possession of the plaintiff, which were misused by him. Learned appellate Court held that defendant in fact had acknowledged receiving an amount of Rs.50,000/- from the plaintiff, though according to him, it was not a loan received by him from the plaintiff, but it was in lieu of a partnership deed. Learned Appellate Court further held that there was no infirmity with the findings which were returned by the learned trial Court with regard to the execution of two promotes by the defendant in favour of the plaintiff which stood duly proved on record. Accordingly, it held that the plaintiff's cause for recovery of the suit amount was duly substantiated on record by proving the execution of two promotes Ex. PW2/A and Ex. PW2/D as well as by proving the issuance of cheques Ex. PW2/B and Ex. PW2/E and thus, it held that no fault could be traced with the judgment passed by the learned trial Court whereby it held the plaintiff to be entitled to recover the decreetal amount. This judgment passed by the learned first Appellate Court has been challenged by way of present appeal.

11. Mr. S.D. Gill, learned counsel for the appellant has argued that both the learned Courts below have erred in not appreciating that no amount as was being claimed by the plaintiff by way of filing of the suit was due to him from the defendant as this liability stood discharged by the defendant even before the suit was filed by the plaintiff. Further, according to Mr. Gill, it was for this reason that the defendant had taken a specific stand in his written statement that no amount in fact was due towards the plaintiff as was being claimed by him and the suit had been filed by misusing the blank cheques and other blank documents which were available with the plaintiff which contained the signatures of the defendant.

12. I have heard the learned counsel for the appellant as well as perused the records of the case and the judgment passed by both the learned Courts below.

13. Before proceeding further, it is relevant to refer to certain judgments of Hon'ble Supreme Court with regard to the scope of interference by this Court while exercising its power under Section 100 of the Code of Civil Procedure.

14. The Hon'ble Supreme Court in **Vishwanath Agrawal** Vs. **Sarla Vishwanath Agarawal** (2012) 7 Supreme Court Cases 288 while relying upon its previous judgments has held that High Court in second appeal should not disturb the concurrent findings of fact unless it is shown that the findings recorded by the Court below are perverse being based on no evidence or that on the evidence on record, no reasonable person could have come to that conclusion. It further held that solely because another view is possible on the basis of the evidence, the High Court would not be entitled to exercise the jurisdiction under Section 100 of the Code of Civil Procedure.

15. Similarly, it has been held by the Hon'ble Supreme Court in **Satya Gupta** Vs. **Brijesh Kumar** (1998) 6 Supreme Court Cases 423:

> *"16. At the outset, we would like to point out that the findings on facts by the Lower Appellate Court as a final Court on facts, are based on appreciation*

of evidence and the same cannot be treated as perverse or based on no evidence. That being the position, were] are of the view that the High Court, after reappreciating the evidence and without finding that the conclusions reached by the Lower Appellate Court were not based on the evidence, reversed the conclusions on facts on the ground that the view taken by it was also a possible view n the facts. The High Court, it is well settled, while exercising jurisdiction under Section 100, C.P.C., cannot reverse the findings of the Lower Appellate Court on facts merely on the ground that on the facts found by the Lower Appellate Court another view was possible."

16**.** Coming to the facts of the present case, in my considered view, there is no merit in the arguments of the learned counsel for the appellant. In fact what is being argued in the present appeal is totally contrary to the stand which has been taken by the defendant in his written statement as well as in the grounds of appeal, on the basis of which, the judgment passed by the learned trial Court was challenged before the learned first Appellate Court. Before the learned trial Court the stand of the defendant was that he had not received any money from the plaintiff as loan and nothing was due from him to the plaintiff and alleged promotes and cheques issued by him were in fact never issued and these were the result of misuse of blank cheques and blank papers and documents of his which were with the plaintiff. It was not his case in the written statement that though he had received an amount of Rs.50,000/-from the plaintiff, but he had discharged his liability before the suit was filed. Further, there is no issue framed by the learned trial Court in this regard and rightly so because this in fact was never the case of the defendant before the learned trial Court. Similarly, even before the learned Appellate Court, the judgment passed by the learned trial Court was challenged on the ground that the case of the plaintiff was based on concoction and fabrication and the suit was hopelessly time barred. Not only this, a perusal of the evidence placed on record by the defendant demonstrates that it is nowhere suggested in the said evidence that though the defendant had received an amount of Rs.50,000/- from the plaintiff, however, the said amount was duly paid back by him to the plaintiff.

17. Therefore, keeping in view the said facts, in my considered view, the defendant had neither set up any case to the effect that decreetal amount already stood satisfied by him even before the suit was filed nor there is any material placed on record by him from which this could be inferred. The substantial question of law is answered accordingly and the appeal being devoid of any merit is dismissed with costs.

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

Balwant Singh & another .....Petitioners
Versus
Ashok Kumar & others. .....Respondents.

CMPMO No. 378 of 2015
Date of Decision: 13.7.2016

Code of Civil Procedure, 1908– Order 39- Plaintiff filed an application for interim injunction which was allowed- an appeal was preferred which was dismissed- held, that a joint owner is not entitled to raise construction over the joint land- defendants pleaded that they may be permitted to raise the construction of cattle shed but there is no evidence that old cattle shed is in the danger of falling, therefore, they cannot be permitted to raise construction over the joint land - the courts had rightly granted the injunction - appeal dismissed. (Para-2)

For the petitioners: Mr. Amandeep Sharma, Advocate.
For the Respondents: Mr. N.K Thakur, Sr. Advocate with Ms. Jamuna, Advocate for respondent No.1.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The parties to the lis uncontrovertedly stand recorded in the apposite revenue record to be joint owners in possession of the suit land. Uncontrovertedly also the suit land remains un-partitioned. Consequently extantly all the co-sharers in the undivided holdings who are parties to the lis enjoy the entire joint holdings vicariously with each other, also exclusive possession, if any, of any of the co-sharers of any portion of the joint holdings would not vest in him/them any right to, till partition of the joint estate occurs, stake any exclusive title to hold without the consent of the other co-sharers any construction activity thereon. The plaintiffs/respondents herein (for short the "plaintiffs") instituted a suit against the defendants/petitioners herein (for short the "defendants") for permanent prohibitory injunction for prohibiting the defendants from changing the nature of the suit land till the joint holdings stand partitioned by metes and bounds. The defendants had by their overt act of threatening to subject a portion of the joint land to construction spurred a cause of action vis-à-vis the plaintiffs also during the pendency of the suit, the plaintiffs had motioned the learned trial Court for the defendants being ad-interim restrained from subjecting any portion of the joint holdings to any construction. The learned trial Court had allowed the application of the plaintiffs. In an appeal carried from the rendition of learned trial Court before the learned Additional District Judge, Hamirpur by the aggrieved defendants, the appellate Court had affirmed the rendition of the learned trial Court.

2. Before the learned appellate Court the defendants had contended of a cattle shed already existing on the joint holding wherein their cattle stand housed being in an dilapidated condition and of there being every likelihood of its at any moment collapsing. They had also contended of theirs being permitted to raise a new cattle shed on the joint holdings, raising whereof being impossible unless the retaining wall beneath it is also permitted to be constructed. The learned appellate Court had concluded on a perusal of the photographs of the already existing cattle shed of the defendants on the joint holdings wherein they housed their cattle not facing any imminent danger of its collapsing. The aforesaid material as relied upon by the learned appellate Court in drawing the aforesaid conclusion does prima-facie unravel of its not suffering from any infirmity. Even if the defendants had in their possession material other than photographic evidence, which they took to place before the learned appellate Court, to sustain their claim qua its facing an imminent danger of collapsing whereupon they stood driven to espouse for theirs being permitted to raise it elsewhere, construction whereof being impossible unless the retaining wall occurring beneath it is permitted to be constructed, they stood enjoined to place the said germane material before the learned appellate Court or were enjoined to motion the appellate Court for appointment of a local Commissioner for the latter visiting the relevant site**,** on his visit whereof, the best credible material to sustain the claim of the defendants would have emerged. However the defendants omitted to do so. Consequently, in the aforesaid omission of the defendants to before the learned first appellate Court produce the best material in pronouncement of their claim therebefore rendered its standing withheld from its sight whereas when only the photographs of the relevant site stood adduced therebefore by the defendants for it to fathom the genuineness of the claim raised therebefore by the defendants, perusal whereof does not nurse any conclusion other than the one formed by the learned appellate Court now estops the defendants to contend of the view formed by the learned Appellate Court on its perusing the photographs as stood adduced thereat by them suffering from any legal frailty. In sequel, this court does not deem it fit and appropriate given the aforesaid omissions on the part of the defendants, omissions whereof estops them to espouse hereat of the reflections occurring

in the photographs being discardable also strips of its vigor their claim hereat for the appointment of a Local Commissioner.

3. Further more the defendants had before the learned appellate Court reared a claim of theirs being permitted to construct a new cattle shed other than the one which already exists on the joint holdings. Since the cattle shed of the defendants as already exists on the joint holding stands concluded by this Court to not suffer any imminent danger of its collapsing besides when the defendants propose to raise a new cattle shed at a site other than the one where their old cattle shed exists, raising whereof would occur on the joint holdings which remain yet un-partitioned, its raising by the defendants if permitted by this Court would sequel the ill fate of the suit of the plaintiffs against them for theirs being injuncted from subjecting the joint holdings to any construction activity till partition thereof occurs, standing rendered nugatory.

I find no merit in the petition, the same is accordingly dismissed. However, the learned trial Court is directed to decide the Civil Suit within three months hereafater.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J

Deepak Kumar. .....Petitioner.
Versus
The State of Himachal Pradesh. ......Respondent.

Cr.MP(M) No. 760 of 2016
Decided on: 13.07.2016

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Sections 302 and 201 of I.P.C- it has been pleaded that petitioner is inside the jail since December, 2015- he has been apprehended on the basis of suspicion alone- held, that considering the gravity of offence and the manner in which offence has been committed, bail cannot be granted- petition dismissed. (Para-6)

For the petitioner: Mr. B.L. Soni, Advocate.
For the respondent: Mr. Virender K. Verma, Addl. AG, with Mr. Pushpinder Jaswal, Dy. AG. ASI Jitender Kumar, Police Station Station Dharamshala, District Kangra, H.P.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge. *(oral)*

The petitioner, by way of filing this petition under Section 439 Cr.P.C., has approached this Court for grant of bail in case FIR No. 240 of 2015, dated 11.12.2015, registered under Sections 302, 201 IPC, Police Station Dharamshala, District Kangra, H.P.

2. As per the prosecution case, on 11.12.2015, at about 8:30 a.m., one Suresh Verma resident of Tang gave information to the Police at Police Post, Yol, that a dead body is lying alongside the road in front of K.C.C. Bank. Pursuant to this information police visited the spot and found a dead body. A mobile phone was recovered from the deceased and through which one Radha Devi was contacted by the Police and she identified the deceased as her husband. The complainant (mother of the deceased) got recorded her statement and as per her statement the deceased was running chowmin and momo shop. On 09.12.2015 the petitioner/accused in drunken state came to the shop of the deceased around 5 p.m. and thereafter at about 9:30 p.m. the deceased was taken by the petitioner/accused in his vehicle. On subsequent morning, i.e. 10.12.2015, the petitioner/accused left the deceased in his shop and they remained there till

1:30 p.m. Again the deceased was taken by the petitioner/accused and his associate Rinku to Court in the same vehicle and they again came back at 4 p.m. and at that time the deceased, Rinku and the petitioner/accused were drunk. The prosecution has further averred that at 9 p.m. the petitioner/accused took the deceased in his vehicle towards Yol and the deceased did not come back. On 11.12.2015 the complainant through telephone enquired the petitioner/accused about the deceased and he informed that he had left the deceased at Yol. The petitioner/accused also argued with the complainant and complainant came to know about the death of deceased from her daughter-in-law, Smt. Radha Devi. The deceased did not have any vendetta against anyone and he was last seen with the petitioner/accused. On the basis of the statement of the complainant an FIR was registered against some unknown person. Post mortem examination revealed that there were six injuries on the body of the deceased and there was ligature mark in the throat of the deceased. The prosecution has further averred that during the period from the night of 09.12.2015 till the night of 10.12.2015 the deceased was in the company of the petitioner/accused and on 11.12.2015 his dead body was found at Tang on the road side. On interrogation the petitioner/accused it came that the deceased was was left by him at Piru Mal Chowk, Yol, on the night of 10.12.2015 and the petitioner/accused was arrested on the basis of last seen together with the deceased. As per prosecution story, the petitioner/accused on refusal of the deceased to give evidence in his favour in the court of SDM killed the deceased. The petitioner/accused is employed as Constable in H.P. Police and being well aware of the things destroyed the evidence against him and he also did not get recovered of weapon of offence. It is also submitted that the petitioner/accused committed heinous crime and he can even now tamper the prosecution evidence. The prosecution has prayed for dismissal of the present bail petition.

3. As per the learned counsel for the petitioner, the rule is bail and not jail. The petitioner has submitted that he is behind the bars since December, 2015 and he will not be in a position to defend him in case during the trial he is kept behind the bars. It is further argued that the petitioner is roped in on the basis of suspicion only and the he is local resident and is not in a position to flee from justice.

4. Conversely, learned Additional Advocate General has argued that the petitioner/accused has committed heinous crime and the manner in which the crime has been committed, the bail to the petitioner/accused deserves dismissal at this stage.

5. I have heard the learned counsel for the petitioner/accused, learned Additional Advocate General for the respondent/State and have gone through the record in detail.

6. After taking into consideration the rival contentions of the parties, gravity of the offence, manner in which the alleged offence has been committed, and considering all the material which has come on record, this Court finds that the present is not a fit case where the judicial discretion needs to be invoked at this stage. Accordingly, the petition, being devoid of merits, is dismissed.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J

Dhanvir Singh .....Petitioner.
Versus
State of Himachal Pradesh & others. ......Respondents.

CWP No. 8705 of 2012
Reserved on: 05.07.2016
Decided on: 13.07.2016

Industrial Dispute Act, 1947- Section 25- Petitioner was engaged as a driver on daily wage basis on 17.06.1983 - he worked with the respondents till 31.03.1985 and has completed more than

240 days in a calendar year- his services were terminated on 31.3.1985 without following due process of law- Civil suit was filed, in which an injunction was granted by the Court- suit was dismissed by the Civil court, however, appeal was allowed- termination of the petitioner was held to be illegal- an appeal was preferred, which was dismissed- services of the petitioner were again terminated on 20.10.1993- a civil suit was filed, in which order of status quo was granted but this order was vacated for want of jurisdiction – an original application was filed before the Tribunal, in which interim order was granted- original application was dismissed as withdrawn for want of jurisdiction after which services of the petitioner were again terminated- a reference was made to Labour Court, which awarded compensation of Rs. 2 lacs after holding that termination was illegal- held, that services of the petitioner were terminated w.e.f. 20.10.1993 after complying with the provision of Section 25(F), however, respondents have employed other persons without affording opportunity to the petitioner, which is in violation of Section 25(H) of Industrial Disputes Act- petitioner has attained age of superannuation and, therefore, only direction which can be issued to the respondents is payment of compensation only- compensation enhanced to Rs.5 lacs. (Para-11 to 18)

Cases referred:

Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya (D. Ed.) and others, (2013) 10 SCC 324

Bharat Sanchar Nigam Limited vs. Bhurumal, (2014) 7 SCC 177

Hari Nandan Prasad and another vs. Employer I/R to Management of Food Corporation of India and another, (2014) 7 SCC 190

For the petitioner: Mr. V.D. Khidta, Advocate.

For the respondents: Mr. Virender K. Verma, Addl. AG, with Mr. Pushpinder Jaswal, Dy. AG, for the respondents.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present writ petition is maintained by the petitioner against the award of Industrial Tribunal-cum-Labour Court, Shimla, dated 18.08.2012, whereby compensation to tune of Rs.2,00,000/- (rupees two lac) was awarded to the petitioner and declining reinstatement, back wages seniority and other service benefits with a prayer to order the reinstatement of petitioner with all consequential benefits.

2. As per the petitioner, he was initially engaged as Driver on daily wage basis on 17.06.1983 and he worked with the respondents till 31.03.1985 and has completed more than 240 days in a calendar year. Thereafter his services were terminated by the respondents on 31.03.1985 without following the due procedure of law. The petitioner made a request to the respondents that he may be continued in service, but when respondents did nothing, the petitioner filed a Civil Suit for permanent prohibitory injunction alongwith application under Order 39, Rules 1 & 2 C.P.C. The learned Civil Court vide order dated 06.06.1985 restrained the respondents from terminating the services of the petitioner. The suit, however, was dismissed by the learned Civil Court and the appeal was allowed by the learned District Judge, consequently, termination of the petitioner was held to be illegal and the petitioner was held entitled for employment. The respondents preferred regular second appeal against the order of the learned District Judge and the same was dismissed by the Hon'ble High Court on 16.12.1989. As per the petitioner, the respondents again terminated the services of the petitioner w.e.f. 20.10.1993 and again a Civil Suit was filed by the petitioner alongwith application under Order 39, Rules 1 & 2 C.P.C. The learned Civil Court on 22.10.1993 ordered to maintain status qua, which order was later on vacated for want of jurisdiction.

3. Thereafter the petitioner, by filing original application, approached the Administrative Tribunal against the termination order wherein interim order was passed by the learned Tribunal on 27.05.1994 and the same was vacated on 12.08.1994 and the original application was dismissed as withdrawn by the Hon'ble Tribunal on the ground of jurisdiction. The respondents again terminated the services of the petitioner on 12.08.1994 w.e.f. 13.08.1994 without complying with the mandatory provisions of Industrial Disputes Act, 1947.

4. Thereafter the petitioner raised demand notice before the Labour Inspector-cum-Conciliation Officer. Conciliation proceedings were conducted by the Conciliation Officer and failure report was submitted by him to the Labour Commissioner, Himachal Pradesh. Thereafter the Labour Commissioner made a reference to the Labour Court to adjudicate the dispute and now the order of the Labour Court is under challenge in this petition.

5. The learned Labour Court awarded the payment of compensation of Rs.2,00,000/- (rupees two lac) to the petitioner after holding that the termination of the petitioner was illegal, conversely the petitioner submits that the compensation is too meager and the Labour Court has not taken into consideration the G.P.F., gratuity, back wages etc. which the petitioner would have got if he would not have been terminated and he had retired after attaining the age of superannuation.

6. Reply to the writ petition was filed by the respondents and it is averred that the petitioner was engaged on daily wage basis as Driver on 17.06.1983 and he joined his duties on 17.06.1983 in the office of respondent No. 3. As per the respondents, the petitioner worked with them w.e.f. 18.06.1983 to 13.12.1983, but he could not be paid the wages for 57 days, viz., w.e.f. 18.10.1983 to 13.12.1983 for want of sanction from the higher authorities. As per the respondents, on 07.12.1983 the petitioner was again appointed after proper interview through Employment Exchange, Nahan, with condition that he will not claim any right for further appointment and his service is liable to be terminated at any time without assigning any reason and without giving any notice. The petitioner joined on 14.12.1983 and he worked till 08.04.1985 with brakes in service.

7. As per the respondents, the petitioner filed a Civil Suit No. 21/1 of 1985 alongwith application under Order 39, Rules 1 & 2 CPC read with Section 151 CPC laying challenge to the order of termination, dated 18.03.1985, before the Sub Judge, Nahan, and the learned Judge restrained the respondents from terminating and removing the petitioner from service till disposal of the main suit. However, the main suit was dismissed on 03.06.1988. It is the case of the respondents that the petitioner remained sitting in the office without any work on the basis of the interim order of the Civil Court. Thereafter the suit, in appeal, was decreed by the learned District Judge, Solan and Sirmour District at Nahan and the respondents filed the regular second appeal, which was dismissed. As per the respondents on 18.10.1992 the respondents retrenched the services of the petitioner w.e.f. 20.10.1993 after giving proper notice under Section 25-F of the Industrial Dispute Act, 1947, and compensation of `11,000/- was paid to the petitioner. As per the respondents, as the petitioner in the month of 1984 was not having requisite qualification, as per the Recruitment and Promotion Rules, he was not interviewed and being ineligible he could not be appointed and so the initial termination took place. Again the petitioner was retrenched after following due procedure of law w.e.f. 20.01.1993.

8. The petitioner filed rejoinder refuting the stand taken by the respondents and reiterated the contents of the petition.

9. I have heard the learned counsel for the petitioner, learned Additional Advocate General for the respondents and have also gone through the record in detail.

10. The learned counsel for the petitioner has argued that when the Labour Court has held that the termination of the petitioner was illegal, the Labour Court should have ordered the reinstatement with all back wages and all consequential benefits considering that the order of retrenchment/termination was not there. To support his contentions, the learned counsel for the

petitioner has relied on the case law, i.e., ***Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya (D. Ed.) and others, (2013) 10 SCC 324, Bharat Sanchar Nigam Limited vs. Bhurumal, (2014) 7 SCC 177*** and ***Hari Nandan Prasad and another vs. Employer I/R to Management of Food Corporation of India and another, (2014) 7 SCC 190.*** On the other hand, the learned Additional Advocate General has argued that the award passed by the Labour Court is just and reasoned as the Labour Court has come to the conclusion that there is no violation of the provisions of Section 25-F of the Industrial Disputes Act, 1947, and there is no evidence that the petitioner remained unemployed and was not gainfully employed. He has argued that the petitioner has otherwise also attained the age of superannuation and it was not in the interest of justice to order his reinstatement.

11. From the perusal of the record it is clear that indisputably the respondents engaged the petitioner as a Driver on daily wage basis w.e.f. 17.06.1983 till 31.03.1985 when he was terminated from services. It has also come on record that the petitioner approached the Court of learned Civil Judge, Nahan, in 1985, and the learned Court through interim measure restrained the respondents from terminating the services of the petitioner. However, the main suit was dismissed by the learned Civil Judge and the learned District Judge allowed the appeal preferred by the present petitioner. Subsequently, the respondents filed a regular second appeal in the Hon'ble High Court and the same was dismissed. It has come on record that even after 31.03.1985 the petitioner remained in service and the termination order dated 31.03.1985 was set aside by the Court, thus rendering termination order dated 31.03.1985 unjust and illegal. However, the petitioner was again terminated w.e.f. 13.08.1994 after following the mandatory provision contained in Section 25-F of Industrial Disputes Act, 1947, and resultantly the petitioner again filed a civil suit in the Court of learned Sub Judge, Nahan on 13.08.1994, wherein the respondents took the plea that the petitioner was terminated on 20.10.1993 and not on 13.08.1994. The termination order dated 18.10.1993 reveals that the petitioner was retrenched w.e.f. 20.10.1993.

12. As far as the break in service is concerned, that is notional break, however, the respondents after following due procedure terminated the services of the petitioner w.e.f. 20.10.1993 after complying with the provisions of Section 25F and after giving him compensation as per law. However, the respondents after terminating the services of the petitioner has employed other persons without affording an opportunity to be employed to the petitioner and the same is violation of Section 25H of the Industrial Disputes Act, 1947. Though the case of the respondents is that the petitioner was not devotional to his duties, but no inquiry was ever conducted by the respondents to this effect.

13. From the award of the Court below it is clear that after termination of the petitioner, the respondents have engaged the services of Shri Ami Chand in 1985, Shri Jahid Khan and Shri Nitin Kumar without giving opportunity to the petitioner and the same is violation of Section 25-H of the Industrial Disputes Act, 1947. As per the order of the Tribunal, the petitioner has already attained the age of 58 years and as per the affidavit of the petitioner, he is 59 years of age as on 19th day of August, 2012 and the retirement age if 58 years. So this Court has to consider the validity of the award passed by the Labour Court with respect to award of compensation only viz-a-viz reinstatement.

14. The Hon'ble Apex Court in ***Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya (D. Ed.) and others, (2013) 10 SCC 324,*** has held as under:

> ***"(i) In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.***
>
> ***(ii) The aforesaid rule is subject to the rider that while deciding the issue of back wages, the adjudicating authority or the court may take into consideration the length of service of the employee/workman, the nature of misconduct, if any, found proved***

against the employee/workman, the financial condition of the employer and similar other factors.

(iii) ***Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the court of first instance that he/she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. This is so because it is settled law that the burden of proof of the existence of a particular fact lies on the person who makes a positive averment about its existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments.***

(iv) ***The cases in which the Labour Court/Industrial Tribunal exercises power u/s. 11-A of the Industrial Disputes Act, 1947 and finds that even though the enquiry held against the employee/workman is consistent with the rules of natural justice and / or certified standing orders, if any, but holds that the punishment was disproportionate to the misconduct found proved, then it will have the discretion not to award full back wages. However, if the Labour Court/ Industrial Tribunal finds that the employee or workman is not at all guilty of any misconduct or that the employer had foisted a false charge, then there will be ample justification for award of full back wages.***

(v) ***The cases in which the competent court or tribunal finds that the employer has acted in gross violation of the statutory provisions and/or the principles of natural justice or is guilty of victimizing the employee or workman, then the court or tribunal concerned will be fully justified in directing payment of full back wages. In such cases, the superior courts should not exercise power under Art. 226 or Art. 136 of the Constitution and interfere with the award passed by the Labour Court, etc., merely because there is a possibility of forming a different opinion on the entitlement of the employee/workman to get full back wages or the employer's obligation to pay the same. Courts must always keep in view that in the cases of wrongful / illegal termination of service, the wrongdoer is the employer and sufferer is the employee/workman and there is no justification to give a premium to the employer of his wrongdoings by relieving him of the burden to pay to the employee/ workman his dues in the form of full back wages.***

(vi) ***In a number of cases, the superior courts have interfered with the award of the primary adjudicatory authority on the premise that finalization of litigation has taken long time ignoring that in majority of cases the parties are not responsible for such delays. Lack of infrastructure and manpower is the principal cause for delay in the disposal of cases. For this the litigants cannot be blamed or penalised. It would amount to grave injustice to an***

employee or workman if he is denied back wages simply because there is long lapse of time between the termination of his service and finality given to the order of reinstatement. The Courts should bear in mind that in most of these cases, the employer is in an advantageous position vis-à-vis the employee or workman. He can avail the services ofr best legal brain for prolonging the agony of the sufferer i.e. the employee or workman, who can ill-afford the luzury of spending money on a lawyer with certain amount of fame. Therefore, in such cases it would be prudent to adopt the course suggested in Hindustan Tin works (P) Ltd., (1979) 2 SCC 80."

15. In ***Bharat Sanchar Nigam Limited vs. Bhurumal, (2014) 7 SCC 177,*** the Hon'ble Supreme Court, vide paras 36 and 37 of the judgment, has held asunder:

"36. Applying the aforesaid principles, let us discuss the present case. We find that the respondent was working as a daily-wager. Moreover, the termination took place more than 11 years ago. No doubt, as per the respondent he had worked for 15 years. However, the fact remains that no direct evidence for working 15 years has been furnished by the respondent and most of his documents are relatable to two years i.e. 2001 and 2002. Therefore, this fact becomes relevant when it comes to giving the relief. Judicial notice can also be taken of the fact that the need of linemen in the Telephone Department has been drastically reduced after the advancement of technology. For all these reasons, we are of the view that ends of justice would be met by granting compensation in lieu of reinstatement.

37. In Man Singh (BSNL vs. Man Singh, (2012) 1 SCC 558) which was also a case of BSNL, this Court had granted compensation of Rs. 2 lakhs to each of the workmen when they had worked for merely 240 days. Since the respondent herein worked for longer period, we are of the view that he should be paid a compensation of Rs. 3 lakhs. This compensation should be paid within 2 months failing which the respondent shall also be entitled to interest at the rate of 12% per annum from the date of this judgment. The award of CGIT is modified to this extent. The appeal is disposed of in the above terms. The respondent shall also be entitled to the costs of Rs. 15,000 (Rupees fifteen thousand only) in this appeal."

16. The Hon'ble Apex Court in another case ***Hari Nandan Prasad and another vs. Employer I/R to Management of Food Corporation of India and another, (2014) 7 SCC 190,*** has held as under:

"39. On a harmonious reading of the two judgments discussed in detail above, we are of the opinion that when there are posts available, in the absence of any unfair labour practice the Labour Court would not give direction for regularization only because a worker has continued as daily-wage worker/ad hoc/temporary worker for number of years. Further, if there are no posts available, such direction for regularization would be impermissible. In the aforesaid circumstances giving of direction to regularize such a person, only on the basis of number of years put in by such a worker as daily-wager, etc. may amount to back door entry into the service which is an anathema to Article 14 of the Constitution. Further, such a direction would not be given when the worker concerned does not meet the eligibility requirement of the post in question as per the recruitment rules.

> ***However, wherever it is found that similarly situated workmen are regularised by the employer itself under some scheme or otherwise and the workmen in question who have approached the Industrial/Labour Court are workmen in question who have approached the Industrial/Labour Court are on a par with them, direction of regularization in such cases may be legally justified, otherwise, non-regularisation of the left-over workers itself would amount to invidious discrimination qua them in such cases and would be violative of Article 14 of the Constitution. Thus, the industrial adjudicator would be achieving the equality by upholding Article 14, rather than violating this constitutional provision."***

17. In the present case, as per the respondent, the petitioner was initially appointed on 17.06.1983 and he served the respondent-department till 31.03.1985 and thereafter he remained in office till 1994 without any work and on 13.08.1994 the services of the petitioner were terminated. As has been held hereinabove, though the respondents have complied with the provisions of Section 25-F of the Industrial Disputes Act, 1947, and there is no illegality, but the respondents have failed to comply with the requirement of Section 25-H of the Industrial Disputes Act, 1947, which mandates as under:

> ***"24H. Re-employment of retrenched workmen.*** –Where any workmen are retrenched, and the employer proposes to take into his employ any persons, he shall, in such manner as may be prescribed, give an opportunity [to the retrenched workmen who are citizens of India to offer themselves for re-employment, and such retrenched workmen] who offer themselves for re-employment shall have preference over other persons."

18. In the present case after taking into consideration the fact that the petitioner remained in service for several years, he has attained the age of superannuation, the termination has taken place more than 20 years back and also taking a harmonious reading of the judgments of the Hon'ble Apex Court, this Court finds that at this stage the only appropriate directions which can be issued to the respondents is compensation only. The Hon'ble Supreme Court in ***Bharat Sanchar Nigam Limited vs. Bhurumal, (2014) 7 SCC 177,*** has allowed compensation of Rs.3,00,000/- (rupees three lac) to the petitioner, which was ordered to be paid within two months failing which the respondent shall also be entitled to interest at the rate of 12% per annum from the date of judgment. In the present case also taking the law on this aspect and the past of the petitioner the award of the Tribunal below is modified only to the extent that the petitioner is entitled to compensation of Rs.5,00,000/- (rupees five lac) in place of Rs.2,00,000/- (rupees two lac). The respondents are directed to pay compensation within a period of two months from today, failing which the petitioner shall be held entitled to interest at the rate of 12% per annum from today. However, in the peculiar facts and circumstances of the case, there is no order as to costs.

19. In view of the above, the petition, as also pending application(s), if any, shall stand(s) disposed of.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Jagjit Singh. …..Petitioner.

Versus

State of Himachal Pradesh & another. ……Respondents.

Cr.MMO No. 147 of 2016
Reserved on: 04.07.2016
Decided on: 13.07.2016

Code of Criminal Procedure, 1973- Section 482- An FIR was registered against the petitioner for the commission of offences punishable under Sections 279 and 337 of Indian Penal Code and Sections 181 and 182 of M.V. Act- petitioner entered into a compromise with the injured and sought quashing of FIR- held, that FIR can be quashed in appropriate cases to meet ends of justice- when the Court is satisfied that parties have settled the disputes amicably without any pressure, FIR and subsequent proceedings can be quashed- FIR quashed and consequent proceedings are thereby rendered infructuous. (Para-8 to 12)

Cases referred:
B.S. Joshi and others vs. State of Haryana and another, (2003) 4 SCC 675
Preeti Gupta and another vs. State of Jharkhand and another, (2010) 7 SCC 667
Jitendra Raghuvanshi and others vs. Babita Raghuvanshi and another, (2013) 4 SCC 58

For the petitioner: Mr. N.K. Thakur, Sr. Advocate, with Ms. Jamuna Thakur, Advocate, with petitioner in person.
For the respondents: Mr. Virender K. Verma, Addl. AG, with Mr. Pushpinder Jaswal, Dy. AG, for respondent No. 1/State.
Respondent No. 2 in person.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present petition is maintained by the petitioner under Section 482 Criminal Procedure Code (hereinafter referred to as 'Cr.P.C') for quashing FIR No. 316 of 2014, dated 29.10.2014, registered at Police Station, Una, District Una, HP, under Sections 279, 337 Indian Penal Code (hereinafter referred to as 'IPC') and Sections 181 and 192 of the Motor Vehicles Act. The petitioner is also seeking quashing of subsequent Criminal Case No. 124-1-15, titled State of H.P. vs. Jagjit Singh @ Happy, which is pending adjudication before the learned Judicial Magistrate 1st Class, Court No. IV, Una, District Una, H.P.

2. Briefly stating the facts of the case, as per the petitioner, are that the FIR No. 316 of 2014, dated 29.10.2014, was registered against the present petitioner on the statement of Shri Som Nath, made under Section 154 Cr.P.C. contending therein that he was told by Shri Manoj Kumar that his uncle Shri Parkash Chand (respondent No. 2 herein) was hit by a motorcyclist while crossing Basdehra Chowk.

3. Police machinery was set into motion. Police investigated the matter and presented the *challan* in the Court under Sections 279, 337 IPC and Sections 181 and 192 of the Motor Vehicles Act. The case is pending adjudication in the Court of learned Judicial Magistrate 1st Class, Court No. IV, Una, H.P. wherein charges have not been framed. It is further averred by the petitioner that he has entered into compromise with respondent No. 2 (Shri Parkash Chand/injured) qua the above FIR as both, petitioner and the respondent No. 2, are residents of same area, they entered into a compromise (Annexure P-2). The petitioner has prayed for quashing of FIR No. 316 of 2014, dated 29.10.2014, registered at Police Station Una, District Una, H.P. under Sections 279, 337 IPC and Sections 181 and 192 of Motor Vehicles Act and pending Criminal Case No. 124-1-15, titled State of H.P. vs. Jagjit Singh @ Happy, before the leaned Judicial Magistrate 1st Class, Court No. IV, Una, District Una, H.P.

4. Reply to the petition has been filed by respondent No. 1, wherein it is contended that Criminal Case is fixed for consideration for 16.06.2016 in the Court of leaned Judicial Magistrate 1st Class, Court No. IV, Una, District Una, H.P. It is submitted by replying respondent that there is no proof of amicable settlement of dispute *inter se* the petitioner and respondent No. 2 and the petitioner has committed a very serious offence against the public at large. It is also submitted that petitioner has alternative and equally efficacious remedy and he can submit his

version before the competent authority for availing the procedure provided under Section 321 of Cr.P.C.

5. I have heard the learned counsel for the petitioner as well as for respondent No. 2, learned Additional Advocate General for respondent No. 1/State and have also gone through the record carefully.

6. Learned counsel for the petitioner has argued that as the parties have compromised the matter, vide Compromise Deed (Annexure P-2), no purpose will be served by keeping the proceedings against the petitioner and the FIR/Challan pending before the Court of learned Judicial Magistrate 1st Class, Court No.IV, Una, District Una, titled State of H.P vs. Jagjit Singh alias Happy and the same be quashed and set aside.

7. On the other hand, learned Additional Advocate General has argued that the offence is not compoundable, so the petition be dismissed.

8. Their Lordships of the Hon'ble Supreme Court ***B.S. Joshi and others*** vs. ***State of Haryana and another***, (2003) 4 SCC 675, have held that if for the purpose of securing the ends of justice, quashing of FIR becomes necessary, section 320 would not be a bar to the exercise of power of quashing. It is well settled that the powers under section 482 have no limits. Of course, where there is more power, it becomes necessary to exercise utmost care and caution while invoking such powers. Their Lordships have held as under:

> **[6] In Pepsi Food Ltd. and another v. Special Judicial Magistrate and others ((1998) 5 SCC 749), this Court with reference to Bhajan Lal's case observed that the guidelines laid therein as to where the Court will exercise jurisdiction under Section 482 of the Code could not be inflexible or laying rigid formulae to be followed by the Courts. Exercise of such power would depend upon the facts and circumstances of each case but with the sole purpose to prevent abuse of the process of any Court or otherwise to secure the ends of justice. It is well settled that these powers have no limits. Of course, where there is more power, it becomes necessary to exercise utmost care and caution while invoking such powers.**
>
> **[8] It is, thus, clear that Madhu Limaye's case does not lay down any general proposition limiting power of quashing the criminal proceedings or FIR or complaint as vested in Section 482 of the Code or extraordinary power under Article 226 of the Constitution of India. We are, therefore, of the view that if for the purpose of securing the ends of justice, quashing of FIR becomes necessary, Section 320 would not be a bar to the exercise of power of quashing. It is, however, a different matter depending upon the facts and circumstances of each case whether to exercise or not such a power.**
>
> **[15] In view of the above discussion, we hold that the High Court in exercise of its inherent powers can quash criminal proceedings or FIR or complaint and Section 320 of the Code does not limit or affect the powers under Section 482 of the Code.**

9. Their Lordships of the Hon'ble Supreme Court ***in Preeti Gupta and another*** vs. ***State of Jharkhand and another***, (2010) 7 SCC 667, have held that the ultimate object of justice is to find out the truth and punish the guilty and protect the innocent. The tendency of implicating the husband and all his immediate relations is also not uncommon. At times, even after the conclusion of the criminal trial, it is difficult to ascertain the real truth. Experience reveals that long and protracted criminal trials lead to rancour, acrimony and bitterness in the relationship amongst the parties. The criminal trials lead to immense sufferings for all concerned. Their Lordships have further held that permitting complainant to pursue complaint would be

abuse of process of law and the complaint against the appellants was quashed. Their Lordships have held as under:

> **[27] A three-Judge Bench (of which one of us, Bhandari, J. was the author of the judgment) of this Court in Inder Mohan Goswami and Another v. State of Uttaranchal & Others, 2007 12 SCC 1 comprehensively examined the legal position. The court came to a definite conclusion and the relevant observations of the court are reproduced in para 24 of the said judgment as under:-**
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> **"Inherent powers under section 482 Cr.P.C. though wide have to be exercised sparingly, carefully and with great caution and only when such exercise is justified by the tests specifically laid down in this section itself. Authority of the court exists for the advancement of justice. If any abuse of the process leading to injustice is brought to the notice of the court, then the Court would be justified in preventing injustice by invoking inherent powers in absence of specific provisions in the Statute."**
>
> **[28] We have very carefully considered the averments of the complaint and the statements of all the witnesses recorded at the time of the filing of the complaint. There are no specific allegations against the appellants in the complaint and none of the witnesses have alleged any role of both the appellants.**
>
> **[35] The ultimate object of justice is to find out the truth and punish the guilty and protect the innocent. To find out the truth is a herculean task in majority of these complaints. The tendency of implicating husband and all his immediate relations is also not uncommon. At times, even after the conclusion of criminal trial, it is difficult to ascertain the real truth. The courts have to be extremely careful and cautious in dealing with these complaints and must take pragmatic realities into consideration while dealing with matrimonial cases. The allegations of harassment of husband's close relations who had been living in different cities and never visited or rarely visited the place where the complainant resided would have an entirely different complexion. The allegations of the complaint are required to be scrutinized with great care and circumspection.**
>
> **36. Experience reveals that long and protracted criminal trials lead to rancour, acrimony and bitterness in the relationship amongst the parties. It is also a matter of common knowledge that in cases filed by the complainant if the husband or the husband's relations had to remain in jail even for a few days, it would ruin the chances of amicable settlement altogether. The process of suffering is extremely long and painful.**
>
> **[38] The criminal trials lead to immense sufferings for all concerned. Even ultimate acquittal in the trial may also not be able to wipe out the deep scars of suffering of ignominy. Unfortunately a large number of these complaints have not only flooded the courts but also have led to enormous social unrest affecting peace, harmony and happiness of the society. It is high time that the legislature must take into consideration the pragmatic realities and make suitable changes in the existing law. It is imperative for the legislature to take into consideration the informed public opinion and the pragmatic realities in consideration and make necessary changes in the relevant provisions of law. We direct the Registry to send a copy of this**

> **judgment to the Law Commission and to the Union Law Secretary, Government of India who may place it before the Hon'ble Minister for Law & Justice to take appropriate steps in the larger interest of the society.**

10. Their Lordships of the Hon'ble Supreme Court in ***Jitendra Raghuvanshi and others*** vs. ***Babita Raghuvanshi and another,*** (2013) 4 SCC 58, have held that criminal proceedings or FIR or complaint can be quashed under section 482 Cr.P.C. in appropriate cases in order to meet ends of justice. Even in non-compoundable offences pertaining to matrimonial disputes, if Court is satisfied that parties have settled the disputes amicably and without any pressure, then for purpose of securing ends of justice, FIR or complaint or subsequent criminal proceedings in respect of offences can be quashed. Their Lordships have held as under:

> **[13] As stated earlier, it is not in dispute that after filing of a complaint in respect of the offences punishable under Sections 498A and 406 of IPC, the parties, in the instant case, arrived at a mutual settlement and the complainant also has sworn an affidavit supporting the stand of the appellants. That was the position before the trial Court as well as before the High Court in a petition filed under Section 482 of the Code. A perusal of the impugned order of the High Court shows that because the mutual settlement arrived at between the parties relate to non-compoundable offence, the court proceeded on a wrong premise that it cannot be compounded and dismissed the petition filed under Section 482. A perusal of the petition before the High Court shows that the application filed by the appellants was not for compounding of non-compoundable offences but for the purpose of quashing the criminal proceedings.**
>
> **[14] The inherent powers of the High Court under Section 482 of the Code are wide and unfettered. In B.S. Joshi , this Court has upheld the powers of the High Court under Section 482 to quash criminal proceedings where dispute is of a private nature and a compromise is entered into between the parties who are willing to settle their differences amicably. We are satisfied that the said decision is directly applicable to the case on hand and the High Court ought to have quashed the criminal proceedings by accepting the settlement arrived at.**
>
> **[15] In our view, it is the duty of the courts to encourage genuine settlements of matrimonial disputes, particularly, when the same are on considerable increase. Even if the offences are non-compoundable, if they relate to matrimonial disputes and the court is satisfied that the parties have settled the same amicably and without any pressure, we hold that for the purpose of securing ends of justice, Section 320 of the Code would not be a bar to the exercise of power of quashing of FIR, complaint or the subsequent criminal proceedings.**
>
> **[16] There has been an outburst of matrimonial disputes in recent times. The institution of marriage occupies an important place and it has an important role to play in the society. Therefore, every effort should be made in the interest of the individuals in order to enable them to settle down in life and live peacefully. If the parties ponder over their defaults and terminate their disputes amicably by mutual agreement instead of fighting it out in a court of law, in order to do complete justice in the matrimonial matters, the courts should be less hesitant in exercising its extraordinary jurisdiction. It is trite to state that the power under Section 482 should be exercised sparingly and with circumspection only when the court is convinced, on the basis of material on record, that allowing the proceedings to continue would be an abuse of the process of the court or that the ends of justice require that the**

proceedings ought to be quashed. We also make it clear that exercise of such power would depend upon the facts and circumstances of each case and it has to be exercised in appropriate cases in order to do real and substantial justice for the administration of which alone the courts exist. It is the duty of the courts to encourage genuine settlements of matrimonial disputes and Section 482 of the Code enables the High Court and Article 142 of the Constitution enables this Court to pass such orders.

[17] In the light of the above discussion, we hold that the High Court in exercise of its inherent powers can quash the criminal proceedings or FIR or complaint in appropriate cases in order to meet the ends of justice and Section 320 of the Code does not limit or affect the powers of the High Court under Section 482 of the Code. Under these circumstances, we set aside the impugned judgment of the High Court dated 04.07.2012 passed in M.C.R.C. No. 2877 of 2012 and quash the proceedings in Criminal Case No. 4166 of 2011 pending on the file of Judicial Magistrate Class-I, Indore."

11. Thus, taking into consideration the law as discussed hereinabove, I find that the interest of justice will be met, in case, the proceedings are quashed, as the parties have already compromised the matter which is placed on record.

12. Accordingly, taking holistic view of the matter and looking into all attending facts and circumstances, I find this case to be a fit case to exercise powers under Section 482 of the Code and accordingly FIR No. 316/2014, dated 29.10.2014, under Sections 279 and 337 of the Indian Penal Code and Section 181 and 192 of the Motor Vehicles Act, registered at Police Station, Una, District Una, is ordered to be quashed. Since FIR No.316/2014, dated 29.10.2014, under Sections 279 and 337 of the Indian Penal Code, registered at Police Station, Una, District Una, has been quashed, consequent proceedings/Challan pending before the learned Magistrate 1st Class, Court No.IV, Una, District Una, H.P. against the petitioner, are thereby rendered infructuous. However, the same are expressly quashed so as to obviate any confusion.

13. The petition stands allowed in the aforesaid terms.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J

Mohammad Yasin @ Sonu & anr. ....Petitioners.
Versus
State of Himachal Pradesh. ...Respondent.

Cr. MP (M) No.733 of 2016.
Decided on: 13th July, 2016.

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for the commission of offences punishable under Sections 376, 506, 323 read with section 34 of I.P.C. – it has been pleaded that petitioners have joined investigation and they be released on bail in the event of their arrest- held, that petitioners are permanent residents of Chamba and are not in a position to flee from justice – they are cooperative and had joined the investigation- therefore, petitioners are ordered to be released on bail of Rs. 25,000/-. (Para-4)

For the petitioners : Mr. N.K. Thakur, Sr. Advocate with Ms. Jamuna Thakur, Advocate.
For the respondent : Mr. Virender Kumar Verma, Addl.Advocate General with Mr. Pushpinder Singh Jaswal, Dy. Advocate General.

ASI Joginder Singh, Police Station, Tissa, District Chamba, present in person.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge (oral).

The present bail application is maintained by the petitioners under Section 438 of the Code of Criminal Procedure for releasing them on bail in case FIR No.58 of 2016 dated 18.6.2016, under Sections 376, 506, 323 read with section 34 of the Indian Penal Code, registered at Police Station, Tissa, District Chamba, H.P. As per the prosecution story, the prosecutrix has lodged a report against the petitioners that petitioner No.1 committed sexual intercourse with her on the pretext of marriage knowingly petitioner No.1 is married.

2. Learned counsel for the petitioners has argued that petitioners are joining the investigation and they may be released on bail in the event of their arrest.

3. On the other hand, learned Additional Advocate General argued that the petitioners have committed heinous offence and the manner in which the crime has been committed makes it a fit case where the judicial discretion is not required to be exercised in favour of the petitioners.

4. At this moment, taking into consideration the fact that the petitioners are permanent resident of Tissa, District Chamba, Himachal Pradesh, are not in a position to flee from justice. The petitioners are co-operating and joining the investigation. The interest of justice demands that judicial discretion to admit the petitioners on bail is required to be exercised in favour of the petitioners. So, it is ordered that in the event of arrest in this case, the petitioners be released on bail, on their furnishing personal bond to the sum of Rs.25,000/- (rupees twenty five thousand only) each with one surety each in the like amount to the satisfaction of Investigating Officer. The bail is granted subject to the following conditions :

i. That the petitioners will join investigation of case as and when called for by the Investigating Officer in accordance with law.

ii. That the petitioners will not leave India without prior permission of the Court.

iii. That the petitioners will not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Investigating Officer or Court.

5. In case, it comes in the notice of the prosecution that the petitioners are in any manner hampering the investigation and tampering with the prosecution evidence, the prosecution is at liberty to approach the Court for cancellation of the bail.

6. The petition is accordingly allowed and stands disposed of.

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BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND THE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Mohd. Sajid .....Petitioner.

Vs.

State of Himachal Pradesh and others ......Respondents.

Cr. WP No.: 10 of 2016
Reserved on: 05.07.2016
Date of Decision: 13.07.2016

Constitution of India, 1950- Article 226- Petitioner sought a direction to get the case registered for the commission of offences punishable under Sections 376 and 506 of I.P.C. and to get it investigated from some investigating Agency or from the Officer not below the rank of Dy. S.P. – petitioner got registered an FIR alleging that minor girl of the petitioner was raped by the accused who had drugged her- this fact was narrated to some persons but they asked her not to disclose this incident- investigation was conducted- accused was arrested- persons to whom incident was narrated denied the prosecution version- nothing was found against those persons- challan was filed before the Court- an application was filed before Learned Special Judge, which was dismissed- held, in petition that criminal case is sub judice and trial is going on- therefore, no observation can be made regarding merit of the case - direction issued to Dy.S.P. to further investigate the allegations made in the petition in accordance with law- petition dismissed.

(Para-5 to 12)

Case referred:

State of Punjab Vs. Central Bureau of Investigation and others (2011) 9 Supreme Court Cases 182

For the petitioner:	Mr. Bimal Gupta, Senior Advocate, with Mr. Vineet Vashishta, Advocate.
For the respondents:	Mr. V. S. Chauhan, Addl. AG, with Mr. Vikram Thakur and Mr. Puneet Rajta, Dy. AGs.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. :

By way of present petition filed under Article 226 of the Constitution of India read with Section 482 of Cr. P.C., the petitioner has *inter alia* prayed for issuing directions to respondent No. 1 to have the case registered under Sections 376 & 506 of the Indian Penal Code vide FIR No. 53 of 2015 dated 29.06.2015 at Police Station, Kala Amb further investigated/re-investigated from some independent agency or from an Officer not below the rank of Deputy Superintendent of Police and also to decide the complaint of the petitioner (P-7) and convey the decision to the petitioner vis-à-vis action taken against respondent No. 5 on the said complaint. The petitioner has also prayed for quashing of order passed by the learned Special Judge, Sirmaur District at Nahan, H.P. in application No. 48-Cr.MP/4 of 2016 dated 09.03.2016 vide which, learned Special Judge, Sirmaur District at Nahan has dismissed the application filed by the present petitioner under Sections 173, 204 and 319 Cr. P.C.

2. An FIR has been registered at Police Station, Kala Amb, i. e. FIR No. 53 of 2015 dated 20.06.2015 under Sections 376 read with Section 506 of the Indian Penal Code as well as under Section 4 of POSCO Act. This FIR has been registered on the basis of complaint of the present petitioner who is a labourer. As per the contents of FIR, it has been alleged that the minor girl of the petitioner was raped by accused Mukesh, who allegedly drugged her and thereafter raped her. It is further mentioned in the FIR that when the minor girl of the complainant gained consciousness, she intimated the factum of her having been sexually abused by Mukesh to Vimal Tiwari, Bhardwaj Sir, Mamta Madam, Parkash Mehra and Vishnu. However, said persons instructed his daughter not to disclose this incident to any person otherwise she will not be given her wages and she will be killed. It is further stated in the FIR that accused Mukesh in conspiracy with Vimal Tiwari, Bhardwaj Sir, Mamta Madam, Parkash Mehra and Vishnu had raped his minor daughter and legal action be taken against all the above mentioned persons. A perusal of the report submitted by the Police on completion of investigation (P-3) dated 15.09.2015 demonstrates that on the basis of complaint of the present petitioner, an FIR was registered under Sections 376 and 506 of the Indian Penal Code and Under Section 4 of the POSCO Act. The medical of the prosecutrix was conducted on 29.06.2015 and the opinion of the Medical Officer is to the effect that “there is nothing to suggest that sexual intercourse has not been done.” It is

further mentioned in the said report that demarcation of the spot was done in the presence of prosecutrix, her parents and *Mausi* and spot map was also prepared. Inquiry was done. The workers of the factory were questioned in this regard, but there was no eye witness to the alleged incident. Statements of the prosecutrix and her relatives were recorded under Section 161 Cr. P.C. and thereafter on 30.06.2015, the statement of the prosecutrix under Section 164 of Cr. P.C. was recorded in the Court of learned Judicial Magistrate 1st Class. Accused Mukesh Kumar was arrested on 30.06.2015 at 5:15 p.m. It is further mentioned in the report that persons mentioned in the statement made under Section 164 Cr. P.C. by the prosecutrix, namely Mamta Kashyap, Vimal Tiwari, Vishnu Dev and Parkash Vohera were made to join the investigation and they were thoroughly investigated, however, all of them have stated that after alleged incident, the prosecutrix had not come to them and they have not coerced or intimidated the prosecutrix as alleged. It is also stated in the said report that during the course of investigation neither any witness nor any evidence has come into light which could fortify the allegations levelled by the prosecutrix in her statement under Section 164 Cr. P.C. against Mukesh or other workers named therein and due to lack of evidence against these persons, they could not be arrested and on account of lack of evidence, the names of these persons have been kept in Column No. 12 of the challan so that if during the course of trial, any material evidence comes against these persons, then they can be called upon and prosecuted. It has also come on record that no evidence has come of the prosecutrix being given any further intimidation etc., therefore, Section 506 of the Indian Penal Code has been removed from the case. It has also come in the said report that *Salwar* which the prosecutrix was wearing on the alleged date when the incident took place was not handed over to the police by her parents on the ground that they did not remember as to what were the clothes worn by the prosecutrix on that date. Accordingly, the challan has been submitted for prosecution of the accused under Section 376 of the Indian Penal Code read with Section 4 of POSCO Act.

3. An application was filed by the present petitioner under Sections 173, 204 and 319 Cr. P.C. in the Court of learned Special Judge, Sirmaur District at Nahan in which it was prayed that the learned Court may direct re-investigation of the case by an Officer not below the rank of Deputy Superintendent of Police and said officer may also be directed to take the clothes which the daughter of the complainant was wearing at the time of incident and the said clothes be sent for appropriate examination. This application has been dismissed by the learned Court below vide its order dated 09.03.2016 (P-6). Learned Court below has held that the application under Section 319 Cr. P.C. was not maintainable at this stage as the said provisions can be invoked only when some evidence comes on record against some other persons other than the charged person. Accordingly, learned Court below held that the question of arraying some other person who were allegedly working in the factory as accused has to be considered only when the evidence has started and not at the stage of hearing on the charge. With regard to handing over of the clothes of the prosecutrix, it has been held by the Court below that the doctor had specifically mentioned in the MLC that the clothes have been changed and these were not brought before the doctor. It further held that nothing prevented the complainant from producing the clothes before the doctor, if they were preserved in the same state. Learned Court also held that there is nothing on record to show that the complainant had tried to produce the same before the Investigating Officer or even before the Superintendent of Police and after about 8-9 months of the incident, learned Court below did not think it fit to pass any directions to the Investigating Officer as prayed for. The learned Court below has further held that the complainant will be free to approach the police authorities for further investigation in terms of Section 173(8) Cr. P.C. and make appropriate prayer, but in the facts and circumstances of the case, the lower Court does not thinks it fit to pass any directions. On these basis, the said application filed by the complainant has been rejected.

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

5. Section 173(8) of the Code of Criminal Procedure provides as under:

"173(8) Nothing in this Section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and whereupon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) and (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2).

6. The provisions of Section 173(8) of the Code of Criminal Procedure are invoked when after submission of a report under Section 173(2) Cr. P.C., further evidence comes into the notice of the investigating officer which may call for further investigation in the matter. In these circumstances, an application is filed before learned Magistrate seeking permission for further investigation of the matter on the basis of such further evidence obtained by the investigating officer whether oral or documentary.

7. It has been held by the Hon'ble Supreme Court in **State of Punjab** Vs. **Central Bureau of Investigation and others** (2011) 9 Supreme Court Cases 182 while interpreting the provisions of Section 482 Cr. P.C. that the provisions of Cr. P.C. does not limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order of the Court or to prevent the abuse of any process of the Court or otherwise to secure the ends of justice. It has been further held that the language of sub-section (8) of Section 173 Cr. P.C., therefore, cannot limit or affect the inherent powers of the High Court to pass an order under Section 482 Cr. P.C. for fresh investigation or reinvestigation if the Court is satisfied that such fresh investigation or reinvestigation is necessary to secure the ends of justice.

8. Reverting to the facts of the present case, the case of the complainant is that after the prosecutrix, i.e. his minor daughter was allegedly raped by the accused, she intimated this fact to other persons, namely Vimal Tiwari, Bhardwaj Sir, Mamta Madam, Parkash Mehra and Vishnu, who asked her not to disclose the occurrence of the incident to any other person otherwise she will not be paid her wages and she will also be killed. This fact is also recorded by the prosecutrix in her statement which has been recorded under Section 164 Cr. P.C. by learned Judicial Magistrate 1st Class on 30.06.2015, in which she has stated that on the fateful day after she re-gained her consciousness, her *Salwar* was stained with blood. After washing her Salwar, she went to Vimal Tiwari and other officers, namely Mamta, Vishnu, Parkash Mehra and Bhardwaj, who scared her and stated that do not disclose this fact to her mother otherwise neither she will be married and her mother will also be killed and the name of the Company will also be spoiled. These facts also find mention in her statement recorded under Section 161 Cr. P.C.

9. It has been averred in the present petition that after the alleged incident, an effort was made to hush up the matter. The complainant has alleged that the SHO concerned, i.e. respondent No. 5 refused to take the *Salwar* of the prosecutrix in possession. The petitioner has also alleged that he was approached by the workers of the Company against whom he wants action to be taken with the help of SHO, Kala Amb and with the help of one mediator Mr. Sada, R/o Chhachhrauli by involving one retired police official and some politicians of Yamunagar and the petitioner was called at PWD Rest House, Chhachhrauli in July, 2015, in which meeting one Mr. Saukin, ITI Yamunagar was also present, where he was pressurized to close the matter and he was also offered money in lieu of the same.

10. The concerned Station House Officer has been arrayed in his own capacity as respondent in the present Criminal Writ Petition, however, he has not filed any independent reply to the petition. There is only one joint reply which has been filed by the respondents to the Criminal Writ Petition and incidentally, this reply is not sworn on the affidavit of respondent No. 5, i.e. SHO, Kala Amb, but the reply is sworn on the affidavit of Superintendent of Police, Sirmaur District at Nahan, H.P. Further, a perusal of para-3 of the reply filed to the Criminal Writ Petition

reveals that the same is vague and evasive as far as the allegations of influence etc. levelled in the said paragraph of the Criminal Writ Petition are concerned. Be that at it may, the fact of the matter is that the Criminal Case is *sub judice* and the trial is going on. In these circumstances, we do not deem it proper to make any comment/observation on the merit of the case as the same can prejudice the case of the accused or the prosecution.

11. However, we are of the considered view that in view of the allegations which have been levelled by the complainant and the prosecutrix against Vimal Tiwari, Bhardwaj Sir, Mamta Madam, Parkash Mehra and Vishnu, the interest of justice will be served in case the Deputy Superintendent of Police, Kala Amb is directed to further investigate the matter with regard to the allegations made against these persons in a free and fair manner. Accordingly, he is directed to carry out further investigation in the matter and the investigation be carried out and completed within a period of two months from today and the respondents shall thereafter proceed in the matter on the basis of the out come of the said investigation in accordance with law. We may again observe that this order has been passed keeping in view the peculiar facts and circumstances of the case as the allegation is with regard to sexual molestation of a minor girl and to hush up the entire matter by the main accused in connivance with other persons who have not been made accused but whose names have been kept in Column No. 12 of the FIR. We further direct that while carrying out investigation, the concerned Officer shall not be influenced by the findings returned by learned Special Judge, Sirmaur District at Nahan, H.P. in its order dated 09.03.2016 vide which, he dismissed the application filed under Sections 173, 204 and 319 Cr. P.C. We also make it clear that during the course of investigation, the Officer concerned shall not be influenced by any observations made by us in the present case and the investigation shall be carried out in a free and fair manner to find out the truth.

12. It has been argued on behalf of the State that direction is being sought against persons who are not even party before this Court and before passing any orders said persons should be impleaded as party respondents. We are of the considered view that though it would have been prudent that all these persons had been impleaded as party respondents in this case, but in view of the order which we have passed, it is not necessary to implead them as party respondents in the case.

13. With the aforesaid directions, the petition is disposed of.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Paras Ram ....Petitioner.
Versus
Rakesh Kumar & anr. ......Respondents.

Cr. Revision No.119 of 2009
Reserved on : 5.7.2016
Decided on: 13th July, 2016

Negotiable Instruments Act, 1881- Section 138- Accused issued a cheque in favour of the complainant in discharge of his legal liability, which was dishonoured for want of 'sufficient funds'- amount was not paid despite receipt of notice of demand- accused was convicted by the trial Court- an appeal was preferred, which was dismissed- held in revision that accused had admitted the issuance of cheque- this fact was also proved by the testimony of the complainant- cheque was dishonoured due to insufficient funds- accused had issued a reply to the notice admitting that cheque was issued by him but the payment was stopped as the complainant had failed to supply apple- however, no evidence was adduced in support of this fact- accused was

under obligation to pay the amount to the complainant- presumption under Section 139 was also not rebutted- in these circumstances, accused was rightly convicted – revision dismissed.

(Para-6 to 10)

For the petitioner : Mr. V.S. Chauhan, Advocate.
For the respondents : Mr. I.N. Mehta, Advocate, for respondent No.1.
Mr. Virender Verma, Addl. Advocate General, for respondent No.2/State.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present Criminal Revision Petition under Section 397 read with section 401 of the Code of Criminal Procedure, against the judgment dated 10.7.2009, passed by learned Sessions Judge, Shimla, in Criminal Appeal No.1-S/10 of 2008 titled Paras Ram vs. Rakesh Kumar & anr., dismissing the appeal of the petitioner and confirming the judgment of conviction and sentence passed by learned Judicial Magistrate 1st Class, Theog, District Shimla, in Case No.124-2 of 2002, whereby the petitioner was convicted and sentenced to undergo rigorous imprisonment for six months for the offence punishable under Section 138 of the Negotiable Instruments Act and to pay compensation to the tune of Rs.1,50,000/-, to the complainant.

2. The brief facts giving rise to the present petition are that the complainant and respondent (hereinafter referred to as 'complainant') maintained the complaint under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as Act) against the accused/petitioner (hereinafter referred to as 'accused) and learned trial Court sentenced the accused, as stated hereinabove, which judgment was affirmed by the learned lower Appellate Court. As per the complainant, on 5.9.2002 accused issued a cheque bearing No.985107 in the sum of Rs.1,50,000/- in favour of the complainant in the discharge of legal liability for consideration, drawn at State Bank of India, Branch, Deha. The complainant presented the said cheque in the State Bank of India, Branch Deha, for encashment on 14.9.2002, but the said cheque was dishonoured by the concerned Bank, for want of sufficient funds in the account of the accused. The State Bank of India, Branch Deha, issued dishonour slip to the complainant on the same date. On 24.9.2002 the complainant got issued a registered notice to the accused through his counsel disclosing the said fact that the cheque has been dishonoured for want of sufficient funds in his account and demanded the payment of the amount within fifteen days from the date of receipt of the notice. The notice was received by the accused on 1.10.2002, but he failed to pay the said amount.

3. In order to prove his case and bring home the guilt of the accused, the complainant examined as many as two witnesses including himself.

4. After the closure of the evidence of the complainant, the incriminating circumstances and evidence were put to the accused, which have been admitted by him to be correct and pleaded that he had struck bargain of apple with the complainant Rs.10,000/- were paid to the complainant through Bindu and Rs.10,000/- were handed over by cash. The complainant did not handover to him the apple vehicle and sold the apples at his own instance. He has examined DW-1 Sandeep Kumar in defence.

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

6. As far as the issuance of cheque is concerned, the same is not undisputed, the accused has specifically admitted that he issued a cheque bearing No.985107. The said fact is duly proved on the strength of testimonies of CW-1 (complainant), Shri Rakesh Kumar and CW-2, Shri S.K. Panth. CW-1, Shri Rakesh Kumar who deposed that accused issued cheque Ex.C-1, which was presented by him in State Bank of India, Branch Deha, for encashment on 14.9.2002,

but the cheque was dishonoured by the Bank, because of insufficiency of funds in the account of the accused in the said Bank regarding which the said Bank issued memos, Ex.C-2 and Ex.C-3. The complainant presented the said cheque in Bank and the same was dishonoured for want of sufficient funds in the account of the accused has been duly supported, corroborated and substantiated by the deposition of CW-2, Shri S.K. Panth. The testimony of CW-2, Shri S.K. Panth, could not be shattered in spite of lengthy cross-examination made on behalf of the accused. CW-2 has specifically stated in cross-examination that on 6.9.2002, there was Rs.28,000/- in the account of the accused and Rs.20,000/- were in the account of the accused on 14.9.2002. The authenticity and genuineness of the memos, Ex.C-2 and Ex.C-3 has not been disputed, it stands fully and firmly established that the accused had issued cheque, Ex.C-1 amounting to Rs.1,50,000/-, drawn at State Bank of India, Branch Deha, which was presented by the complainant for encashment in the said Bank, but the same was dishonoured for want of sufficient funds.

7. CW-1, Rakesh Kumar deposed that on 24.9.2002, he got issued a notice by registered post to the accused through his counsel and intimated the accused that the cheque, Ex.C-1, has been dishonoured for want of sufficient funds and demanded the payment of amount within 15 days from the date of receipt of the notice and notice was handed over and served upon the accused. He has proved in evidence copy of notice Ex.C-1 and postal receipt and acknowledgement, Ex.C-5 and Ex.C-6, respectively. The said fact has also been admitted by the accused in his statement under Section 313, Cr. P.C. Even the accused has stated that the notice was duly replied by him vide reply, Ex.D-2. It is also not disputed on behalf of the accused that the accused failed to make the payment of the cheque amounting to Rs.1,50,000/- within fifteen days after the receipt of the notice.

8. In reply, Ex.D-2, of the notice, Ex.C-4, the accused has specifically stated that the cheque amounting to Rs.1,50,000/- was issued by him for consideration of apple crop agreed to be sold by the complainant to him at the road side after plucking and packing, but he stopped the payment of the cheque for want of fulfillment of the agreement, as the complainant failed to supply the apples. The accused has not adduced any evidence in support of the fact that the payment was ever stopped by him, as a result of which the contents of the notice are false to the said effect. The accused has examined in defence one Shri Sandeep as DW-1, who is Forwarding Agent. He has specifically stated in cross-examination that the complainant agreed to sell apples to the accused in the sum of Rs.2,10,000/-, out of which Rs.50,000/- were paid by the accused through him to the complainant. The accused had issued cheque of Rs.1,50,000/- to the complainant and an amount of Rs.10,000/- was paid in cash. The apples were taken to Delhi by the accused and when he came back after three days, he disclosed that the bilty was in the name of R.R, hence the price of the apples was not paid to him. He asked him to get the cheque handed over to him. In his cross-examination, DW-1 has specifically stated that he alongwith accused visited K.G.S Commission Agent. K.G.S. Commission Agent disclosed that the sale price of the apple had been taken by the accused and Bilty was retained by them. He has specifically admitted that the accused did not pay the amount of cheque to the complainant. He has also admitted that the apple had been sold by the accused.

9. In view of the aforesaid versions, it stands fully established that the accused was under an obligation or liability to make the payment of Rs.1,50,000/- to the complainant as price of the apples sold by the complainant to the accused, but he failed to make the payment of said amount and the cheque so issued by the accused stood dishonoured for want of sufficient funds, when presented for encashment. Even as per the provisions contained under Section 139 of the Act, it has to be presumed, until and unless contrary is proved that the complainant received the cheque of the nature referred to in Section 138 for the discharge in whole or in part or any debt or other liability. The accused tried to prove non-existence of any debt or liability, but the said defence is not probablised, as a result of which it has to be concluded that the cheque, Ex.C-1, was issued by the accused in favour of the complainant in the discharge of legal liability.

10. Keeping in view the above facts and circumstances of the case, learned Courts below properly appreciated the evidence on record and rightly came to the conclusion that the accused had committed the breach of Section 138 of the Negotiable Instruments Act, making himself liable for conviction and sentence. Since there is no illegality, impropriety or incorrectness in the impugned judgments, therefore, the revision petition is dismissed being devoid of any merit. Pending application (s), if any, shall also stand (s) disposed of.

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

Rajesh Thakur and another ....Petitioners

Versus

State of Himachal Pradesh and another ....Respondents

CrMMO No. 359/2015
Reserved on: June 29, 2016
Decided on: July 13, 2016

Code of Criminal Procedure, 1973- Section 482- An FIR was registered against the petitioners for the commission of offences punishable under Section 447 of IPC and Section 3(I)(V) of Scheduled Castes & The Scheduled Tribes (Prevention of Atrocities) Act – it was pleaded that petitioners were interfering with the land of the informant- a civil suit was also instituted in which interim relief was granted- it was asserted in the FIR that petitioners were aggressive and were likely to cause interference at every stage of enjoyment of land by the informant - this leads to an inference that FIR was filed regarding the civil dispute- a civil dispute cannot be permitted to be converted into criminal offence - where the allegations were made to foist criminal liability, FIR should be quashed- petition allowed and the FIR quashed. (Para-2 to 5)

Cases referred:

Rajiv Thapar v. Madan Lal Kapoor (2013) 3 SCC 330
Rashmi Jain v. State of U.P. (2014) 13 SCC 553

For the petitioners	:	Mr. Ajay Vaidya, Advocate.
For the respondents	:	Mr. Parmod Thakur, Additional Advocate General, for respondent No. 1. Mr. Rakesh Manta, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge (oral**)**

The petitioner has sought quashing of FIR No. 0045 of 2015 dated 16.8.2015 registered against the petitioners by Police Station Shimla East under Section 447 IPC and Section 3(1)(V) of The Scheduled Castes & The Scheduled Tribes (Prevention of Atrocities) Act registered at the instance of one T.D. Negi at about 9.15 PM against the petitioners. it was alleged that he had purchased the land comprising of Khasra Nos. 689, 690, 691, 692, 694 and 695 measuring 18539 square metres. Petitioners are immediate Neighbourers of the complainant and owners of the land adjacent to the land of the complainant. It was alleged that dispute was qua Khasra No. 695 which he claimed to be his land and petitioners were interfering with the enjoyment of the land. It was also alleged that the petitioners were aggressive and were likely to cause interference at every stage of its enjoyment.

2. Petitioners have also submitted an application to the Settlement Officer for the correction of the revenue entries and Settlement Officer has directed the Naib Tehsildar (Settlement) vide letter dated 29.7.2015 to do the needful as per annexure P-2, qua Khasra No. 695. Petitioners have also instituted a suit before the learned Civil Judge (Junior Division). Petitioners have also filed an application under Order 39 Rules 1 and 2 read with Section 151 CPC for grant of interim injunction. Learned trial Court vide order dated 8.7.2015 has granted in interim relief with the following observations:

> "….. Hence, as on date prima facie case appears in favour of applicant and balance of convenience also lies in his favour and in case respondent is not restrained at this juncture, legal injuries shall be suffered to the applicant. Hence, in view the interest of justice and in order to prevent the multiplicity of litigation between the parties, both the partitas are directed to maintain status quo at Khasra No. 695 qua interference or dispossessing over use of Khasra NO. 695 as possessed by the applicant"

3. The Court has gone through the contents of the FIR. The phrase used in the FIR is that "the petitioners were aggressive and were likely to cause interference at every stage of enjoyment of the land by the complainant." It can be safely gathered from the contents of FIR that it is a civil dispute qua which suit is already pending before the Civil Judge (Junior Division), Shimla. Injunction has been granted in favour of the petitioners as reproduced herein above. Filing of FIR by the complainant against the petitioners is gross misuse of the process of law. Civil dispute can not be permitted to be converted into criminal case. Criminal cases are not shortcuts and civil disputes can not be permitted to be converted into criminal cases. Contents of FIR do not constitute any atrocity upon the complainant by the petitioners within the ambit of Section 3 (1)(V) of the Scheduled Castes & the Scheduled Tribes (Prevention of Atrocities) Act.

4. Their Lordships of Hon'ble Supreme Court in **Rajiv Thapar v. Madan Lal Kapoor** reported in (2013) 3 SCC 330 have held that following steps should be followed by the High Court to determine veracity of a prayer for quashing of proceedings raised by an accused by invoking the power vested in the High Court under Section 482 CrPC:

(i) Step one, whether the material relied upon by the accused is sound, reasonable, and indubitable, i.e., the material is of sterling and impeccable quality?

(ii) Step two, whether the material relied upon by the accused, would rule out the assertions contained in the charges levelled against the accused, i.e., the material is sufficient to reject and overrule the factual assertions contained in the complaint, i.e., the material is such, as would persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false.

(iii) Step three, whether the material relied upon by the accused, has not been refuted by the prosecution/complainant; and/or the material is such, that it cannot be justifiably refuted by the prosecution/complainant?

(iv) Step four, whether proceeding with the trial would result in an abuse of process of the court, and would not serve the ends of justice?

If the answer to all the steps is in the affirmative, judicial conscience of the High Court should persuade it to quash such criminal proceedings, in exercise of power vested in it under Section 482 of the Cr.P.C. Such exercise of power, besides doing justice to the accused, would save precious court time, which would otherwise be wasted in holding such a trial (as well as, proceedings arising therefrom) specially when, it is clear that the same would not conclude in the conviction of the accused.

5. Their Lordships of Hon'ble Supreme Court in **Rashmi Jain v. State of U.P.** reported in (2014) 13 SCC 553 have held that purely civil disputes can not be permitted to be converted into criminal offence. Their lordships have further observed that the averments made in that case were made only to foist criminal liability on the appellant by converting a purely civil

dispute into criminal act, alleged to have been committed by the appellant. The allegations were held to be absurd and outlandish on the face of it. Their lordships have held as under:

> [6] To take the complaint out of the realm of a purely civil dispute, it is maliciously alleged in the complaint that when respondent 2 approached the appellant for payment, the appellant stated as follows:
>
> > "On 22-3-2009, the applicant met the accused in the market of bazarganj saraitareen and asked for his balance amount, but the accused in the presence of two other persons flatly refused to pay the same and threatened the applicant that if he ever asked for the payment again he will be killed and stated that you don't know me. i have not paid to the high and mighty people, who are you. i had to usurp your money and i had done so. thereafter she went in a car."
> >
> > in our opinion, the aforesaid averment has been made only to foist criminal liability on the appellant by converting a purely civil dispute into criminal act, alleged to have been committed by the appellant. the allegations are absurd and outlandish on the face of it; firstly, the appellant is a lady, a widow, who was not accompanied by anybody else at the time of the alleged occurrence; secondly, she, though being a resident of delhi, misbehaved with number of high and mighty parties with whom she had earlier transacted business at moradabad. in our opinion, these are allegations which on the face of it, cannot be taken seriously by any reasonable person. the high court, in our opinion, has committed jurisdictional error in dismissing the criminal petition filed by the appellant on the ground that it involves disputed questions of fact, which can only be gone into by the trial court.
>
> [10] Again in g. Sagar Suri v. State of U.P, 2000 2 SCC 636, this court observed as follows: (scc p. 643, para 8)
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> > "8. jurisdiction under section 482 of the code has to be exercised with great care. in exercise of its jurisdiction the high court is not to examine the matter superficially. 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."
>
> [11] in Bhajan Lal Case3, this court enumerated the categories of cases, by way of illustration, wherein the high court would be justified in exercising its inherent power under section 487 CrPC or article 226 of the constitution of India to prevent abuse of the process of court or to otherwise secure the ends of justice. in para 102, these categories of cases are listed as under: (SCC pp. 378-79)
>
> > "(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.
> >
> > (2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under section 156(1) of the code except under an order of a magistrate within the purview of section 155(2) of the code.
> >
> > (3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a magistrate as contemplated under section 155(2) of the code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the code or the concerned act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the code or the concerned act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

in our opinion, the case pleaded by the petitioner, and as argued by ms Indu Malhotra, squarely falls within the ambit of propositions 5 and 7.

6. Accordingly, the present petition is allowed. FIR No. 0045 of 2015 dated 16.8.2015 registered against the petitioners by Police Station Shimla East under Section 447 IPC and Section 3(1)(V) of The Scheduled Castes & The Scheduled Tribes (Prevention of Atrocities) Act, is quashed.

Pending applications, are also disposed of.

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

Reeta Devi ..Appellant

Versus

Manohar Lal ..Respondent

FAO(HMA) No. 445/2015
Reserved on: June 29, 2016
Decided on: July 13, 2016

Hindu Marriage Act, 1955- Section 13- Marriage between parties was solemnized on 24.11.1988- husband filed a divorce petition pleading that wife had left matrimonial home without any reasonable cause and had caused cruelty to him- petition was allowed by the trial Court- marriage was dissolved on the ground of desertion – held, in appeal that wife was ousted from the matrimonial home and was maltreated by the husband- husband had contracted second marriage and had two children from the second marriage- maintenance was awarded in favour of the wife- husband had not taken any steps to bring the wife to matrimonial home- divorce petition was wrongly allowed by the trial Court- appeal allowed and judgment of trial Court set aside. (Para-12 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. Vikram Thakur, Advocate.
For the Respondent : Mr. Devender K. Sharma, Advocate.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge:

This appeal has been instituted against Judgment dated 15.9.2015 rendered by the learned Additional District Judge (II), Mandi, District Mandi, Himachal Pradesh in HMA No. 45/15/2010.

2. "Key facts" necessary for the adjudication of the present appeal are that the marriage between the parties was solemnised on 24.11.1988. Respondent has filed petition under Section 13 of the Hindu Marriage Act for dissolution of marriage before Additional District Judge (II) Mandi. According to the averments made in the petition, appellant left the matrimonial home in April, 1990 without any reasonable cause. Appellant has caused mental as well as physical cruelty to him. Petition was contested by the appellant. Factum of marriage was admitted. It was denied that the appellant has willfully deserted the respondent. Respondent started ill-treating the appellant immediately after marriage. Local Panchayat was informed. However, respondent did not mend his ways. Respondent without any reasonable cause ousted the appellant from the matrimonial home in April, 1990. She was forced to live with her parents. Learned trial Court framed issues on 23.3.2013. Petition was allowed by the learned Additional District Judge on 15.9.2015 and marriage was dissolved on the ground of desertion.

3. Mr. Vikram Thakur, Advocate, has vehemently argued that his client has never deserted the respondent. It is the respondent who has ousted her from his house in the month of April, 1990.

4. Mr. Devender K. Sharma, Advocate, has supported the judgment dated 15.9.2015.

5. I have heard the learned counsel for the appellant and also gone through the record carefully.

6. Respondent has led his evidence by way of affidavit Ext. PW-1/A. He has reiterated the averments made in the petition. According to him, appellant has left his company without his permission and without reasonable cause. She has filed false litigation for maintenance under Section 125 CrPC. He paid maintenance allowance. Appellant has deserted his company since April, 1990. In his cross-examination, he admitted that the marriage was solemnised on 24.11.1988. Appellant remained with him till April, 1990. He was paying `300/- to the appellant. He has also categorically admitted that since April, 1990, he has not filed any petition for restitution of marriage.

7. Sant Ram (PW-2) has also led evidence by filing affidavit Ext. PW-2/A. According to the averments made in the affidavit, marriage was solemnised 26 years back. Parties have no children. Respondent as well as father tried their best to bring appellant back to the house at village Kapahi but she did not come back. She was treated nicely by the respondent. In his cross-examination, he has admitted that he was closely related to the respondent. He also admitted in his cross-examination that Sarita Devi was residing with respondent. He did not know the relationship. He also admitted that the respondent has two children, one daughter and one son. According to him, appellant had deserted the respondent.

8. Inder Singh (PW-3) has led evidence by filing affidavit Ext. PW-3/A. According to him, appellant has deserted the respondent.

9. Appellant has appeared as RW-1. She has led evidence by filing affidavit Ext. RW-1/A (sic. RW-2/A). According to the averments made in the affidavit, after marriage, respondent started maltreating the appellant. Matter was even reported to the Panchayat. Respondent ousted

her from the matrimonial home without any reasonable cause and contracted second marriage with one Sarita Devi. He was residing with Sarita Devi as her husband and one son and one daughter were born out of their union. She was constrained to file petition under Section 125 CrPC. Respondent in connivance with the Secretary, Gram Panchayat got name of the appellant struck off from the Panchayat. She came to know about it. She filed an application before the Sub Divisional Magistrate. Her name was re-entered in the *Parivar* register. She denied the suggestion that her father-in-law has convened the Panchayat thrice to take her back to the matrimonial home.

10. Statement of RW-1 has been corroborated by Ram Dass (RW-2) who has led evidence by filing affidavit Ext. RW-2/A. According to the averments made in the affidavit, appellant was ousted by the respondent from matrimonial home in 1990. He contracted second marriage with one Sarita Devi and was living with her.

11. Ashwani Kumar (RW-3) deposed that he was Secretary, Gram Panchayat Sari. He had brought the record pertaining to Parivar register. Coy of Parivar register is Ext PW-3/A. Earlier name of respondent was stuck off from the Parivar register of respondent. Later on, on the order of SDM, her name was re-entered.

12. What emerges from the discussion of the evidence herein above is that the marriage between the parties was solemnised on 24.11.1988. They lived together for one year. According to the respondent, appellant has deserted him in the month of April, 1990. However, fact of the matter is that as per evidence led by the appellant, she was ousted from the matrimonial home in April, 1990. She was maltreated by the respondent. She had no choice than to live with her parents. It has also come on record that the respondent had contracted second marriage with one Sarita Devi and had two children from her. Appellant was constrained to file a petition under Section 125 CrPC seeking maintenance. Maintenance was allowed and thereafter it was also enhanced. Respondent, in his cross-examination admitted that he never filed any petition for conjugation of marriage nor taken any steps to bring back the appellant to matrimonial home. Appellant denied the suggestion that her father-in-law had convened Panchayat thrice to take her back to the matrimonial home. It has also come on record that the appellant was always ready and willing to live with the respondent. He has refused to take her back. Respondent can not be allowed to take advantage of his own wrongs, firstly by neglecting the appellant and then also contracting second marriage. He has got name of the appellant deleted from the *Parivar* register. However, same was re-entered on the basis of orders of the SDM. This fact is duly proved from Ext. RW-3/A. Learned trial Court has not discussed the evidence adduced by the parties and has abruptly come to the conclusion that the appellant has deserted the respondent. In order to prove desertion, it was necessary for the respondent to prove *animus deserendi.* Order whereby maintenance was allowed to the appellant under Section 125 CrPC is Ext. RW-2/B, whereby she was granted maintenance @ `375/- and thereafter same was enhanced as per Ext. RW-2/C dated 8.6.2010. Respondent has also not led any evidence that the appellant has caused any mental or physical cruelty to him, rather it is the respondent who has caused mental and physical cruelty to the appellant by neglecting her and ousting her from the matrimonial home in the month of April, 1990 and by also not taking any steps for bringing her back.

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 inference 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. In view of the discussion and analysis made herein above, appeal is allowed. Judgment dated 15.9.2015 rendered by the learned Additional District Judge (II), Mandi, District Mandi, Himachal Pradesh in HMA No. 45/15/2010 is set aside. Pending applications, if any, are disposed of.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Sanjay Kumar Rana .....Petitioner.

Versus

State of Himachal Pradesh & another ......Respondents.

Cr.MMO No. 129 of 2016
Reserved on: 05.07.2016
Decided on: 13.07.2016

Code of Criminal Procedure, 1973- Section 482- An FIR was registered against the petitioner for the commission of offences punishable under Sections 498-A, 323, 325 and 506 of I.P.C with the allegations that he had treated the respondent No. 2 with cruelty- present petition was filed for quashing the FIR on the ground that matter has been compromised between the parties- held, that when the matter has been settled between the parties and does not affect the party at large- proceedings can be quashed- petition allowed and the FIR quashed. (Para-7 to 11)

Cases referred:
B.S. Joshi and others vs. State of Haryana and another, (2003) 4 SCC 675
Preeti Gupta and another vs. State of Jharkhand and another, (2010) 7 SCC 667
Jitendra Raghuvanshi and others vs. Babita Raghuvanshi and another, (2013) 4 SCC 58

For the petitioner: Mr. Anuj Gupta, Advocate.
For the respondents: Mr. Virender K. Verma, Addl. AG, with Mr. Pushpinder Jaswal, Dy. AG, for respondent No. 1/State.
Mr. Manoj Thakur, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present writ petition is maintained by the petitioner under Section 482 Criminal Procedure Code (hereinafter referred to as 'Cr.P.C') for quashing FIR No. 67 of 2012, dated 25.7.2012, registered at Police Station, Chotta Shimla, District Shimla, HP, under Sections 498-A, 323, 325 and 506 of Indian Penal Code (hereinafter referred to as 'IPC'). The petitioner is also seeking quashing of subsequent Criminal Case No. 53/2 of 2012, titled State of Himachal Pradesh vs. Sanjay Kumar, which is pending adjudication before the learned Additional Chief Judicial Magistrate, Court No.1, Shimla, District Shimla, H.P.

2. Briefly stating the facts of the case, as per the petitioner, are that marriage between the petitioner and respondent No.2 (Indu Bala) had been solemnized on 6th February, 2007 in accordance with Hindu Rites and customs. Petitioner and respondent No.2 after their marriage, cohabited together at the house of the petitioner situated at Shimla. One son has been born out of the said marriage. It is averred that with the passage of time, relations between the petitioner and respondent No.2 got strained on account of their mutual differences and on account of their incompatible temperaments, which resulted in frequent quarrels. So much so, they stopped living together after July, 2012. Respondent No.2 filed FIR No.67/12 dated 25.7.2012, against the petitioner for commission of offence under Section 498-A read with section 325 of Indian Penal Code at Police Station, East, Shimla. It is further averred by the petitioner that during the course of proceedings, a compromise was arrived at between the parties, whereby the parties had agreed to amicably sort out the differences interse them especially in view of that they are the parents of a seven year old male child (namely Akash) whose welfare is paramount to both of them, they entered into a compromise (Annexure P-2). The petitioner has prayed for quashing of FIR No. 67 of 2012, dated 25.7.2012, registered at Police Station Chotta Shimla, District Shimla, H.P. under Section 498-A read with section 325 of Indian Penal Code and pending Criminal Case No.53/2 of 2012, titled State of H.P. vs. Sanjay Kumar, before the leaned Additional Chief Judicial Magistrate, Court No.1, Shimla.

3. Reply to the petition has been filed by respondent No. 1, wherein it is contended that Section 498-A IPC, is non compoundable and the petitioner has other alternative remedies and instead of approaching this Court, the petitioner should have approached the learned trial Court under Section 321, Cr. P.C.

4. I have heard the learned counsel for the petitioner as well as learned Additional Advocate General for respondent No. 1/State and have also gone through the record carefully.

5. Learned counsel for the petitioner has argued that as the parties have compromised the matter, vide Compromise Deed (Annexure P-3), no purpose will be served by keeping the proceedings against the petitioner and the FIR/Challan pending before the Court of learned Additional Chief Judicial Magistrate, Court No.1, Shimla, titled State of H.P vs. Sanjay Kumar and the same be quashed and set aside.

6. On the other hand, learned Additional Advocate General has argued that the offence is non compoundable, so the petition be dismissed.

7. Their Lordships of the Hon'ble Supreme Court ***B.S. Joshi and others*** vs. ***State of Haryana and another***, (2003) 4 SCC 675, have held that if for the purpose of securing the ends of justice, quashing of FIR becomes necessary, section 320 would not be a bar to the exercise of power of quashing. It is well settled that the powers under section 482 have no limits. Of course, where there is more power, it becomes necessary to exercise utmost care and caution while invoking such powers. Their Lordships have held as under:

> **[6] In Pepsi Food Ltd. and another v. Special Judicial Magistrate and others ((1998) 5 SCC 749), this Court with reference to Bhajan Lal's case observed that the guidelines laid therein as to where the Court will exercise jurisdiction under Section 482 of the Code could not be inflexible or laying rigid formulae to be followed by the Courts. Exercise of such power would depend upon the facts and circumstances of each case but with the sole purpose to prevent abuse of the process of any Court or otherwise to secure the ends of justice. It is well settled that these powers have no limits. Of course, where there is more power, it becomes necessary to exercise utmost care and caution while invoking such powers.**
>
> **[8] It is, thus, clear that Madhu Limaye's case does not lay down any general proposition limiting power of quashing the criminal proceedings or FIR or complaint as vested in Section 482 of the Code or extraordinary power under Article 226 of the Constitution of India. We are, therefore, of the view that if for the purpose of securing the ends of justice, quashing of FIR becomes necessary, Section 320 would not be a bar to the exercise of power of quashing. It is, however, a different matter depending upon the facts and circumstances of each case whether to exercise or not such a power.**
>
> **[15] In view of the above discussion, we hold that the High Court in exercise of its inherent powers can quash criminal proceedings or FIR or complaint and Section 320 of the Code does not limit or affect the powers under Section 482 of the Code.**

8. Their Lordships of the Hon'ble Supreme Court ***in Preeti Gupta and another*** vs. ***State of Jharkhand and another***, (2010) 7 SCC 667, have held that the ultimate object of justice is to find out the truth and punish the guilty and protect the innocent. The tendency of implicating the husband and all his immediate relations is also not uncommon. At times, even after the conclusion of the criminal trial, it is difficult to ascertain the real truth. Experience reveals that long and protracted criminal trials lead to rancour, acrimony and bitterness in the relationship amongst the parties. The criminal trials lead to immense sufferings for all concerned. Their Lordships have further held that permitting complainant to pursue complaint would be abuse of process of law and the complaint against the appellants was quashed. Their Lordships have held as under:

> **"[27] A three-Judge Bench (of which one of us, Bhandari, J. was the author of the judgment) of this Court in Inder Mohan Goswami and Another v. State of Uttaranchal & Others, 2007 12 SCC 1 comprehensively examined the legal position. The court came to a definite conclusion and the relevant**

observations of the court are reproduced in para 24 of the said judgment as under:-

"Inherent powers under section 482 Cr.P.C. though wide have to be exercised sparingly, carefully and with great caution and only when such exercise is justified by the tests specifically laid down in this section itself. Authority of the court exists for the advancement of justice. If any abuse of the process leading to injustice is brought to the notice of the court, then the Court would be justified in preventing injustice by invoking inherent powers in absence of specific provisions in the Statute."

[28] We have very carefully considered the averments of the complaint and the statements of all the witnesses recorded at the time of the filing of the complaint. There are no specific allegations against the appellants in the complaint and none of the witnesses have alleged any role of both the appellants.

[35] The ultimate object of justice is to find out the truth and punish the guilty and protect the innocent. To find out the truth is a herculean task in majority of these complaints. The tendency of implicating husband and all his immediate relations is also not uncommon. At times, even after the conclusion of criminal trial, it is difficult to ascertain the real truth. The courts have to be extremely careful and cautious in dealing with these complaints and must take pragmatic realities into consideration while dealing with matrimonial cases. The allegations of harassment of husband's close relations who had been living in different cities and never visited or rarely visited the place where the complainant resided would have an entirely different complexion. The allegations of the complaint are required to be scrutinized with great care and circumspection.

36. Experience reveals that long and protracted criminal trials lead to rancour, acrimony and bitterness in the relationship amongst the parties. It is also a matter of common knowledge that in cases filed by the complainant if the husband or the husband's relations had to remain in jail even for a few days, it would ruin the chances of amicable settlement altogether. The process of suffering is extremely long and painful.

[38] The criminal trials lead to immense sufferings for all concerned. Even ultimate acquittal in the trial may also not be able to wipe out the deep scars of suffering of ignominy. Unfortunately a large number of these complaints have not only flooded the courts but also have led to enormous social unrest affecting peace, harmony and happiness of the society. It is high time that the legislature must take into consideration the pragmatic realities and make suitable changes in the existing law. It is imperative for the legislature to take into consideration the informed public opinion and the pragmatic realities in consideration and make necessary changes in the relevant provisions of law. We direct the Registry to send a copy of this judgment to the Law Commission and to the Union Law Secretary, Government of India who may place it before the Hon'ble Minister for Law & Justice to take appropriate steps in the larger interest of the society."

9. Their Lordships of the Hon'ble Supreme Court in ***Jitendra Raghuvanshi and others*** vs. ***Babita Raghuvanshi and another,*** (2013) 4 SCC 58, have held that criminal proceedings or FIR or complaint can be quashed under section 482 Cr.P.C. in appropriate cases in order to meet ends of justice. Even in non-compoundable offences pertaining to matrimonial disputes, if court is satisfied that parties have settled the disputes amicably and without any pressure, then for purpose of securing ends of justice, FIR or complaint or subsequent criminal proceedings in respect of offences can be quashed. Their Lordships have held as under:

"[13] As stated earlier, it is not in dispute that after filing of a complaint in respect of the offences punishable under Sections 498A and 406 of IPC, the parties, in the instant case, arrived at a mutual settlement and the complainant also has sworn an affidavit supporting the stand of the appellants. That was the position before the trial Court as well as before the High Court in a petition filed under Section 482 of the Code. A perusal of the impugned order of the High Court shows that because the mutual settlement arrived at between the parties relate to non-compoundable offence, the court proceeded on a wrong premise that it cannot be compounded and dismissed the petition filed under Section 482. A perusal of the petition before the High Court shows that the application filed by the appellants was not for compounding of non-compoundable offences but for the purpose of quashing the criminal proceedings.

[14] The inherent powers of the High Court under Section 482 of the Code are wide and unfettered. In B.S. Joshi , this Court has upheld the powers of the High Court under Section 482 to quash criminal proceedings where dispute is of a private nature and a compromise is entered into between the parties who are willing to settle their differences amicably. We are satisfied that the said decision is directly applicable to the case on hand and the High Court ought to have quashed the criminal proceedings by accepting the settlement arrived at.

[15] In our view, it is the duty of the courts to encourage genuine settlements of matrimonial disputes, particularly, when the same are on considerable increase. Even if the offences are non-compoundable, if they relate to matrimonial disputes and the court is satisfied that the parties have settled the same amicably and without any pressure, we hold that for the purpose of securing ends of justice, Section 320 of the Code would not be a bar to the exercise of power of quashing of FIR, complaint or the subsequent criminal proceedings.

[16] There has been an outburst of matrimonial disputes in recent times. The institution of marriage occupies an important place and it has an important role to play in the society. Therefore, every effort should be made in the interest of the individuals in order to enable them to settle down in life and live peacefully. If the parties ponder over their defaults and terminate their disputes amicably by mutual agreement instead of fighting it out in a court of law, in order to do complete justice in the matrimonial matters, the courts should be less hesitant in exercising its extraordinary jurisdiction. It is trite to state that the power under Section 482 should be exercised sparingly and with circumspection only when the court is convinced, on the basis of material on record, that allowing the proceedings to continue would be an abuse of the process of the court or that the ends of justice require that the proceedings ought to be quashed. We also make it clear that exercise of such power would depend upon the facts and circumstances of each case and it has to be exercised in appropriate cases in order to do real and substantial justice for the administration of which alone the courts exist. It is the duty of the courts to encourage genuine settlements of matrimonial disputes and Section 482 of the Code enables the High Court and Article 142 of the Constitution enables this Court to pass such orders.

[17] In the light of the above discussion, we hold that the High Court in exercise of its inherent powers can quash the criminal proceedings or FIR or complaint in appropriate cases in order to meet the ends of justice and Section 320 of the Code does not limit or affect the powers of the High Court under Section 482 of the Code. Under these circumstances, we set aside the

impugned judgment of the High Court dated 04.07.2012 passed in M.C.R.C. No. 2877 of 2012 and quash the proceedings in Criminal Case No. 4166 of 2011 pending on the file of Judicial Magistrate Class-I, Indore.”

10. Thus, taking into consideration the law as discussed hereinabove, I find that the interest of justice will be met, in case, the proceedings are quashed, as the parties have already compromised the matter which is placed on record.

11. Accordingly, taking holistic view of the matter and looking into all attending facts and circumstances, I find this case to be a fit case to exercise powers under Section 482 of the Code and accordingly FIR No. 67/2012, dated 25.7.2012, under Section 498-A, 323, 325 and 506 of the Indian Penal Code, registered at Police Station, Chotta Shimla, District Shimla, is ordered to be quashed. Since FIR No.67/2012, dated 25.7.2012, under Section 498-A, 323, 325 and 506 of the Indian Penal Code, registered at Police Station, Chotta Shimla, District Shimla, has been quashed, consequent proceedings/Challan pending before the learned Additional Chief Judicial Magistrate, Court No.1, Shimla, H.P. against the petitioner, are thereby rendered infructuous. However, the same are expressly quashed so as to obviate any confusion.

12. The petition stands allowed in the aforesaid terms.

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Before HON’BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON’BLE MR. JUSTICE SANDEEP SHARMA, J.

Sant Ram & another ….Petitioners.
Versus
State of H.P. & others …Respondents.

CWP No 662 of 2014
Judgment Reserved on :29.06.2016.
Date of Decision : 13th July, 2016.

Constitution of India, 1950- Article 226- Respondent No. 4 acquired huge chunk of land belonging to private land owners as well as the Government in the year, 2005- amount of compensation was deposited by respondent No. 4- petitioners claimed that they are not only entitled to compensation but also to resettlement according to the Scheme- they further claimed compensation and resettlement under the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013- respondents contended that land was acquired as per the provisions of the Act applicable at the time of acquisition – land of choice could not be given to the petitioner and compensation of Rs. 11 lacs was paid to the oustees- held, that petitioners are part of joint family headed by ‘B’ who had received Rs. 11 lacs under the Scheme and Rs. 83,16,551/- as compensation - relevant date for determining the family is the date of notification issued under Section 4 of the Act- land was acquired in the year 2005 and the family of the petitioners was recorded separately w.e.f. 5.11.2006 till date- petitioners were residing with ‘B’ to whom compensation was paid- petition dismissed. (Para-14 to 20)

For the Petitioners	:	Mr. Virender Thakur, Advocate.
For the Respondents	:	Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan, Additional Advocate General and Mr. Kush Sharma, Deputy Advocate General, for respondents No. 1 to 3.
		Mr. G.D.Verma, Senior Advocate, with Mr. B.C.Verma, Advocate, for respondent No.4.
		Mr. Abhilasha Kaundal, Advocate, for respondent No.5.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge

By way of present petition the petitioners have prayed for the following reliefs:-

"(i) **That the respondents may very kindly be directed to implement the scheme of Rehabilitation and Resettlement of the Oustees of the JAYPEE Himachal Cement Project (Annexure P-1) in favour of the petitioners immediately.**

(ii) **That the respondents may very kindly be directed not to force the petitioners to vacate their houses till the implementation of the Scheme**

(iii) That the respondents may further be directed not to use any undue or unlawful force against the petitioners for vacating their houses till the implementation of the Scheme (Annexure P-1).

(iv) That the respondents may kindly be burdened with costs.

(v) That the entire record of the case may kindly be summoned.

Or

Such other orders which this Hon'ble Court deems fit and proper in the facts and circumstances of the case may kindly be passed in favour of the petitioner and against the respondents."

2. Briefly stated facts as emerged from the record are that respondent No.4, Jaypee Himachal Cement Project*(for short 'JHCP')* solely with a view to establish its cement plant at village Baga, Tehsil Arki, District Solan, Himachal Pradesh, acquired huge chunk of land belonging to private land owners as well as the Government in the year, 2005. The land acquisition proceedings were started in the year, 2005 and thereafter Land Acquisition Collector, Arki passed award with respect to acquired land on 10.1.2008 vide Award No.1/2008 and in compliance thereof, amount of compensation was deposited by the aforesaid 'JHCP' with the Land Acquisition Collector, Arki for disbursement to the interest holders.

3. Record further reveals that apart from the other villages, land of three villages i.e Baga, Samtyari, and Sehnali were also acquired for the purpose of mining etc. by the aforesaid 'JHCP' for the establishment/ construction of cement plant. Petitioners in their petition have averred that since their considerable land and houses were acquired for the mining purposes by the aforesaid 'JHCP' in village Samtyari, they were entitled to compensation as well as resettlement in terms of Scheme for the Rehabilitation and Resettlement of the Oustees (for short "Scheme") of the 'JHCP', formulated by the Respondent-State at the time of acquisition of the land of the villagers. Petitioners further averred that despite there being elapse of more than seven years after the acquisition of land and establishment of cement plant, respondents have not granted any benefit to them in terms of the aforesaid Scheme. It is also averred that respondent-State had framed the aforesaid Scheme and as such, scheme being mandatory in nature was required to be given effect by the respondents but despite several requests, no steps whatsoever, have been taken by the respondents to re-settle and rehabilitate the oustees and aggrieved families, whose land and houses were acquired for the construction of the "JHCP". Petitioners have also placed on record the copy of scheme (**Annexure P-1**).

4. The petitioners in paragraph 5 of the petition have stated that under the scheme a grant of Rs.11,00,000/- was to be granted to the oustees or to the aggrieved families but till date no amount, as referred above, has been granted to the petitioners despite several requests. It is also averred that they have been continuously visiting the office of respondents No.3 and 4 for the grant of benefit to them in terms of the Relief & Rehabilitation Policy but no action is being taken by them. Petitioners with a view to substantiate their claim that their houses and properties stand acquired by the respondents for the construction of "JHCP" have also placed on

record copies of jamabandi (**Annexure P-2**), Pariwar Register (**Annexure P-3**) and certificate issued by the Cooperative Society of village Kandhar (**Annexure P-4**). Petitioners have also stated in their petition that bare perusal of Annexures P-3 and P-4 demonstrate that families of the petitioners are living separately and they are entitled for rehabilitation grant under the scheme as framed by the State Government in its independent capacity. At this stage, it may be pointed out that both the petitioners are brothers and members of one family. Petitioners further stated that the scheme formulated by the respondents was to Rehabilitate and resettle the ousted people and affected families but respondents have miserably failed to discharge their lawful duties to implement this scheme, which is mandatory in nature.

5. Petitioners have also averred in the petition that they are also entitled to resettlement in terms of Act, namely, Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013. As per petitioners, it is/was mandatory upon the authorities to frame Rehabilitation Scheme for affected persons before acquisition of any land. The petitioners have set up case that since their land as well as houses have been acquired for the construction of "JHCP, they are entitled for resettlement in terms of the Policy. Petitioners also stated that they are living separately with their families and as such, respondents cannot adopt pick and choose method while granting rehabilitation grant under the Scheme. The Petitioners have also stated that since their houses alongwith land have been acquired by the 'JHCP for the purpose of construction, it is the duty of the State to provide houses to the affected families under the scheme. The petitioners have also submitted that since they are presently residing alongwith their families in the houses, respondents cannot throw them out of their houses until they are resettled in term of the scheme of Rehabilitation/ policy framed at the time of acquisition.

6. Since the petitioners in the present case were apprehending the eviction orders from the respondents, they approached this Court by way of instant writ petition seeking relief as have been reproduced hereinabove. This Court vide order dated 31.1.2014, while issuing notices to the respondents, passed following order:-

> **"In the meanwhile, there shall be a direction to the respondents to issue a week's prior notice to the petitioners, in the event of their eviction from the acquired property is required."**

7. Respondents pursuant to notices issued by this Court, filed detailed reply to the averments contained in the writ petition. Respondents No. 1 to 4 have specifically taken objection of delay and latches. Respondents have stated that the land of the petitioners and their brother Sh. Babu Ram stands acquired, as per the provision prevalent at that time, and award thereof was passed on 10.1.2008 i.e. **Annexure R-4/A**, whereby land and houses of the petitioners stand acquired. As per respondents, since the houses and land of the petitioners and their brother Sh. Babu Ram were joint and moreover the acquired land was in joint khata of Sh. Dharam Pal, Sh. Sant Ram and their brother Sh.Babu Ram alongwith their mother Smt. Premi Devi, Smt.Sevti Devi and Smt. Lachhmi both daughters of Sh. Gandhi and as such, there was no question, whatsoever, to grant separate compensation, if any, to each of the petitioners. Respondents with a view to substantiate their contention that the compensation stands paid to the petitioners according to their respective shares in terms of the award passed by Land Acquisition Collector Arki on 2.2.2008 have also placed on record, the copy of voucher, whereby amount of compensation was received by the petitioners i.e. **Annexure R-4/3.** It has been specifically stated by respondents No. 1 to 3 that family of the petitioners was under the headship of their brother Sh.Babu Ram and as such, benefit under the Scheme could only be given to the head of the family and as such, Sh. Babu Ram brother of the petitioners was paid an amount of Rs.11,00,000/- as grant under the Scheme.

8. Respondents also stated in their reply that Scheme has been strictly enforced by them and due and admissible compensation as well as other relief, as envisaged under the Scheme, has been given to all the affected parties. As per respondents, the definition of family

given under the Scheme includes brothers and sisters living jointly as per entries of Panchayat Pariwar Register as on the date of issuance of Notification issued under Section 4 of the Land Acquisition Act (for short "Act"). In the present case Notification under Section 4 of the Act was issued on 12.8.2015 i.e. **Annexure-4/4,** the copy of Pariwar Register of the family of the petitioners as it existed in the Pariwar Register of Gram Panchayat, Mangal on 16.5.2006 was taken into consideration while extending the benefit under the Scheme referred hereinabove.

9. It also emerge from the reply filed by the respondents that despite their being best efforts, land of the choice of the interest holders could not be given to the affected families and as such, it was decided that a sum of Rs.11,00,000/- would be paid to the oustees as full and final settlement. Accordingly, in terms of conscious decision taken by the concerned authorities, and an amount of Rs.7,72,000/-, out of Rs.11,00,000/-, was forwarded to the Tehsildar, Arki, to disburse the same, as Rehabilitation and Resettlement grant to Sh. Babu Ram, the brother of the petitioners, a copy of receipt showing that the amount was received by Sh.Babu Ram has been made available on record as **Annexure R-6**. It also emerges from the record that the rest of the amount i.e. Rs.3,28,000/-, under the Scheme, was paid in advance by respondent No.4 to Sh. Babu Ram, brother of the petitioners vide letter dated 3rd June, 2010 (**Annexure R-7**). Respondents with a view to refute the claim put forth by the petitioners (**Annexure P-3)** that he being a separate family is entitled for compensation in its individual capacity, have stated in their reply that at the time of issuance of Notification under Section 4 of the Act on 12.8.2005, the family of the petitioners was joint along with their elder brother Sh. Babu Ram and as such, they were rightly granted compensation to the tune of Rs.11,00,000/- as one unit of the family. Respondents also refuted the contention of the petitioners with regard to existence of separate Ration card got prepared by them on the basis of the entries in the Panchayat Pariwar Register. Respondents reiterated that since notification was issued on 12.8.2005 and compensation, in terms of the Scheme, was granted to the petitioners in term of that notification, no benefit, if any, could be granted to the petitioners on the strength of entries made in the Panchayat Pariwar Register as well as Ration card for the year, 2005-06. As per respondents, under the scheme, no authenticity is attached to the entries in the register of ration card or the records of the Co-operative Society, rather respondents have refuted the claim of the petitioners that they were falling under BPL Category, because as per own version of the petitioners, Dharam Pal received compensation of Rs.10,00,000/-. Similarly, Sh. Sant Ram also received compensation more than Rs.10,00,000/- on account of acquisition of their land.

10. Respondents in para-9 of their reply specifically stated that they had called a meeting to settle the dispute between respondent No.4 and the petitioners vide communication dated 27th December, 2013 and on spot possession of land of the petitioners as acquired under Award No. 1/2008, was handed over to "JHCP" on 4.4.2008. It also emerge from the reply filed by the respondents that the petitioners were paid compensation to the tune of Rs.11,00,000/- on account of house benefits under the Scheme. Similarly respondent No.4 refuted the claim of the petitioners by stating that the land of the petitioners along with their brother Sh.Babu Ram was acquired on the basis of acquisition proceedings initiated on 12.8.2005 and on the basis of which award was made on 10.1.2008 by the Land Acquisition Collector and the amount of compensation was paid to them. Respondent No.4, solely with a view to substantiate their claim that along with the land of the petitioners their houses were also acquired, a copy of award Annexure R-4/1 placed on record, which suggests that houses of the petitioners and their brother Sh.Babu Ram were joint, whereas acquired land was in joint khata of Sh. Dharam Pal, Sant Ram and their brother Sh.Babu Ram alongwith their mother Smt. Premi Devi alongwith Smt. Sevti Devi, Lachhmi Devi daughter of Sh.Gandhi and the amount of compensation was paid to them according to their respective shares by the Land Acquisition Collector, Arki on 2.2.2008. It also emerges from the reply filed by respondent No.4 that the petitioners, apart from receiving a total sum of Rs.11,00,000/- on account of benefit under the scheme, have also received an amount of Rs.83,16,551/- on account of compensation in lieu of acquisition of their land.

11. Learned counsel representing the petitioners, vehemently argued that the respondent-State has miserably failed to give effect to the scheme and no steps, whatsoever, have been taken by the respondents to rehabilitate and resettle the oustees of 'JHCP' even after seven years of the acquisition of the land. He forcibly contended that since land of the petitioners as well as houses were acquired by the respondents for construction of cement plant, the respondents were bound to provide alternate accommodation before getting them evicted from the houses acquired by the 'JHCP' for the construction of cement plant. During arguments, he invited the attention of this Court to the scheme i.e Annexure P-1 to demonstrate that the petitioners, apart from compensation in lieu of acquisition of land, were also entitled to alternative accommodation in lieu of the house acquired along with land. He also made this Court to travel through Annexures P-2 and P-3 to demonstrate that the petitioners were the owners in possession of the land acquired by respondent No. 4. It is contended that Annexure P-3 clearly suggests that petitioner, namely, Sant Ram lives separately from Sh. Babu Ram and as such, Sant Ram, in his independent capacity is/ was entitled to the benefit, as envisaged under the scheme.

12. On the other hand, Shri Shrawan Dogra, learned Advocate General and learned Senior Advocates, representing the respondents, vehemently opposed the aforesaid submissions having been made on behalf of the petitioners and stated that due and admissible compensation, in terms of the scheme being relied upon by the petitioners, stands duly paid to the petitioners and as such, nothing more can be claimed by the petitioners. It is contended on behalf of the respondent-State that the Scheme for the oustees of the 'JHCP' has been given full effect and in terms of the same, due and admissible benefit have been extended to each affected persons and as such, contention put forth by the petitioners that till date no steps, whatsoever, have been taken by the respondent to give effect to the scheme deserves outright rejection. Respondents, with a view to substantiate their statements, invited the attention of this Court to the reply filed by the respondents, duly supported with an affidavit and annexures, wherein it has been specifically mentioned that at the time of starting of acquisition proceedings and passing of award family of the petitioners was under the headship of their brother Sh. Babu Ram and as such, benefits under the scheme were given to the head of the family. Sh. Babu Ram brother of the petitioner being head of the family received total sum of Rs.11,00,000/-under the rehabilitation scheme. Respondents also invited the attention of this Court to the award passed by the Land Acquisition Collector, whereby present petitioners alongwith other family members namely Sh. Sant Ram, Dharam Pal, Sh. Babu Ram and Smt. Premi Devi received an amount of Rs.83,16,551/- as compensation in lieu of their land acquired for the purpose of construction of "JHCP". It is also contended on behalf of the respondents that no claim, if any, could be granted to the petitioners on the strength of Annexures P-3 and P-4 because as per Annexure P-3, petitioners are members of the family alongwith other family members namely Sh. Babu Ram, Dharam Pal, Sh. Sant Ram and Smt. Premi Devi. As far as Annexure P-3 is concerned, respondents submitted that entry in the Pariwar Register showing separation of the family has been made on 5.11.2006 and as such, no benefit, if any, can be granted in terms of rehabilitation policy, which was admittedly framed at the time of acquisition of land in the year, 2005. In the aforesaid background, respondents prayed for dismissal of the petition.

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

14. Careful perusal of the records made available to this Court as well as submissions having been made on behalf of the parties clearly suggests that by way of present petition, petitioners have made an attempt to demonstrate that they being an independent family on the strength of Annexure P-3 are/were entitled to compensation in terms of the scheme of the 'JHCP'. It also appears that apprehending eviction from the houses, which admittedly stand acquired alongwith the land, the petitioners approached this Court by way of writ petition, wherein prayer is made to implement the scheme of "JHCP. But this Court after perusing the pleadings available on record and hearing the submissions having been made on behalf of the

respondents is unable to accept the contention put forth by the petitioners. The record or pleadings do disclose that the petitioners being part of the joint family headed by Sh.Babu Ram have already received an amount of Rs.11,00,000/- under the scheme apart from an amount of Rs.83,16,551/- received on account of compensation in lieu of the land acquired by the respondents for the purpose of construction of the "JHCP".

15. Perusal of Annexure P-1, scheme for the Rehabilitation and Resettlement of the oustees of the Jaypee Himachal Cement Project (A unit of Jai prakash Associated Limited) clearly provides the definition of family which is reproduced as under:-

> **" b. Family" means husband/wife, who is entered as owner/co-owner of land in the Revenue Record, their children including step or adopted children and includes his/her parents and those brothers and sisters who are living jointly with him/her as per entries of Panchayat Pariwar Register as on the date of Notification under Section 4 of the Land Acquisition Act, 1894."**

16. Perusal of clause (b) of the scheme clearly suggests that family means husband/wife, who is entered as owner/co-owner of land in the Revenue Record, their children including step or adopted children and includes his/ her parents and those brothers and sisters, who are living jointly with him as per entries of Panchayat Pariwar Register as on the date of issuance of Notification under Section 4 of Act, 1894. Aforesaid provision leaves no doubt in the mind of this Court that relevant date for determining the family for the grant of benefit under the Scheme for Rehabilitation and Resettlement of the Oustees is the date of notification issued under Section 4 of the Act.

17. Though, perusal of clause (b), wherein family has been defined suggest that members of the family, who have been entered separately as a different family in the Pariwar Register could be termed as a separate family but for grant of benefit under the above referred scheme, one need to establish that they were entered as a separate family in the Panchayat Pariwar Register on the date of notification issued under Section 4 of the Act, 1894.

18. In the present case, admittedly land was acquired in the year, 2005 and compensation as awarded by Land Acquisition Collector was paid to the affected parties including the petitioners. Annexure P-3, which has been heavily relied upon by the petitioners clearly suggest that the family of the petitioners namely Sant Ram has been recorded separately in the Pariwar Register w.e.f. 5.11.2006, meaning thereby, at the time of issuance of notification under Section 4 of Act, family of the petitioner Sant Ram was not recorded as separate family in the Pariwar register as required under clause (b) of the scheme referred hereinabove.

19. Perusal of Annexure P-3 clearly suggests that till 5.11.2006, Sant Ram was residing along with other brother, namely, Sh. Babu Ram and as such, claim put forth by the petitioners that they being independent family are also entitled to the benefit under the scheme formulated for the benefit of Rehabilitation and Resettlement of the Oustees of the 'JHCP' deserves to be rejected out rightly being baseless. Rather, perusal of Annexure P-2, jamabandi for the year, 2000-01 clearly suggests that petitioners Sant Ram and Dharam Pal have been recorded as joint owners with Sh. Babu Ram, who has admittedly being head of the family received an amount of Rs.11,00,000/- under the Scheme apart from an amount of Rs.83,61,551/- on account of compensation in lieu of the land acquired for the purpose of construction of "JHCP". Hence, in view of the above, this Court sees no force and merit in the contention of the petitioners that they being an independent family are entitled to the benefit of the scheme. Moreover, it clearly emerge from the reply filed by the respondents that an amount of Rs.11,00,000/- was paid to the petitioners under the scheme in lieu of the houses acquired by the respondents for the construction of "JHCP". It has specifically come in the reply of respondent No.4 that since despite best efforts they were unable to provide suitable land to the petitioners as well as other similarly situate person, a conscious decision was taken to make onetime payment to the affected persons in lieu of their houses acquired along with the land, accordingly, an

amount of Rs.11,00,000/- was awarded and paid to the family of the petitioners as well as other similarly situate person.

20. Consequently, in view of above discussion, this Court sees no merit in the contentions put forth by the petitioners in their petition, rather after perusing the averments contained in the petition, this Court is constrained to observe that this is sheer abuses of process of the law where petitioners by filing instant petition have made an attempt to procure relief to which they were/are not entitled at all. The another contention put forth by the petitioners that no prior notice was issued to them by the respondents before getting them evicted from their houses cannot be considered at this stage by this Court after seeing the specific reply filed by the respondents, wherein it has been specifically mentioned that the possession of the land acquired stands delivered to the respondent company for the construction of cement plant.

Hence, this Court does not see any merit in the petition and the same is accordingly dismissed. Pending application(s), if any, shall also stands(s) disposed of.

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

State of H.P. .....Appellant.
Versus
Harji & others. .....Respondents.

Cr. Appeal No. 106 of 2007
Decided on : 13.7.2016

Indian Forest Act, 1927- Sections 32 and 33- Forest Guard found that one second class kail tree was cut and the accused persons were converting the tree into logs- the accused were tried and acquitted by the Trial Court- held in appeal, PW-1 had admitted that a criminal case was pending between him and the accused which shows animosity on his part- iron saw and two axes were not seized by the Forest Guard- testimony of PW-4 was contradictory - prosecution version was not proved and trial court had rightly acquitted the accused - appeal dismissed.
(Para 9-11)

For the Appellant: Mr. Vivek Singh Attri, Deputy Advocate General.
For the Respondents: Mr. H.R Sidhu, Advocate vice counsel

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant appeal stands directed by the State of Himachal Pradesh against the impugned judgment of 29.12.2006 rendered by the learned Sub Divisional Judicial Magistrate, Chachiot at Gohar, District Mandi, H.P., in Indian Forest Act No. 280-I/2004, whereby the respondents (for short 'accused') stood acquitted by the learned trial Court for the offences charged.

2. Facts in brief are that on 26.11.2003 Sh. Chet Singh, Forest Guard was on patrolling duty in Kliperi beat. He found that one second class kail tree was cut and the accused persons were converting the said tree into logs. The felling and converting of this tree into logs was witnessed by Tej Ram who was collecting dry fallen wood in the forest. Sh. Chet Singh, the forest guard prepared the damage report Ex.PW-1/A. The accused persons refused to sign the damage report. Tej Ram put his signatures to the damage report and iqbalnama. The timber were handed over on supardari to one Mr. Maghu Ram, Forest worker vide memo Ex. PW-1/C. The logs were then converted into sleepers and were carried out and stored in the depot

concerned. Damage report was entered by the Range Officer Thachi. After completing all codal formalities and on conclusion of the investigation into the offence, allegedly committed by the accused challan was prepared and filed in the Court.

3. Notice of accusation stood put by the learned trial Court to the accused for theirs committing offences punishable under Sections 32 and 33 of the Indian Forest Act read with Section 34 of the Indian Penal Code, to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 7 witnesses. On closure of prosecution evidence, the statements of the accused under Section 313 of the Code of Criminal Procedure were recorded in which they pleaded innocence and claimed false implication. However, they chose to lead evidence in defence.

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

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

7. The learned vice counsel appearing for the respondents/accused has with considerable force and vigor contended qua the findings of acquittal recorded by the Court below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

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

9. PW-1 Chet Singh, the forest guard of the beat concerned while holding patrolling on 26.11.2003 at about 11.00 a.m. at Binglao DPF he noticed thereat of the accused after felling a kail tree theirs converting the same into logs. In respect thereof he prepared a damage report comprised in Ex. PW-1/A which stood signed by an independent witness namely Tej Ram. The seized timber was handed over on supardari under Memo comprised in Ex.PW-1/C to one Maghu Ram. The veracity of the depositions of PWs 1 and 4 witnesses to PW-1/A stood undermined by the learned trial Court on account of both holding animosity towards the accused. The inference of animosity reared by PW-1 against the accused stood aroused from an admission made by him of his instituting a case against the accused qua theirs subjecting him to beatings, case whereof he admits to be pending before the Court concerned. Even if an inference of the aforesaid animosity nursed by PW-1 towards the accused may not be sufficient to discard his testimony yet with an omission on his part to seize the iron saw and two axes, possession whereof he concedes to be held by the accused at the relevant time does give immense vigor to an inference of his making a false case against the accused. Also with both PW-2 and PW-5 wheretowhom PW-1 in his deposition ascribes a role of theirs visiting the relevant site of occurrence belying the pronouncement aforesaid testified by PW-1 amplifyingly accentuates an inference of PW-1 concocting the genesis of the prosecution case.

10. Be that as it may the testimony of PW-4 which stood discountenanced by the learned trial Court on account of his nursing an animosity towards the accused does display of his deposing a version in improvement of the version of PW-1 qua the latter seizing form the possession of the accused, a rope, used by them for fructifying their penal misdemeanors also when the relevant rope was not produced in Court does give leverage to an inference of in PW-4 testifying qua its standing seized by PW-1 from the possession of the accused, his thereupon underlining the factum of PW-1 engineering his presence at the relevant site of occurrence. Consequently no credence is imputable to his testimony, he being an invented witness to seizure memo Ex.PW-1/A, who merely to settle his animosity with the accused, inference whereof qua his nursing an animosity towards the accused stands engendered by his conceding in his deposition of his previously deposing against the accused also of his holding no talking terms with them.

Given the imminent display of animosity standing reared by PW-1 besides by PW-4 towards the accused, animosity whereof construed in coagulation with the aforesaid contradictions occurring intra-se the testimony of PW-1 and the testimonies of PW-2 and PW-5 also given the aforesaid contradictions occurring intra-se the testimonies of PW-1 and PW-4 does give a boost to an firm conclusion of the prosecution abysmally failing to sustain its case against the accused.

11. A wholesome analysis of the evidence on record portrays that the appreciation of evidence as done by the learned trial Court does not suffer from any perversity and absurdity nor it can be said that the learned trial Court in recording findings of acquittal has committed any legal misdemeanor, in as much, as, its mis-appreciating the evidence on record or its omitting to appreciate relevant and admissible evidence. In aftermath this Court does not deem it fit and appropriate that the findings of acquittal recorded by the learned trial Court merit interference.

12. In view of the above discussion, I find no merit in this appeal, which is accordingly dismissed and the judgment of the learned trial Court is maintained and affirmed. Record of the learned trial Court be sent back forthwith.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Tej Singh …..Petitioner

Vs.

Bhakra Beas Management Board and another …..Respondents

CWP No.: 7938 of 2010
Reserved on: 1.7.2016
Date of Decision: 13 .7.2016

Constitution of India, 1950- Article 226- Father of the petitioner was serving under the respondent Board as Chowkidar- he died in harness – petitioner applied for compassionate appointment but his application was returned with the observation that compassionate appointment had been discontinued in view of new policy - held, that at the time of death there was no policy to offer compassionate appointment to the family members- petitioner pleaded that his case should be treated as special case for grant of appointment on compassionate basis- however, it was not explained as to how appointment could be granted on compassionate basis in absence of the policy - Board had provided that instead of compassionate appointment, a lump sum payment can be made to help the family- compensation was duly paid to the family of the deceased- compassionate appointment is not source of recruitment- compassionate appointment cannot be granted as a matter of right in absence of the rules- petition dismissed. (Para-7 to 13)

Cases referred:

MGB Gramin Bank vs. Chakrawarti Singh (2014) Supreme Court Cases 583
Bhawani Prasad Sonkar vs. Union of India and others, (2011) 4 Supreme Court Cases 209
Canara Bank and another vs. M. Mahesh Kumar along with connected matters, 2015(7) Supreme Court Cases 412

For the petitioner: M/s Tek Chand & K. C. Sankhyan, Advocates.
For the respondents: Mr. N.K. Sood, Senior Advocate with Mr. Hemant Sharma, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.

By way of present petition, the petitioner has prayed for following reliefs:-

"i) That the respondents may kindly be directed to relax its policy dated 21.10.2005 and offer compassionate appointment as a Class-III/IV to the petitioner

as a special case being dependent of deceased employee who was electrocuted while on duty and died on the spot.

ii) That the respondents may very kindly be directed to produce the entire record pertaining to the case of the petitioner for the kind perusal of this Hon'ble Court.

iii) Any other order/direction which this Hon'ble Court deems just and proper in the facts and circumstances of the case may also kindly be passed/issued in favour of the petitioner.

2. The case of the petitioner is that his father, Sh. Sohan Singh, was serving under the respondent-Board as regular Chowkidar. He died in harness on 14.11.2007. The deceased was the sole bread earner of the family. The petitioner being the son of the deceased applied for compassionate appointment on the prescribed proforma to the respondent-Board. However, the application was returned back with the observations that the compassionate appointment had been dis-continued in view of new policy dated 3.11.2005 having been brought in force in this regard. In these circumstances, mother of the petitioner got a legal notice issued to the respondent Board on 4.5.2009. In response to said legal notice, the respondent-Board sent its reply stating therein that the petitioner's mother was not entitled for appointment on compassionate ground on account of death of her husband as per policy decision of the board dated 3.11.2005. Thereafter, the petitioner again submitted representation on 22.8.2009 seeking compassionate appointment as a special case.

3. As per the petitioner, being the dependent of the sole bread earner, he was wrongly denied the compassionate appointment on the pretext of policy dated 21.10.2005, whereas dependents of the employees of BBMB taken from other states/Electricity Board have been exempted from the existence of the policy and they are getting compassionate appointment under the respondent-Board. It is further the case of the petitioner that he being eligible and entitled for compassionate appointment as a "special case" on account of accidental death of his father has been discriminated since the other dependents of deceased employees of the respondent-Board similarly situated as him are being treated differently and have been given appointment. It is in these circumstances, the petitioner has filed the present petition praying for the reliefs already enumerated above.

4. The respondent-Board in its reply has denied the claim of the petitioner and has stated that the respondent-Board has dis-continued its policy for grant of compassionate appointment and at the time of death of father of the petitioner, policy for compassionate appointment was not in existence in the Board, as such the petitioner was not entitled for appointment in the respondent-Board. It is further case of the respondent-Board that in place of earlier policy of compassionate appointment, an alternative policy had been adopted by the respondent-Board to compensate the family of the deceased employees. As per the alternative policy, the mother of the petitioner was paid a sum of Rs.3 lac vide cheque No.002169 dated 7.9.2009 as Solatium. In addition, as per terms of the alternative policy, mother of the petitioner was also being paid special pension regularly. It is further case of the respondent-Board that ex-gratia amount of Rs.50,000/- also stood paid to the mother of the petitioner on 13.7.2009 and an amount of Rs.89808/- was paid on account of death-cum-retirement gratuity. Thus, as per the respondent-Board, once earlier policy of compassionate appointment had been dis-continued and substituted by a new alternative policy, there cannot be any deviation from the same and the case of the petitioner cannot be considered for compassionate appointment under a policy, which is no more in vogue and has been dis-continued. On these grounds, the respondent-Board denied the case of the petitioner. It was also specifically denied that any person similarly situated as the petitioner was given appointment by the respondent-Board on compassionate basis.

5. In rejoinder, the petitioner has stated that he and his mother are ready and willing to refund Rs. 3 lac, received as Solatium, if he is offered compassionate appointment as a "special case" and the factum of having received the solatium cannot be made the ground to deny

him compassionate appointment, because his mother in fact was coerced/directed to receive the solatium vide communication dated 4.3.2009 failing which, no other payment was to be released to her. Accordingly, the petitioner reiterated his prayer that the respondent-board be directed to offer appointment to him on compassionate basis as a special case.

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

7. It is not disputed by the petitioner that on the date when his father died in harness, there was no policy in vogue in the respondent-Board to offer compassionate appointment to the family members of its deceased employees. It is also not disputed by the petitioner that the policy, which was in vogue on the relevant date, is one which is appended with the writ petition as Annexure P-4 and all the benefits which are contemplated in the said alternative policy have been conferred upon the family of the petitioner by the respondent-Board. Incidentally, in the present case, what the petitioner has prayed for is that the respondent-Board be directed to treat his case as a "Special Case" for the purpose of grant of appointment on compassionate basis. However, besides, using the words "Special Case" learned counsel for the petitioner could not elaborate as to how the case of the petitioner was a special case. Not only this, learned counsel for the petitioner also failed to point out as to how this Court can direct the respondent-Board to offer appointment to the petitioner on compassionate basis on account of the death of his father in harness in the absence of any such policy in vogue at the relevant time in the respondent-Board.

8. It is a settled law that compassionate appointment is not a source of recruitment. Further it is not the case of the petitioner that there was a policy in vogue in the respondent-Board either at the time when his father died or at the time when his application was considered by the respondent-Board, which offered compassionate appointment to the kith and kin of the deceased employee of the respondent-Board. Further perusal of Annexure P-4 demonstrates that the respondent-Board in its meeting held on 21.10.2005 decided to dis-continue the BBMB policy of providing compassionate employment to the wards/dependents of the deceased BBMB employees. It further decided to adopt its new alternative policy in lieu of compassionate employment to help the family of the deceased BBMB employee to tide over the financial crises which the family had to face due to sudden demise of the bread earner. This policy also envisaged grant of lump sum compensation i.e. solatium to the dependents of the deceased employee and a special pension equal to the last pay (basic) drawn along with dearness relief sanctioned from time to time till the date of superannuation of the deceased employees and thereafter pension as admissible in accordance with the normal family pension Rules. Clause 8 of the policy provided as under:-

> *"Members of families of deceased State Governments/State Electricity Boards/Power Utilities allocated employees shall be governed by the policy, rules/instructions of their respective parent departments of State Governments/SEBs/Power Utilities."*

9. These compensations have been duly paid to the family of the petitioner. The vires of the alternative policy of compensation brought into force by the respondent-Board has not been challenged by the petitioner. Further the petitioner has not demonstrated that any other similarly situated person has been offered compassionate appointment by the respondent-Board. Mr. Naresh Sood, learned Senior Counsel appearing for the respondent-Board has submitted that the contention of the petitioner that dependents of other persons who had died in harness were given compassionate appointment is totally baseless and incorrect as no such appointment in fact had been made by the respondent-Board.

10. The Hon'ble Supreme Court in ***MGB Gramin Bank vs. Chakrawarti Singh (2014) Supreme Court Cases 583*** has held that every appointment to public office must be made by strictly adhering to the mandatory requirements of Articles 14 and 16 of the Constitution of India and an exception by providing employment on compassionate grounds has

been carved out in order to remove the financial constraints on the bereaved family, which has lost its bread earner. It has been further held that mere death of government employee in harness does not entitle the family to claim compassionate appointment and the Court should not stretch the provision by liberal interpretation beyond permissible limits on humanitarian ground.

11. Incidentally, this law has been declared by the Hon'ble Supreme Court in those cases, where the policy for appointment on compassionate basis in lieu of the death of an employee in harness was existing. It is settled law that the appointment on compassionate ground cannot be clamed as a matter of right nor an applicant/claimant becomes entitled automatically for appointment, rather it depends on various other circumstances and the application has to be considered in accordance with the scheme.

12. The Hon'ble Supreme Court in ***Bhawani Prasad Sonkar vs. Union of India and others, (2011) 4 Supreme Court Cases 209*** has held that while considering the case for employment on compassionate ground, **it has to be borne in mind that compassionate employment cannot be made in the absence of rules or regulations issued by the government or a public authority**. This judgment has been followed by the Hon'ble Supreme Court in **Canara Bank and another vs. M. Mahesh Kumar along with connected matters, 2015(7) Supreme Court Cases 412**, and the relevant para of the same is quoted here-in-below:-

> 16. The same principle was reiterated by this Court in the case of Bhawani Prasad Sonkar vs. Union of India & Ors., (2011) 4 SCC 209, wherein it was held as under :-
>
> > 15. Now, it is well settled that compassionate employment is given solely on humanitarian grounds with the sole object to provide immediate relief to the employees family to tide over the sudden financial crisis and cannot be claimed as a matter of right. Appointment based solely on descent is inimical to our constitutional scheme, and ordinarily public employment must be strictly on the basis of open invitation of applications and comparative merit, in consonance with Articles 14 and 16 of the Constitution of India. No other mode of appointment is permissible. Nevertheless, the concept of compassionate appointment has been recognised as an exception to the general rule, carved out in the interest of justice, in certain exigencies, by way of a policy of an employer, which partakes the character of the service rules. That being so, it needs little emphasis that the scheme or the policy, as the case may be, is binding both on the employer and the employee. Being an exception, the scheme has to be strictly construed and confined only to the purpose it seeks to achieve.

13. Therefore, it is apparent from the law laid down by the Hon'ble Supreme Court in ***Bhawani Prasad Sonkar's case (supra)*** that the compassionate appointment cannot be made in the absence of rules or regulations issued by the government or public authority. In the present case, admittedly, there were no rules or regulations issued by the respondent-Board pertaining to the compassionate appointment as on the date when the father of the petitioner died in harness. That being the case, no right, leave aside legal right, accrued upon the petitioner to claim compassionate appointment on account of death of his father from the respondent-Board.

In this view of the matter, in my considered view, the case of the petitioner is totally misconceived and there is no merit in the same. Accordingly, the same is dismissed so also the pending application(s), if any. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Union of India and others .....Petitioners.

Vs.

Meenu Aggarwal ......Respondent.

CWP No.: 1114 of 2009
Reserved on: 05.07.2016
Date of Decision: 13.07.2016

Constitution of India, 1950- Article 226- Respondent/applicant was appointed as Resident Medical Officer in the Indian Institute of Advanced Study, which was a solitary post in the institution - she was confirmed as such- an Assured Career Progression Scheme was introduced by the Government of India to mitigate hardship of acute stagnation either in a cadre or in an isolated post- applicant made a representation for granting higher pay scale but representation was rejected- aggrieved from the order, an original application was filed before the Central Administrative Tribunal, which was allowed- aggrieved from the order, writ petition was filed- held, that Government of India came out with Dynamic Assured Career Progression Scheme (DACPS) which was made applicable to all Medical Officers- applicant is entitled to the benefit under DACPS as her service conditions were the same as of any medical officer serving in CHS- parent organization of the petitioners was not owned and controlled by the Union of India - the benefit cannot be denied to the respondent/applicant as she is similarly situated- petition dismissed. (Para-10 and 11)

For the petitioners: Mr. Ashok Sharma, ASGI.
For the respondent: Mr. Sanjeev Bhushan, Sr. Advocate, with Ms. Abhilasha Kaundal, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. :

By way of present writ petition, the petitioner-Union of India has challenged the order passed by learned Central Administrative Tribunal, Chandigarh Bench in OA No. 778/HP/2005 dated 30.05.2008 vide which, learned Tribunal has allowed Original Application of the present respondent and declared that applicant therein is entitled to the same benefits of time bound promotion at par with any other CHS Medical Officers on the basis of the provisions of Para 2(1) of order dated 5.4.2002 appended as Annexure A-14 with the Original Application. Learned Tribunal has further held that the benefit would be available to applicant w.e.f. 05.04.2002.

2. The case of the respondent/applicant before the learned Tribunal was that the applicant was appointed as Resident Medical Officer in the pay scale of Rs.2200-4000/-, which was a solitary post in the Indian Institute of Advanced Study vide appointment letter dated 26.05.1993. She was confirmed as such on the recommendations of the Departmental Promotion Committee w.e.f. 28.05.1995 in the pay scale of Rs.2200-4000/- (subsequently revised to Rs.8000-13500/-). The Government of India vide Office Memorandum dated 9th August, 1999 introduced an Assured Career Progression Scheme for the Central Government Civilian Employees on the basis of the recommendations of the Fifth Central Pay Commission. The said scheme was to become operational from the date of issuance of Office Memorandum, which was 09.08.1999. As per the Office Memorandum, a Departmental Screening Committee was to be constituted for the purpose of processing the cases for grant of benefits under the ACP Scheme. The same was adopted to mitigate hardship in cases of acute stagnation either in a cadre or in an

isolated post. It was mentioned in Clause 3.1 of the Office Memorandum that isolated posts in group 'A', 'B', 'C' and 'D' categories which have no promotional avenues shall also qualify for similar benefits on the pattern indicated in the Office Memorandum. In light of what was contained in the said Office Memorandum, the applicant made a representation dated 18.06.1998, wherein she prayed that she be granted the next grade of Rs.3000-4500/- pre-revised (revised to Rs.10000-15200/-). It was mentioned by her in the said representation that the employees of the Indian Institute of Advanced Study, which was an autonomous organization under the Ministry of Human Resource Development were governed by the Rules, Regulations and Pay Scales notified by the Government of India from time to time. It was further mentioned in the representation that there were only two persons in the Medical Section of the Institute and there interests were being overlooked as orders regarding medical personnel passed by the Ministry of Health and Family Welfare had gone unnoticed in the Ministry of Human Resource Development keeping in view the fact that there were very few medical professionals serving in the said Ministry which was causing unnecessary inconvenience, harassment and financial loss to the personnel of Medical Section. It was further stated in the representation that the Government of India had issued various notifications conferring benefits on its employees serving in the medical sections and one of such notification was dated 08.10.1996, which provides time bound promotions in the following manner:

		"Pre-revised	*Revised*
(i)	*Medical Officer*	Rs.*2200-4000*	Rs.*8000-13000*
(ii)	*After four years Of service (Sr. N.9)*	Rs.*3000-4500*	Rs.*10000-15200*
(iii)	*After 10 years Of service (CMO)*	Rs.*3700-5000/-*	Rs.*12000-15500"*

3. Accordingly, the applicant stated by way of the said representation that keeping in view the fact that she had completed four years of service in the Grade of her appointment, she was entitled to be conferred the higher Grade as contemplated in notification dated 08.10.1996 w.e.f. 01.01.1997. However, the representation of the applicant was not acceded to and the same was rejected vide notification dated 01.11.2000. Ministry of Health & Family Welfare, Government of India thereafter vide notification dated 5th April, 2002 accepted the recommendations of Fifth Central Pay Commission with regard to Dynamic Assured Career Progression Scheme for officers of the Central Health Services. This communication which was appended with the Original Application as Annexure A-14 contemplated as under:

> *"In the General Duty Medical Officer (GDMO) sub cadre, Medical Officer (Rs.8000-13500) will be promoted to Senior Medical Officer (Rs. 10000-15200) on completion of 4 years of regular service. Senior Medical Officer with 5 years of regular service as Senior Medical Officer will be promoted to the post of Chief Medical Officer (Rs. 12000-16500) and after completion of 4 years in Chief Medical Officer grade, officer will be promoted to the post of Chief Medical Officer (Non Functional Selection Grade) (Rs.14300-18300). Thus on completion of 13 years of regular service in the GDMO sub cadre of CHS, Officer of GDMO sub cadre will be promoted to Chief Medical Officer (Non Functional Selection Grade) (Rs.14300-18300)."*

4. Applicant made a representation for the conferment of the benefits to her under the said scheme. As no benefits were conferred upon the applicant by the respondent, in this background, she filed an Original Application praying for the following reliefs:

> *"(i) That the respondents may be directed to grant the benefit of higher pay-scale of Rs.10,000-15,200 to the applicant on completion of four years of service*

and thereafter to place her on further higher pay-scale of Rs.12,000-16,500 when it is due to the applicant.

(ii) That further directions be issued to the respondents to release all arrears in view of such fixation, alongwith interest at some nationalized bank rate.

(iii) That the respondents may be directed to produce the entire record pertaining to the case for the perusal of this Hon'ble Tribunal.

(iv) That the cost of this application may also be awarded in favour of the applicant and against the respondents throughout.

(v) That any other order or relief deemed just and proper by this Hon'ble Tribunal in the light of the facts and circumstances of the case may also be passed in favour of the applicant and against the respondents."

5. The claim of the applicant was resisted by the Union of India on the ground that no autonomous body was participating unit of Central Health Services and it was for the Ministry of Human Resources Development to decide the promotional avenues of the officer of the Indian Institute of Advanced Study, Shimla. It was further the stand of the department that Ministry of Human Resource Development vide letter dated 17th March, 2003 had made the applicant entitled to normal Assured Career Progression Scheme formulated by DOPT, which was applied to the isolated Group 'A' post and the case had been referred to Sixth Pay Commission for consideration. The contents of said notification dated 17th March, 2003 are quoted hereinbelow:

"I am directed to refer to Institute's letter No. 4(a)(44)93/Admn.F.2/14654 dated 14.1.2003 on the subject mentioned above and to say that the matter has been reconsidered in consultation with IFD and Department of Personnel & Training.

2. DOPT has advised that Ministry of Health and Family Welfare has approved the Dynamic ACP Scheme only in respect of Central Health Service for the present. Till the picture becomes clearer about application of Dynamic ACPs to holder of isolated Group 'A' Medical Doctors, there may not be any objection in extending normal ACPs to such Doctor holding isolated Group 'A' post.

3. In view of above, the Institute is advised that the incumbent may be given financial up gradation as per provision of the normal Assured Career Progression Scheme formulated by DOPT which also applies for isolated Group 'A' post."

6. Further as per the applicant, the benefit of Assured Career Progression Scheme was initially conferred by the Department of Personnel and Training vide Office Memorandum dated 9th August, 1999, which was arbitrarily denied to the applicant on the ground that Indian Institute of Advance Study where she was employed was not a unit of Central Health Services. Thereafter, when in April, 2002 Dynamic Assured Career Progression Scheme was introduced by the Department of Health, Government of India, the same was again denied to the applicant on the same ground. However, subsequently, the respondents extended the Assured Career Progression Scheme benefit to the applicant as was evident from notification dated 17th March, 2003, which confirmed that despite the fact that applicant was serving in an autonomous body, she had been treated as Central Government employee. Thus, there was no occasion to deprive the benefit to the applicant as was given to her counter parts serving in the Central Government Services keeping in view the fact that as the applicant was a Medical Officer, she was entitled to all the benefits which otherwise were accruable to her counter parts serving in the Central Health Services. It was further the case of the applicant that the only difference between the Assured Career Progression Scheme and the subsequent Dynamic Assured Career Progression Scheme was that while earlier was a financial up-gradation scheme, the subsequent was a time bound promotion scheme meant for Medical Officers. According to the applicant, her functional responsibility has been equated with Central Health Services, accordingly there was no justification to deny the benefit of Dynamic Assured Career Progression Scheme to her.

7. Learned Tribunal on the basis of material produced on record came to the conclusion that the question which was to be decided was whether the applicant was entitled to the benefits under the Dynamic Assured Career Progression Scheme of 2002 or Assured Career Progression Scheme which had been made applicable to her. It held that the Assured Career Progression Scheme was based on the recommendations of 5th Central Pay Commission and Assured Career Progression Scheme in paragraph No. 13 provides for an option to the Ministries or Departments as per choice to continue with any time bound promotion scheme in which event such scheme shall not run concurrently with ACP Scheme. It further held that in case of CHS, presumably, ACP is not applicable and thus, the applicant's case should have been considered for DACP and not for ACP. It further held that the promotions under DACP has to be made without any linkage to the vacancies and as such, the benefit of DACP could not have been denied to the applicant on the ground that the post of Resident Medical Officer at the Institute of Advanced Study, Shimla is an isolated post. It further held that NPA is an allowance admissible only to the Medical Officers and applicant's entitlement to NPA which was evident from her appointment order confirms that she should be treated as one of the Central Government Medical Officers. Learned Tribunal further held that when the respondents have chosen to extend the ACP concession to the applicant notwithstanding the fact that she was functioning in an autonomous body, then the extension of the said benefit would mean that she would be deemed to be a Central Government Employee. As per the learned Tribunal, when such a legal fiction has been pressed into service, then the consequences thereof equally have to follow. It further held the applicant shall be deemed to be a Central Govt. Employee as she has been holding the post of Resident Medical Officer and keeping in view the fact that NPA was admissible to her at par with Central Government Officer, she should be treated as Central Health Services Officer as already recommended on the basis of functional responsibilities by the Ministry of Human Resources Development and in that event as ACP was not available to CHS Officials, the applicant should not have been given the benefit of ACP, but she should have been extended the benefit of Dynamic Assured Career Progression Scheme, i.e. DACP. Accordingly, on these basis, the Original Application filed by the applicant was allowed and learned Tribunal held the applicant entitled to the same benefits of time bound promotion as were available to other Medical Officers of Central Health Services as were provided under the provisions of Para 2(1) of order dated 05.04.2002 appended with the Original Application as Annexure A-14. The applicant was held entitled to the said benefits w.e.f. 05.04.2002. However, no interest was granted in favour of the applicant by the learned Tribunal.

8. This order passed by the learned Tribunal has been assailed by the present petitioners *inter alia* on the ground that the Tribunal has failed to appreciate that the respondent-applicant was an employee of an autonomous body which was not a participating unit of Central Health Services and accordingly, there was no occasion to confer upon the respondent-applicant any benefit under the Dynamic Assured Career Progression Scheme, which was introduced only in respect of the officers of Central Health Services. It was further alleged that learned Tribunal had erred in not appreciating that the applicant could not have been conferred the benefits of Dynamic Assured Career Progression Scheme unless the Ministry of Human Resource Development took a decision in this regard of extending the said benefits even to those employees who are serving in autonomous bodies as was the case with the respondent-applicant. Thus, on these basis, the order passed by the learned Tribunal has been challenged before this Court.

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

10. During the course of arguments, it was brought into the notice of this Court by the learned Senior Counsel appearing for the private respondent that besides the factum of the benefit of the order passed by the learned Tribunal having been implemented and conferred to the respondent-applicant, the benefits of the Dynamic Assured Career Progression Scheme under the Sixth Pay Commission also stands extended and accorded to the private respondent. Learned Senior Counsel has also placed on record the copy of Office Memorandum, dated 29th October,

2008 from which it is apparent that CHS Division of the Ministry of Health and Family Welfare, Government of India has ordered to extend the scheme of DACP up to SAG level to all Medical/Dental Doctors in the Central Government whether belonging to Organized Service or holding isolated posts. Be that as it may, in our considered view, there is no infirmity with order which has been passed by the learned Tribunal directing the present petitioners to confer the benefit of DACP Scheme to the applicant on the basis of the recommendations of the Fifth Central Pay Commission. It is evident from the material on record that the respondent-applicant first made a representation for conferring upon her the benefits of Assured Career Progression Scheme on the basis of Office Memorandum issued in this regard by the Department of Personnel and Training, Government of India, which was rejected by the present petitioners on the ground that the Office Memorandum was not applicable to the respondent-applicant as she was an employee of an autonomous organization. Thereafter, in the year 2002, CHS Division of the Ministry of Health and Family Welfare, Government of India came out with Dynamic Assured Career Progression Scheme which was made applicable to all Medical Officers and the respondent-applicant again made a representation to the effect that the benefits of the said Scheme be conferred upon her keeping in view the fact that she was similarly situate as any other Medical Officer serving in Central Health Services. Though the said request of the respondent-applicant was not heeded to, but simultaneously in the year, 2003, she was conferred the benefits under the Assured Career Progression Scheme. Learned Tribunal has held that the applicant-respondent was entitled to the benefits of DACP and not ACP keeping in view the fact that her service conditions were *pari materia* with those of any other Medical Officer serving in CHS. Therefore, on these basis, learned Tribunal concluded that the respondent-applicant cannot be denied the benefits of Dynamic Assured Career Progression Scheme which had been conferred by the present petitioners to the Medical Officers serving under the Central Government. Learned Tribunal in fact concluded that respondent-applicant is also deemed to be an employee of Central Government keeping in view the fact that she was serving in autonomous body of the Union of India. It is not disputed that now the benefits of DACP as recommended by the Sixth Central Pay Commission have been conferred upon the respondent-applicant. Keeping all these facts into consideration, in our considered view, learned Tribunal has rightly held that the respondent-applicant was entitled to the benefits under the DACP at par with any other Medical Officer serving in the CHS Department. It is not the case of the petitioners before this Court that the parent organization of the petitioners though autonomous, was not owned and controlled by the Union of India. Further, the only ground on which the said benefit has been denied to the respondent-applicant by the present petitioners is that according to them, the parent organization of the applicant was not part of CHS and whether or not the benefit has to be conferred upon the applicant is a decision which is taken by the Ministry of Human Resource Development. In our considered view, the applicant could not have been denied the benefit of DACP simply on this ground that the parent organization of the petitioners was not a part of CHS unit and till a decision in this regard was taken by the Ministry of Human Resource Development, the benefit of DACP could not have been conferred upon the applicant. DACP is a Scheme which has been formulated by the Union of India for the purpose of removing stagnation amongst Medical Officers serving in Central Health Services. The applicant is similarly situated as all other Medical Officers serving in Central Health Services, though she is employed with Indian Institute of Advance Study, which is an autonomous body of Union of India. The fact remains that Ministry of Health and Family Welfare and Ministry of Human Resource Development both are under the Union of India. Not only this, though the respondent-applicant is serving in an autonomous body under the Ministry of Human Resource Development, but it is an undisputed fact that she is serving there as a Medical Officer. Keeping in view the fact that there are isolated posts of Medical Officers in the Ministry of Human Resource Development and there is no separate DACP Scheme which has been formulated by the Ministry of Human Resource Development, it is but obvious and prudent that the benefits which have been envisaged by the Central Government for Medical Officers serving under the Central Health Services should be *ipso facto* made extendable to Medical Officers who are serving in autonomous organizations may be not under the Ministry of Health and Family Welfare, but under other Ministries. This is for the reason that similarly

situated persons cannot be treated with a different yardstick by the Government of India. It is no one's case that the autonomous organization in which the respondent-applicant serves does not belong to the Government of India. Article 14 of the Constitution of India strikes at discrimination. This Article *inter alia* provides that equals are to be treated alike. In our considered view, giving a differential treatment to a Medical Officer, i.e. the respondent-applicant in the present case vis-à-vis other Medical Officers serving under the Ministry of Health and Family Welfare simply on the ground that the respondent-applicant is not serving under the said Ministry, but is serving under another Ministry, is nothing but an action of discrimination, especially keeping in view the fact that it is no one's case that the duties and responsibilities of the respondent-applicant in any manner were different from the Medical Officers serving under the Central Health Services.

11. Therefore, in view of what has been discussed above, we do not find any infirmity with order passed by the learned Administrative Tribunal OA No. 778/HP/2005 dated 30.05.2008 and the same is upheld and the writ petition being devoid of any merit is accordingly dismissed.

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

Anil Kumar …….Petitioner.

Versus

State of H.P. …….Respondent.

Cr. MP (M) No. 827 of 2016.
Decided on: 14th July, 2016

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the accused for the commission of offences punishable under Sections 323, 324, 326, 307 and 354 of the Indian Penal Code- investigation is complete- challan has been filed in the Court- case has been committed to Court of Sessions and is fixed for consideration of charge- accused is not required to be detained in custody as he is not so influential as to win over the prosecution witnesses or tamper with the prosecution case – he will not abscond or flee away from justice- hence, bail application allowed and the accused ordered to be released on bail. (Para-3 to 8)

For the petitioner : Mr. Ajeet Singh Saklani, Advocate.
For the Respondent : Mr. D.S. Nainta & Mr. Virender Verma, Addl. A.Gs.

The following judgment of the Court was delivered:

Dharam Cand Chaudhary, J. (oral).

Petitioner is an accused in a case registered against him under Sections 323, 324, 326, 307 and 354 of the Indian Penal Code, in Police Station, Pachhad, District Sirmaur, H.P. vide FIR No.76/15 on the basis of a complaint made by Shri Sanjay Bahadur, son of the prosecutrix.

2. The accused-petitioner has been arrested in this case on 21.9.2015 and is presently in judicial custody. The investigation in this case is complete. Challan has also been filed. Learned Judicial Magistrate, Rajgarh has committed the case to the Court of Sessions and the same is now listed for consideration of charge on 16.7.2016. The victim is a Nepali National and residing, for the last 6-7 years with her son Sanjay Bahadur, the complainant at Village Dasana, Tehsil Pachhad, District Sirmaur, H.P. She along with her son, the complainant, is managing all agricultural and household affairs of one Raman Singh, resident of the same village.

3. The record reveals that on 6.9.2015, she went to Forest along with her son, the complainant, for bringing fodder for the cattle of Raman Singh, their master. When they were at different locations and the prosecutrix collecting fodder by lopping the branches of 'chhinar' tree, the accused-petitioner, whose age has been disclosed by her in between 18-22 years, appeared there and asked for *Bidi* from her. She entertained his request and having climbed on the tree, threw her bundle of *bidi* and lighter down. The accused lit *bidi* and started smoking. In the meanwhile, she also came down from the tree and while coming down the accused-petitioner allegedly raised his hand and wanted her to place foot thereon and to come down. However, she did not agree and told him that she does not want any support from him.

4. When came down, the prosecutrix inquired from the accused as to why he had come there. His reply was that he is going to village Runjha and requested her to show him path leading to the said village. On this, she told him that why he had come there and that the place from where the path leads to village Runjha is far away from here. On this the accused told her that he came there on hearing voice of girl (lady). He asked for her drat (sickle) and virtually snatched the same from her and thrown away at a distance. It is thereafter he started misbehaving with her and also asked for sexual favour. When she objected to it, he gagged her mouth and made her to lie down forcibly. He picked-up the *drat* lying nearby and inflicted many blows on her forehead and other parts of body. On account of that she fell unconscious and when returned in her senses found that the accused-petitioner had fled away from that place and the thumb and finger of her right hand cut.

5. The matter was reported to the police by her son Sanjay Bahadur, the complainant. The applications for grant of bail having been filed twice were dismissed by learned Sessions judge and learned Additional Sessions Judge, Sirmaur District at Nahan vide orders annexed to this petition

6. The orders passed by learned Sessions Judge on 14.12.2015 reveals that the application was dismissed with the observations that the investigation is still in progress and the prayer of the accused for the grant of bail can be considered after the investigation is complete. Now vide order dated 31.3.2016, passed by learned Additional Sessions Judge, the application has been dismissed on the grounds that the accused-petitioner may influence the prosecution witnesses or may commit similar type of offence.

7. The accused-petitioner is 22 years of age. He belongs to village Puning, under Police Station, Baijnath, District Kangra. According to learned counsel, he is a labourer and doing the work of cutting, conversion and sawing of trees. He was working as such in the areas around District Sirmaur at the relevant time. There is no past criminal history in his credit to make this Court to believe that he may commit similar offence if admitted on bail.

8. Though it may not be proper to make any observations touching the merits of the case, however, suffice would it to say that in view of the investigation conducted in the case, further detention of the accused-petitioner is not warranted. No doubt, thumb and finger of the right hand of the prosecutrix were allegedly found to have been cut and the cut pieces were recovered by the police, however, she did not return to senses even when the accused had chopped her thumb and finger; it is difficult to believe so at this stage when she fell unconscious, the accused may have subjected her to sexual intercourse. The prosecution may produce evidence to prove its case in this regard; however, the accused petitioner is not required to be detained any further in custody. The prosecution witnesses are none-else but the prosecutrix, her son the complainant, and Ram Lal, who informed the complainant that his mother was lying unconscious. The accused petitioner, who belongs to District Kangra, cannot be believed to be so influential so as to win over the prosecution witnesses or tamper with the prosecution case, if admitted on bail. Challan against him has already been filed. The trial is at the stage of consideration of charge. He may not abscond or flee away from justice, suitable conditions can be imposed upon him so that his presence can be ensured during the course of trial also.

9. In view of the above, this petition succeeds and the same is accordingly allowed. Consequently, it is ordered that the accused-petitioner, who has been arrested in connection with FIR No.76/15, Police Station, Pachhad and presently confined in judicial custody, shall be released on bail, subject to his furnishing personal bond in the sum of Rs.10,000/- with one surety in the like amount to the satisfaction of learned trial Court and shall further abide by the following conditions:-

That he shall;

a. regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;

b. keep on visiting Police Station, Pachhad, District Sirmaur periodically, i.e. once in two months and shall keep on informing the Station House Officer, about his whereabouts till the statements of material prosecution witnesses are recorded.

c. not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

d. not make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Investigating Officer;

e. not leave the territory of India without the prior permission of the Court.

10. It is clarified that if the petitioner misuses his liberty or violates any of the conditions imposed upon him; the Investigating Agency shall be free to move this Court for cancellation of the bail.

11. The observations hereinabove shall remain confined to the disposal of this petition and have no bearing on the merits of the case. The application stands disposed of.

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

Himachal Pradesh State Electricity Board. ......Appellant.

Versus

Yash Pal & ors. ......Respondents.

RSA No. 437 of 2002.
Date of decision:July 14, 2016.

Specific Relief Act, 1963- Section 34- Plaintiffs are owners in possession of the suit land and khokha constructed thereon- they claimed that suit land was acquired by their father by way of oral sale- mother of plaintiffs No. 1 and 2 had sold the land in favour of the plaintiff No. 3- they had raised construction of Khokha on the suit land, which was replaced by three pucca shops of brick, masonry - they were in continuous, peaceful and exclusive possession of the suit property without any interference- defendant No. 1 had acquired suit property vide award No. 60/72 and the land was transferred to defendant No. 2- eviction proceedings were initiated against the plaintiffs- plaintiffs cannot be evicted from the suit land as they are owners in possession of the same- mutation on the basis of award is illegal and wrong- declaration and injunction were sought – suit was decreed by the trial Court- an appeal was preferred, which was dismissed- held, that suit land was acquired by the defendant No. 1 for being used by defendant No. 2- it is situated within the acquired width of the road- compensation was paid and received by A and F-

land was entered in the name of A and F- one biswa of the land belong to predecessor-in-interest of the plaintiffs- compensation of Rs. 46/- was deposited in the bank- no declaration should have been sought against acquisition of the suit land - remedy was available under the Act itself- declaration should not have been granted- plaintiffs were being evicted by the Competent Authority under due process of Law- no injunction can be granted- appeal allowed- judgment and decree passed by the trial Court set aside. (Para-8 to 14)

For the appellant : Mr. Satyen Vaidya, Senior Advocate with Mr. Vivek Sharma, Advocate.
For the respondents :Mr. Karan Singh Kanwar, Advocate, for respondents No. 1 to 3.
Mr. D.S. Nainta, Addl. Advocate General, for respondent No. 4.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. *(Oral)*

The erstwhile Himachal Pradesh State Electricity Board (defendant No. 2 in the trial Court) is in second appeal. Defendant No. 2 is aggrieved by the judgment and decree passed by learned Additional District Judge, Sirmour district at Nahan in Civil Appeal No. 45-N/13 of 2000 whereby the appeal has been dismissed and the judgment and decree dated 30.3.1999 passed by learned Civil Judge Ist Class, Court No. 1, Paonta Sahib, District Sirmour in Civil Suit No. 6/1 of 1993 has been affirmed.

2. Respondents No. 1 to 3 (hereinafter referred to as the plaintiffs) claim themselves to be owner in possession of the suit land measuring 0-1 biswa bearing Khasra No. 418/358, Khata No. 140min/238 and "Khokhas" constructed thereon situated at village Kolar, revenue estate Dhaula Kuan Tehsil Paonta Sahib, District Sirmour. Admittedly, S/Shri Ami Chand and Fateh Singh were the owners of the suit land. Plaintiffs No. 1 and 2 claim that it was acquired by their father late Shri Prem Chand by way of oral sale from the owners. On the death of Prem Chand, it is they who inherited the suit property along with their mother Smt. Parkasho. Said Smt. Parkasho has allegedly sold her share to plaintiff No. 3 Dharam Singh. They initially had raised construction of "Khokhas" on the suit land. Now they have raised construction of three pucca shops of brick, masonry. They were in continuous, peaceful and exclusive possession of the suit property without any interference from anyone including the defendants. They, however, came to know that defendant No. 1 (respondent No. 4 herein) had acquired the suit property vide award No. 60/72 dated 22.4.1972. The suit land after acquisition was transferred in favour of appellant-defendant No.2. The Assistant Collector Ist Grade, Paonta Sahib has initiated eviction proceedings against the plaintiffs vide order dated 23.10.1992. The warrant of possession was issued and the Field Kanungo had to take possession of the suit land after demolition of the structures in-existence thereon. However, before the warrant of possession is executed, the plaintiffs had obtained the copy of mutation No. 142 dated 20.8.1987 whereby the land was transferred in favour of the defendant-State. The plaintiffs had claimed that they cannot be evicted from the suit land in view of the same being not acquired in accordance with law. Therefore, they filed the suit and sought declaration that they are owners in possession of the suit property and that the attestation of mutation No. 142 dated 20.8.1987 on the basis of award No. 60/72 is wrong, illegal and not binding on them and also that mutation No. 580 which has been attested in favour of defendant No. 2 subsequently on 30.6.1992 is also illegal, null and void. The proceedings initiated against them under Section 163 of the H.P. Land Revenue Act and order of eviction dated 23.10.1992 being illegal were also sought to be declared as null and void. As a consequential relief, the said defendant was sought to be restrained from causing any interference in the peaceful possession of the plaintiffs over the suit land.

3. The defendant No.1 had contested and resisted the suit. In preliminary, objections qua jurisdiction of the trial Court to try and entertain the suit, the same bad for want of service of legal and valid notice under Section 80 CPC and also that there exists no enforceable cause of action in favour of the plaintiffs and against the defendants were raised. The suit was

also sought to be dismissed being time barred. On merits, it was claimed that S/Shri Ami Chand and Fateh Chand were the recorded owners of the suit land at the time of acquisition. The suit land was acquired after complying with all codel formalities prescribed under the Land Acquisition Act. Compensation as determined was received by S/Shri Ami Chand and Fateh Singh. It is, therefore, claimed that Assistant Collector Ist Grade, Paonta Sahib has rightly initiated the proceedings under Section 163 of the Land Revenue Act against the plaintiffs and the order of eviction passed on 23.10.1992 is legal and valid.

4. The defendant No.2 though had filed separate written statement, however, on the similar lines on which the defendant No. 1 has contested the suit.

5. The replication was also filed. On the pleadings of the parties, following issues were framed:

1. Whether plaintiff are owners in possession of the suit property, as alleged?....OPP
2. Whether plaintiffs are bonafide purchasers with consideration and without notice of the suit property, as alleged? ....OPP
3. Whether mutation No. 142 dated 20.8.87 and mutation dated 20.6.1992 are wrong, void and illegal as alleged?....OPP
4. Whether ejectment order dated 23.10.1992 passed by Assistant Collector Ist Grade, Paonta Sahib, is wrong, void and illegal, as alleged?...OPP
5. Whether suit is not maintainable, as alleged? ...OPD
6. Whether plaintiffs have no cause of action to file the present suit as alleged?......OPD
7. Whether suit is not properly valued for the purpose of court fees and jurisdiction, as alleged? ....OPD
8. Whether the suit is barred by limitation? ...OPD
9. Whether suit is bad for non-joinder of section 80 CPC? ......OPD
10. Whether defendant No. 2 became the owner of the suit land as a result of acquisition of the landed property, as alleged? OPD-2
11. Whether in the alternative, defendants are entitled to receive cost of the land underneath the shops of the plaintiffs, without ejecting the plaintiffs from the said shops, as alleged ? ....OPD

11-A. Whether the original owner Sh. Ami Chand had sold 0-1 biswa land to Sh. Prem Chand in the year 1969, as alleged. If so, to what effect? .....OPP

12. Relief.

6. The parties on both sides have produced oral as well as documentary evidence in support of their claims and counter claims. Learned trial Court on appreciation of the evidence available on record has arrived at a conclusion that Shri Prem Chand, the predecessor-in-interest of plaintiffs No. 1 and 2 had acquired the suit land by way of oral sale well before the same was acquired, therefore, the acquisition proceedings were held illegal, null and void. The plaintiffs have been held to be joint owners in possession of the suit land. The suit as such was decreed as a whole.

7. The defendant No.2, no doubt, had assailed the judgment and decree passed by the trial Court in the Lower Appellate Court, however, unsuccessfully because learned Lower Appellate Court has dismissed the appeal and affirmed the judgment and decree passed by the trial Court. The legality and validity of the impugned judgment and decree have been questioned on the grounds, inter alia, that at the time of issuance of notification under Section 4 of the Land Acquisition Act the recorded owners of the suit land were S/Shri Ami Chand and Fateh Singh. The notification under Section 4 of the Act was issued purposely to invite interested persons and raise objection(s), if any, to the acquisition proceedings. The plaintiffs never staked their claim

during the course of the proceedings conducted under the Land Acquisition Act. Consequently, Land Acquisition Collector has assessed the market value of the acquired land and made award No. 60/1972 on 22.4.1972. The compensation was paid and received with respect to the acquired land by S/Shri Ami Chand and Fateh Singh. The suit land as such has rightly been transferred initially in the name of the respondent-State and subsequently in favour of the appellant-defendant No. 2. Both Courts below have allegedly failed to appreciate the given facts and circumstances and also the evidence available on record. The appeal though has been admitted on substantial questions of law at Serial Nos. 1 to 4 on page-7 of the paper book. There are, however, only three substantial questions of law at page-7, which read as follows:

1. *Whether a person can claim any interest in any land/property which has been acquired by the Government under the provisions of Land Acquisition Act and compensation as awarded by Land Acquisition Collector has been deposited with him?*
2. *Whether the Civil Court has any jurisdiction to declare the Land Acquisition proceedings to be null and void if the notifications under Sections 4 to 6 are not personally served on any interested persons but are otherwise duly notified?*
3. *Whether the application for additional evidence under Order 41 Rule 27 CPC was dismissed without any cogent reasons?*

8. Before coming to the substantial questions of law as formulated, it is worth mentioning that the plaintiffs during the course of arguments has come forward with the version that the suit land is now no more required by the defendants. On the request made by learned Counsel, they were allowed to make representation to the Appellant-Board and also Public Works Department to explore the possibility that the suit land if not required can be de-notified from Acquisition or not. The order in this behalf passed on 18.3.2015 reads as follow:

> *"Learned Counsel representing respondents No. 1 to 3 submits that the land in dispute most probably is now not required by the defendant-Board for the purpose, the same is acquired, as according to him, the road stood constructed on the spot over some other land. The suit land is still in possession of respondents No. 1 to 3 and that the shops they constructed are in existence thereon. They, therefore, intend to approach the appellant-Board and also Public Works Department to whom the road now stood transferred to explore the possibility as to whether the suit land can be de-notified from acquisition. Learned Counsel seeks time for the purpose. Allowed.*
>
> *List on 27th May, 2015. This Court be informed about the progress, if any, made in this regard n the date fixed."*

9. The representation made by the plaintiffs came to be decided by the Additional Chief Secretary, Public Works Department to the Government of Himachal Pradesh vide order dated 24.5.2015, which has been placed on record and reads as follow:

> *"The Hon'ble High Court vide order dated 06-10-2015, directed the Secretary (PWD) to pass an order on the representation of the respondents who prayed that land comprised in khasra No. 418/358, be de-notified and land returned to the owners.*
>
> *2. The HPSEB had acquired land for the construction of Giri Power House and constructed the road from Dhaulakuan to Giri Nagar. HPSEB in the year 2011, transferred the road to PWD for maintenance etc., and the acquired width of said road is 20 meters (70 ft.). Accordingly, a demarcation was also obtained, wherein the field Kanungo pointed out that land of the representationist does not come in the acquired width of the road, although a part of the road so acquired has not been mutated in favour of the Government and matter has been taken up by the PWD authorities with the Revenue Department.*

3. A personal hearing was given on 17.05.2016, wherein Superintending Engineer (HPSEB), Superintending Engineer, HPPWD, Nahan and Executive Engineer, HPPWD, Paonta Sahib attended, it was stated that Government acquired the land vide award No. 60/72 dated 22.04.1972, from Shri Amin Chand and Fateh Singh. Mutation vide No. 142 dated 20.08.1978, was entered, some portion of the land was further mutated in favour of HPSEB vide mutation No. 580 dated 30.04.1992. After mutation ejectment proceedings were initiated under section-163, of H.P. Land Revenue Act, 1954 and eviction order was also passed on 23.10.1992, against certain encroachers. During the hearing the Superintending Engineer, HPSEB stated that the road was constructed in the year 1969 and actual construction cost of the road was Rs. 0.59 lac. The taking over and handing over certificates from HPSEB to PWD, is also part of record, wherein it is stated that the total acquired width of road is 70 ft., 35 ft. on either site from the centre line of the road i.e. side burms as per the PCC burjis fixed the metalled road width is 4.50 mtrs. (average) and the maintained width of cause way in Sunkar Khala Nallah is 6.00 mtr., in Konthri Khala Nallah is 5.75 mtr & in Mandi Khallah Nallah is 5.25 mtr.

4. The Superintending Engineer, HPPWD Nahan has also stated that the junction of the said road is located at RD 83/500 on the Kala Amb Paonta Sahib NH-72 (New No. NH-7), and the acquired width of the NH from the centre line is 15.29 meters. That the road to Giri Nagar bifurcates at this junction and de-notifying the acquired land will add to traffic hazard and be a danger to motorists. Further the acquired width of the road to Giri Nagar may be required for future upgradation of road infrastructure. Therefore, the department is not keen to de-notify any of the land which stands acquired w.e.f. 1970's. On the contrary encroachments on acquired/controlled width should be removed under the H.P. Land Revenue Act, 1954 or H.P. Road side Control Act. The respondents have stated that the structures put up by them are not a hindrance to the traffic and they have not occupied the acquired or controlled width. This aspect need to be taken cognizance of by the SDM (Collector), Paonta Sahib. In so far as plea regarding de-notifying the land is concerned, the same cannot be accepted. Accordingly the representation is rejected and accordingly disposed off."

10. Not only this, but in support of the order passed by defendant No. 1 a site plan also came to be placed on record. On going through the same, this Court has observed in the order dated 30.5.2016 that the suit land is within the acquired width of Giri Nagar-Perduni road. This order also reads as follow:

"In support of the order placed on record on the previous date, learned Additional Advocate General has also placed on record the site plan to show that the land in dispute is within the acquired width of Giri Nagar Perduni road. The order and the site plan reveal that the disputed land and dhara in existence thereon is the property acquired for the construction of Giri Nagar Perduni Road. The record produced by the appellant-defendant Board also reveals that the suit land was acquired and the compensation received by one Ami Chand, admittedly the predecessor-in-interest of the respondents. In this view of the matter, the judgment and decree under challenge, prima-facie, is unsustainable. However, Mr. Karan Singh Kanwar, Advocate, learned Counsel representing the respondents-plaintiffs seeks time to have instructions in the light of the order and site plan now placed on record. Allowed. List on ***20.6.2016."***

11. In view of the order *ibid* passed by this Court and also the order passed by the Additional Chief Secretary, Public Works Department to the Government of Himachal Pradesh, it would not be improper to conclude that the suit land has been acquired by defendant No. 1 for being used by defendant No. 2. The same situate within the acquired width of Giri Nagar-Perduni

road and in the map placed on record during the course of proceedings in this appeal denoted by shops No. 1, 2 and 3 in yellow colour. The boundary of the road has also been shown with red pencil in the map. The suit land is inside the boundary of the road. The order passed by the Additional Chief Secretary also reveals that the compensation was paid and received by Ami Chand and Fateh Singh. No doubt, in the application under Order 41 Rule 27 CPC filed for adducing additional evidence in the Lower Appellate Court it has come that Rs.46/- was deposited in State Bank of India at Nahan on 24.4.2012 through Nahan treasury. However, learned Lower Appellate Court being influenced with the factum of Prem Chand, the predecessor-in-interest of the plaintiffs No. 1 and 2 was not associated during the acquisition proceedings has dismissed the appeal.

12. Now if coming to substantial questions of law, the suit land has been acquired by defendant No. 1 for being used by the beneficiary i.e. defendant No. 2. It has come in the evidence that the Land Acquisition Collector has passed award No. 60/72 dated 22.4.1972 and also paid the compensation. The evidence further reveals that the suit land in the revenue record was entered in the name of S/Shri Ami Chand and Fateh Chand at the time of its acquisition. Shri Prem Chand, the predecessor-in-interest of the plaintiffs never appeared before the Land Acquisition Collector during the course of the proceedings conducted and the notification(s) issued under the Provisions of the Act. True it is, that while disbursing the compensation, it transpired that one biswa of land out of the acquired land belongs to Prem Chand, the predecessor-in-interest of the plaintiffs. The compensation i.e. Rs.46/- due and payable in lieu thereof has been deposited in State Bank of India, Nahan branch. When the suit land has been acquired under the provisions of Land Acquisition Act, both Courts have failed to appreciate the legal position in its right perspective. As a matter of fact, no declaration against the acquisition of the suit land should have been sought by filing the suit. The remedy was available to the plaintiffs under the Act itself. This aspect of the matter has not been appreciated by both Courts below in its right perspective.

13. As a matter of fact, the application filed under Order 41 Rule 27 of the Code of Civil Procedure should have been allowed and the additional evidence taken on record to decide the *lis* judiciously and effectively. It has, however, not done and the application under Order 41 rule 27 CPC has also been dismissed mechanically and without application of mind. On acquisition of the suit land in accordance with law and the award of just and reasonable compensation, the attestation of mutation No. 142 dated 20.8.1987 in favour of defendant No. 1 and subsequently mutation No. 580 dated 30.6.1992 in favour of defendant No. 2, it is now the appellant-defendant No. 2 owner of the suit land. The plaintiffs are in possession thereof, however, without any right title or interest, hence trespassers. True it is, that even a trespasser cannot also be evicted from the land in his possession save and except under due process of law. As a matter of fact, the Assistant Collector Ist Grade has already initiated the eviction proceedings against the plaintiffs and such proceedings initiated against them on 23.10.1992 have been sought to be declared illegal, null and void. In view of the discussion hereinabove, the said order is absolutely legal and valid and the declaration as sought should have not been granted. Similarly, the plaintiffs are not entitled to perpetual injunction as they are in unlawful possession of the suit land. When they have already been ordered to be evicted by the Compeptent Authority from the suit land the suit for decree of perpetual injunction has also been erroneously decreed. Having said so, the judgment and decree under challenge is not legally and factually sustainable and as such, deserves to be quashed and set aside.

14. For all the reasons hereinabove, this appeal succeeds and the same is accordingly allowed. Consequently, the impugned judgment and decree is quashed and set aside. No order so as to costs.

15. Before parting, this Court would like to observe that the plaintiffs, if so, advised may seek remedy available to them in accordance with law including seeking release of the compensation lying deposited in State Bank of India, Nahan branch through treasury at Nahan.

16. The appeal 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.

Sh. Roshan Lal ....Petitioner.
Versus
Sh. Beli Ram and others ......Respondents.

CMPMO No. 4157 of 2013
Date of decision: 14th July, 2016

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiffs filed a civil suit pleading that M was owner of the suit land to the extent of 1/8th share- Will was executed by M in favour of 'D' – suit land is ancestral and cannot be bequeathed - ad-interim injunction was prayed which was declined by the trial Court- an appeal was preferred, which was allowed- defendant was restrained from alienating, transferring or creating any charge over the suit land- held, that Aks Shazra Nasab Malkaan prima facie shows that land was inherited by the parties from their grand-father- hence, nature of the property is proved to be ancestral - allowing defendant to alienate, encumber, dispose or even change the nature of the suit land will lead to multiplicity of litigation, which may not be in the interest of the parties- Appellate Court had rightly granted the injunction- petition dismissed. (Para-8 and 9)

For the petitioner: Kanwar Bhupinder Singh, Advocate.
For the respondents: Mr. K.R. Thakur, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral).

Petitioner herein is the defendant in Civil Suit No. 96-I/11. The respondents are the plaintiffs. Their predecessor-in-interest Shri Med Ram was owner of the suit land detailed in para 1 of the plaint situated in Mauza Dhanda, Tehsil Shimla (Rural), District Shimla to the extent of 1/8th share. The total land is 85-11 bighas. The 1/8th share of Shri Med Ram therein comes to 10-14 bighas. Deceased Med Ram has allegedly executed a will dated 22.06.1995, a copy whereof has been placed on record by the parties on both sides. The suit land, as per this will, has been bequeathed by deceased Med Ram in favour of the petitioner-defendant in exclusion of his remaining sons and daughters, the plaintiffs.

2. The plaintiffs have sought declaration to the effect that the suit land being ancestral in nature has been inherited by them along with defendant, their brother in equal shares. In view of the ancestral nature of the suit land, the same could have not been bequeathed in favour of defendant and in exclusion of the plaintiffs. Therefore, the will has been sought to be declared as illegal, null and void and as a consequential relief, decree for permanent prohibitory injunction restraining the defendant from interfering with the lawful ownership and possession of the plaintiff over the suit land and also restraining him from transferring, selling, mortgaging or creating any third party interest over the suit land as well as encumbering the same in any manner whatsoever has also been sought.

3. Along with the suit, an application, registered as CMA No. 102-6 of 2011 under Order 39 Rules 1 and 2 of the Code of Civil Procedure was also filed for grant of ad-interim injunction restraining the defendant during the pendency of the suit from alienating,

encumbering or disposing of the suit land in any manner whatsoever. Learned trial Court on hearing the parties and also going through the record has arrived at a conclusion that neither there exists a prima-facie case in favour of the plaintiffs nor balance of convenience lie in their favour. Also that, they will not suffer irreparable loss and injury in case the injunction is not granted. The application as such, was dismissed vide order dated 07.04.2012, Annexure 'A' with the observations that the alienation of the suit property by the defendant will otherwise be subject to the order passed by this Court as per the provisions of Transfer of Property Act.

4. The plaintiffs have assailed the order Annexure 'A' in appeal, registered as Civil Miscellaneous Appeal No. 10-S/14 of 2012. Learned Additional District Judge (I), Shimla has allowed the appeal vide order dated 02.08.2013 and quashed the impugned order dated 07.04.2012. Consequently, the defendant has been restrained from alienating, transferring, or creating any charge over the suit land till the main suit is pending disposal.

5. It is this order, which has been assailed, in this petition on the grounds *inter-alia* that no documentary proof is produced by the plaintiffs to establish ancestral nature of the suit land. The plaintiffs have been given the land at Village Galot in lieu of the suit situated at village Dhanda. The will was executed in the year 1995 and the testator died in the year 2006. The plaintiffs have never challenged the will during the life time of the testator till the filing of the present suit in the year 2011. All these material facts have been ignored by learned lower appellate Court and to the contrary passed the impugned order on surmises and conjectures without appreciating the pleadings and documents produced by the parties on both sides in its right perspective.

6. Mr. Bhupinder Singh Kanwar, learned counsel representing the petitioner-defendant has strenuously contended that by virtue of the will, which is duly registered, it is the defendant, who is owner in possession of the suit land. According to him, ancestral nature of the suit land is not at all established. Also that, in lieu of the suit land, the plaintiffs have been given land in village Galot, by their father deceased Med Ram, the testator. Mr. Kanwar, while drawing the attention of this Court to the prayer made in the plaint has pointed out that the plaintiffs have claimed their share in the suit land to the extent of 16.25 square meters each, which according to him, corresponds to ½ biswa of land in bigha. Therefore, in view of the meager share they claimed in the suit land, the defendant cannot be restrained from using the same in a better manner as per his convenience.

7. On the other hand, Mr. K.R. Thakur, learned counsel representing the respondents-plaintiffs has drawn the attention of this Court to the detail of the suit property given in paras 1 and 2 of the plaint and contended that the same is 10-14 bighas. The plaintiffs and defendant are owner thereof in equal share i.e., around 2 bighas, which according to Mr. Thakur is 00-16-25 hectares. He has also clarified that in the prayer clause, each share should have been mentioned as 00-16-25 hectares, instead of 16.25 square meters. In order to establish the ancestral nature of the suit land, he has relied upon the copy of 'Aks Shazra Nasab' (pedigree table).

8. On analyzing the rival submissions and also the record of this case, owner of the suit land admittedly was Med Ram, predecessor-in-interest of the parties on both sides. The defendant claims himself to be the exclusive owner thereof on the basis of will dated 22.06.1995. True it is that as per recitals in this document the suit property, which is situated at village Dhanda in Tehsil Shimla (Rural), District Shimla has been bequeathed by the testator aforesaid Shri Med Ram in favour of defendant. The plaintiffs, however, claim their ownership and possession to the extent of equal shares therein. According to them they are in physical possession of the suit land on the spot. Their further claim is that the suit land being ancestral could have not been bequeathed by way of a will and rather each co-sharer has right to inherit the same on the death of owner thereof, Shri Med Ram. Mr. Kanwar, learned counsel has, however, vehemently disputed the ancestral nature of the suit land, as according to him, no documentary evidence is available at this stage to establish all characteristics of ancestral

property. He has relied upon ***Para 292 of Hindu Law and Usage by Mayne's 50th Edition***, which provides that the property inherited by a person from a direct male ancestor not exceeding three degrees higher than himself is ancestral property. The plaintiffs have placed reliance on the 'Aks Shazra Nasab Malkaan' (pedigree table), which prima-facie reveals that the parties on both sides have inherited the suit land from their grand-father, Kanshi Ram. The inheritance, therefore, prima-facie is from a direct male ancestor exceeding three degrees higher than themselves. Therefore, at this stage, it is difficult to believe that the suit land is not ancestral. Otherwise also, the plaintiffs only intend that the defendant should not alienate, encumber, transfer or change the nature of the suit land in any manner whatsoever during the pendency of the suit. They have not sought the interim relief to the effect that he should be restrained from causing interference therein. The defendant, as such, has every right to use the suit land to the extent of the same is in his possession. However, to allow him to alienate, encumber or dispose of and even change the nature of the suit land in any manner whatsoever during the pendency of the suit would amount to multiplicity of litigation and also result in other legal complications of like nature, which may not be in the interest of the parties and also in fair play, equity and justice. Therefore, while concurring with the findings recorded by learned lower appellate Court that prima-facie a case is made out in favour of the plaintiffs-respondents and the balance of convenience also lie in their favour, it would not be improper to affirm the order under challenge and dismiss this petition.

9. For all the reasons hereinabove, this petition fails and the same is accordingly dismissed. Pending application(s), if any, shall also stand disposed of.

Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of this petition alone.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

State of Himachal Pradesh …. Appellant

Versus

Dagu Ram …. Respondent

RSA No. 217 of 2007
Reserved on: 07.07.2016
Date of decision:14.07.2016

Code of Civil Procedure, 1908- Section 100- Plaintiff filed a civil suit for recovery of Rs. 81,100/- on the ground that he was owner in possession of two storeyed house- A middle school was opened in the Village- son of the plaintiff was persuaded by the Headmaster of the Primary School and the villagers to provide accommodation of three rooms- three rooms were allotted to the School- one room in the upper story was occupied by the Headmaster- plaintiff demanded the rent for the premises, which was not paid, on which suit was filed- suit was dismissed by the trial Court- an appeal was preferred, which was allowed- held, in second appeal that possession of the suit premises had been handed over to plaintiff by the State – plaintiff was estopped from filing the suit because of his own act and conduct- Middle School started running in the premises on the basis of affidavit given by the son of plaintiff - legal notice was served in September, 2002- no material was placed on record to show as to what action was taken by the plaintiff for occupying the premises from the date of occupation till September, 2002 unauthorizedely – plaintiff was residing in the same premises, where the school was being run- therefore, an inference can be drawn that premises were handed over to the defendant by son of the plaintiff with his consent and permission and that's why he remained silent for two years- further, no material was brought

on record to show that plaintiff is entitled to the amount - appeal allowed and judgment of the Appellate Court set aside. (Para-11 to 16)

Case referred:
Sunderabai w/o Devrao Deshpande and another Vs. Devaji Shankar Deshpande, A.I.R. 1954 S.C. 82 (Vol. 41, C. N. 23)

For the appellant: Mr. V.S. Chauhan, Additional Advocate General with Ms. Parul Negi, Deputy Advocate General.
For the respondent: Mr. Lalit Sehgal, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.:

By way of the present appeal, the State has challenged the judgment and decree passed by the Court of learned District Judge, Kinnaur at Rampur Bushahr, in Civil Appeal No. 75 of 2004, decided on 02.07.2005, vide which, learned Appellate Court has allowed the appeal of the present respondent and set aside the judgment passed by the Court of learned Civil Judge (Junior Division), Rampur Bushahr, in Civil Suit No. 34-1 of 2003 dated 24.08.2004.

2. This appeal was admitted on 14.03.2008 on the following substantial questions of law:-

> "1. Whether the Ld. Appellate Court below has misread and misconstrued the evidence on record.
>
> 2. Whether the finding of the lower Appellate Court are vitiated on account of misinterpretation of the Law of estoppel and promissory estopped.
>
> 3. Whether the Ld. District Judge has wrongly and erroneously overlooked the implied consent and the acquiescence of the Plaintiff."

3. Brief facts necessary for the adjudication of the present case are that the respondent/plaintiff hereinafter referred to as the plaintiff, filed a suit for recovery of Rs.81,100/- on the ground that he was owner in possession of two storeyed house comprising three rooms in each storey situate in Muhal Munish Bahli, Tehsil Rampur, District Shimla, H.P. i.e. the suit property. His further case was that in September, 2000, village Munish Bahli was allotted Middle School by upgrading the Primary School, which existed in the village. The building housing the Primary School was not having sufficient accommodation for the classes of Middle School. The son of the plaintiff Saran Dass was persuaded by the Headmaster of the Primary School and the villagers to provide accommodation of three rooms in the lower storey of the demised premises and a writing in the form of affidavit was got executed from him i.e. the son of the plaintiff and possession of the lower storey was thus allotted to the school. According to the plaintiff, the son of the plaintiff had no legal authority to allot the accommodation without seeking permission from the plaintiff and that too without claiming any rent for an indefinite period. According to the plaintiff, one room in the upper storey was also being occupied by the Headmaster, Government Middle School Munish Bahli and no rent was being paid for the same. The plaintiff issued a legal notice to the Headmaster, Government High School Munish, who had the supervisory authority over the Middle School Munish Bahli, for vacating the accommodation unauthorizedly given by the son of the plaintiff without his consent. According to the plaintiff, the accommodation i.e. four rooms were being unauthorizedly occupied and no rent was being paid and loss was being caused to the agricultural crop and to the apple crop for the last two years, which had caused loss to the tune of Rs.50,000/- to the plaintiff. According to the plaintiff, he was also entitled to the amount of Rs.30,000/- as use and occupation charges of the four rooms w.e.f. 06.09.2000 to 30.09.2002 and thereafter also. On these basis, the plaintiff filed

a suit for recovery of Rs.81,100/- with future interest at the rate of 9% per annum from the date of filing of the suit till realization of the amount claimed.

4. In the written statement filed by the State, it denied the case of the plaintiff. According to the defendant, Saran Dass son of the plaintiff who was owner in possession of the said building had given three rooms to the defendant department for running the Middle School in that building and when these rooms were given for running the school at that time the building was in the possession of Saran Dass and he had given an affidavit to that effect. The defendant denied that Saran Dass was not competent to provide the said accommodation to the department. It was further mentioned in the written statement that the building was handed over by Saran Dasss in September, 2000 and thereafter the plaintiff had never shown his unwillingness for the act of his son and as such, the plaintiff was estopped from filing the present suit by his own act, as the plaintiff had given his passive consent to run the Middle School and to provide the accommodation through his son. It was further submitted that neither the plaintiff nor his son Saran Dass were entitled to claim any rent because they had given their consent to make the Middle School functional before providing accommodation to the defendant department. It was also denied that the Headmaster or any other teacher of the school had occupied extra rooms in the disputed building as alleged. The factum of loss being caused to apple orchard and its fruits etc. either by the school was also denied. It was denied that the rooms were occupied by the defendant unauthorizedly as alleged by the plaintiff. It was further mentioned that there a policy decision of the Government of Himachal Pradesh to the effect that the beneficiaries of the schools upgraded shall provide accommodation for the school premises free of cost and it was a pre-requisite condition that the school shall become functional only if suitable accommodation as per norms of the Education Department is handed over to the Government by the people of the area. The defendant relied upon the affidavit sworn in by Saran Dass son of the plaintiff vide which he gave possession of three rooms voluntarily to make the Middle School functional in his village.

5. On the basis of the pleadings, the following issues were framed by the learned trial Court:-

1. Whether the son of the plaintiff was not legally competent to hand over the possession of the disputed building and land to the defendant, as alleged? … OPP
2. If issue No. 1 is proved in affirmative, whether the plaintiff is entitled to use and occupation charges thereof as claimed? … OPP
3. Whether any damage has been caused to the apple orchard of the plaintiff. If so, whether the defendant is liable to pay a sum of Rs.50,000/- as damages to the plaintiff as alleged? … OPP
4. Whether Saran Dass, son of the plaintiff, was owner in possession of the suit premises and was thus competent to execute and handover the possession of the premises to the defendant as alleged? … OPD
5. Whether the plaintiff is estopped by his act and conduct from filing the present suit as alleged? … OPD
6. Whether the suit is not maintainable? … OPD

6-A. Whether the plaintiff is entitled to the relief of eviction as alleged? … OPP

7. Relief.

6. On the basis of material placed on record, the learned trial Court returned the following findings on the issues so framed:-

Issue No. 1	Rendered redundant.
Issue No. 2	No.
Issue No. 3	No.

Issue No. 4	Partly No.
Issue No. 5	Yes.
Issue No. 6	Yes.
Issue No. 6-A	No.
7.	Suit dismissed, as per operative part of the judgment.

7. Accordingly, the learned trial Court dismissed the suit filed by the respondent/plaintiff by holding that it clearly emerged out of the pleadings of the parties that Saran Dass son of the plaintiff had handed over the possession of three rooms in the lower storey of the building to the defendant in the month of September, 2000 and thereafter Government Middle School started running there. Learned trial Court held that son of the plaintiff was 40 years old and was having a family which showed that he was a mature person. It further held that it was the pleaded case of the plaintiff that the villagers of village Bahli as well as the Headmaster of Government Primary School had persuaded Saran Dass to hand over the possession of three rooms of double storey building to the school and in pursuance thereof, he handed over the possession thereof to the school authorities. The learned trial Court observed that the plaintiff had not specifically pleaded in his plaint as to where he was when the aforesaid negotiation took place but in his cross-examination he had admitted that he had come back to the house in the evening. Accordingly, the learned trial Court held that this proved that the plaintiff had come back to his home on the same evening i.e. on the day when the school was opened. The learned trial Court further held that even if it is assumed that the plaintiff was not present in the village and that the negotiation took place behind his back, even then he was required to show as to what steps he had taken when he came back to village and came to know about the handing over of the building by his son to the Education Department without his consent. The learned trial Court further held that the plaintiff did not take any steps till 04.03.2002 i.e. when he sent a letter addressed to the Headmaster. Accordingly, the learned trial Court held that the plaintiff remained dormant for two years after the opening of the school, which reflects that he had approbated the conduct of his son in handing over the building in question to the Education Department. The learned trial Court further held that the running of a school could not be said to be such an event which could have had gone un-noticed by the plaintiff for such a long period. On these basis, the learned trial Court held that the plaintiff was estopped by acquiescence from filing the suit. Accordingly, the suit of the plaintiff was dismissed by the learned trial Court. However, it observed that since the defendant had been apprised of the real picture about the ownership of the building, it would take necessary steps in near future for creating its own infrastructure.

8. Feeling aggrieved by the said judgment passed by the learned trial Court, the plaintiff filed an appeal which was allowed by the learned First Appellate Court vide its judgment dated 02.07.2005. The learned Appellate Court while allowing the appeal decreed the suit of the plaintiff for eviction of the defendant from the suit premises and also for use and occupation charges quantified at Rs.20,000/- with interest at the rate of 6% per annum from the date of suit to the date of decree. The suit of the plaintiff for damages quantified at Rs.50,000/- for loss to apple crop, was dismissed. While arriving at the said conclusion, the learned Appellate Court held that the reasons given by the learned trial Court in concluding that the plaintiff was present at the time of handing over of possession of the suit property to the representative of the defendant were entirely fallacious, as DW-2 who was present at the time of handing over the premises by the son of the plaintiff to the defendant, categorically deposed in his cross-examination that at the time of handing over the possession of the suit premises, the plaintiff was not present. The learned Appellate Court further held that the delay on the part of the plaintiff to take measures to seek restitution of the suit property cannot bar his remedy as delay was not such a blatant delay that it would have invited the learned trial Court to draw inference that the plaintiff had acquiescenced in the act of his son. The learned Appellate Court

further held that evidence had come to the effect that the plaintiff and his son resided separately and in this view of the matter, the learned trial Court could not have fastened the principle of estoppel on plaintiff to an act of the son of the plaintiff who was residing separately from the plaintiff and who was not present at the time of handing over of the possession of the suit premises to the representative of the defendant. Accordingly, the learned Appellate Court held that the suit of the plaintiff seeking eviction of the defendant from the suit premises was decreed. The learned Appellate Court further held that a sum of Rs.30,000/- had been claimed by the plaintiff from the defendant on the score that the sum constitutes a reasonable sum on account of use and occupation charges payable by the defendant. However, the basis of the estimation of the said amount was unsubstantiated. Accordingly, the learned Appellate Court held that a sum of Rs.20,000/- was an adequate and reasonable amount payable to the plaintiff by the defendant and accordingly, it passed a decree for Rs.20,000/- being the sum for use and occupation charges payable by the defendant to the plaintiff with interest at the rate of 6% per annum from the date of suit till the date of decree was awarded in favour of the plaintiff.

9. Feeling aggrieved by the said judgment passed by the learned Appellate Court, the State has filed the present appeal.

10. I have heard learned counsel for the parties and have also gone through the records of the case as well as the judgments passed by the Courts below.

11. In my considered view, the learned Appellate Court has totally misread and mis-appreciated the evidence on record while coming to the conclusion that the plaintiff was entitled for a decree of eviction as well as an amount of Rs.20,000/- as use and occupation charges from the present appellant. The findings returned by the learned Appellate Court that the learned trial Court proceeded to non-suit the plaintiff on the premise that the son of the plaintiff had executed the affidavit aforesaid at a time when the plaintiff, too, was present at the site, are perverse and not borne out from the record. The findings which have been returned by the learned trial Court are to the effect that the plaintiff had not specifically pleaded in his plaint as to where he was when the negotiations took place about the handing over the possession of rooms of his building by his son to the department and he had tried to show at the time of evidence that at the relevant time he was not present in the village when the school was opened. Thereafter, the learned trial Court after relying upon the cross-examination of the plaintiff had concluded that the plaintiff had come back to his village in the evening, which shows that the plaintiff was in his house on the same evening when the school was opened.

12. I refer to the statement of plaintiff, who has entered the witness box as PW-1. In his cross-examination, first he sated that it was correct that when the school came to his house he was there. Thereafter, he stated that he was not there, he had gone with his cattle and he returned back in the evening. He has also stated that he had not made any report to the police or other officers of the Education Department about the unauthorized occupation of his premises. Incidentally, the plaintiff has not impleaded his son as a defendant in the case. He admitted in his cross-examination that Middle School was opened only after his son has given in writing that they will allow the school in his premises without charging any rent.

13. From this, it is evident that the findings returned by the learned Appellate Court while decreeing the suit of the plaintiff partly are a result of misreading and misconstruing the pleadings as well as the documentary evidence placed on record by the parties.

14. It is pertinent to mention that the possession of the suit premises in issue has already been handed over by the State to the plaintiff. It was further the common case of the parties before this Court that now the only thing which has to be adjudicated upon is whether the defendant is liable to pay the decretal amount, as has been decreed by the learned Appellate Court as use and occupation charges or not.

15. In my considered view, the judgment passed by the learned Appellate Court to this effect in favour of the plaintiff is also not sustainable in law. The learned Appellate Court has erred in not appreciating that the learned trial Court had rightly concluded that the plaintiff was estopped from filing the suit because of his own act and conduct. It has been held by the Hon'ble Supreme Court in ***Sunderabai w/o Devrao Deshpande and another Vs. Devaji Shankar Deshpande***, ***A.I.R. 1954 S.C. 82 (Vol. 41, C. N. 23)***, that estoppel is a rule of evidence and when one person has by his declaration, act or omission caused or permitted another person to believe a thing to be true and to act upon such belief neither he nor his representative shall be allowed in any suit or proceeding between himself or such person and his representative to deny the truth of that thing.

16. In the present case, the Middle School started running in the premises of the plaintiff on the basis of the affidavit given by his son in September, 2000. The suit was filed by the plaintiff on 25.03.2003. Before this, he had served a legal notice on the defendant dated 30.09.2002. No material has been placed on record by the plaintiff as to what action he took against the defendant for unauthorizedly occupying his premises from September, 2000 till September, 2002. As already noted above, the plaintiff has not impleaded his son as a defendant in the suit. It is not the case of the plaintiff that he was not residing in the same village in which premises where the school was running were situated. Rather, the plaintiff was residing in the part of the same premises where the school was being operated since September, 2000. From this the only inference which can be drawn is that the premises were handed over to the defendant by the son of the plaintiff with his consent and permission and that is the only reason why the plaintiff remained quite from September, 2000 till September, 2002, when in all probabilities he initiated the process of eviction in order to get his premises back from the department and to achieve his design he came up with his concocted story of the premises being handed over to the department by his son without his permission. Not only this, the learned Appellate Court has arrived at the amount of Rs.20,000/-, which has been decreed in favour of the plaintiff alongwith interest on conjectures because there is no material on record referred to by the learned Appellate Court to substantiate and justify as to how the learned Appellate Court had arrived at this amount. Therefore, the judgment passed by the learned Appellate Court is not sustainable in law and the same is a result of misreading and misconstruing the evidence on records as well as misinterpreting the law of estoppel. The substantial questions of law are answered accordingly.

17. Accordingly, keeping in view the findings which have been returned above, the present appeal is allowed with cost and the judgment passed by the learned Appellate Court is set aside. Miscellaneous application(s) pending, if any, stand disposed of and interim order(s), if any, also stand vacated.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

The Executive Engineer, HPPWD Division Arki, Distt. Solan, H.P. .....Appellant.

Vs.

Smt. Rameshwari Devi and others .....Respondents.

CWP No.: 4611 of 2009
Reserved on: 08.07.2016
Date of Decision: 14.07.2016

Industrial Disputes Act, 1947- Section 25- L was appointed as Daily Rated Beldar in January, 1994- his services were terminated in December, 1994 without assigning any reasons- many new persons were engaged and juniors were retained- his termination was in violation of principle of last come first go- L died during the pendency of the proceedings- Labour Court passed the award in favour of the legal representatives directing that son of L be given service in place of L- aggrieved from the award, present writ petition has been filed- held, that L had died on

12.4.2008- he was born in 1944, he would have superannuated from services on attaining the age of 60 years - Tribunal was bound to answer and to grant appropriate relief claimed in the claim petition- there was no reference, "whether son of workman was to be given employment or not" - award modified and direction issued to pay back wages from the date of raising industrial dispute dill date of superannuation. (Para-11 to 18)

Cases referred:

Raghubir Singh Vs. General Manager, Haryana Roadways, Hissar (2014) 10 Supreme Court Cases 301

Jasmer Singh Vs. State of Haryana and another (2015) 4 Supreme Court Cases 458

For the petitioner: Mr. V.S. Chauhan, Addl. A.G.

For the respondents: Mr. Neel Kamal Sood and Mr. Vasu Sood, Advocates.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. :

By way of present writ petition, the petitioner has challenged the award passed by the learned Presiding Judge, Industrial Tribunal-cum-Labour Court, Shimla in Reference No. 92 of 2005 dated 16.06.2009. The learned Tribunal vide award dated 16.06.2009 has granted the following relief:

> *"As a sequel to my above discussion and findings on issue No. 1 to 3, the claim of the deceased petitioner Shri Lachi Ram succeeds and is hereby allowed and as such Shri Ram Lal, son of original petitioner Shri Lachi Ram is ordered to be given service forthwith against the job of his father from the date of passing of this award i.e. 16.06.2009 without seniority, continuity and back wages being fresh appointee. Let a copy of this award be sent to the appropriate Government for publication in the official gazette. File, after completion, be consigned to records."*

2. Brief facts necessary for adjudication of the present case are that one Shri Lachhi Ram raised an industrial dispute on the basis of which, the following reference was made by the appropriate Government:

> *"Whether the termination of services of Shri Lachhi Ram, S/o Shri Attru Ram workman by the Executive Engineer, HPPWD Division Arki, District Solan, H.P. w.e.f. December, 2004 without complying with the provisions of the Industrial Disputes Act, 1947 is proper and justified? If not, what relief of service benefits and amount of compensation the above aggrieved workman is entitled to?"*

3. Pursuant to said reference, a claim petition was filed by Shri Lachhi Ram before learned Court below, in which it was stated that he was initially appointed as Daily Rated Beldar by the respondents (present petitioner) in January, 1994 and after his appointment, he worked as such till December, 1994 when his services were terminated without assigning any reason. His case further was that during his service period, he had continuously worked and completed more than 240 days in a calendar year and after December, 1994, he was not allowed to work despite requests. Therefore, as per the claimant, the termination of his service was unlawful and illegal and was in violation of the provisions of Sections 25-F, 25-G and 25-H of the Industrial Disputes Act, as within the same Sub-division/Division, many new persons were engaged and junior persons were retained and it was only the claimant who was thrown out of job. Thus, according to the claimant, his termination was in violation of the principle of *'last come first go.'* On these grounds, he prayed that the respondents be directed to reinstate him with retrospective effect with all consequential benefits, back wages, continuity of service, seniority, regularization, promotion etc.

4. In its reply to the said claim petition, the employer-department stated that the claimant was engaged in November, 1993 and in the calendar year 1993, in the months of November and December, he worked only for 55 days. It was emphatically denied that he worked in the year 1994 till December as alleged. As per the department, in the year 1994, he worked only for 198 days and that too up to August. Thereafter, the petitioner left the work at his own. Thus, according to the department, as the claimant had left the work of his own will, there was no question of violation of the provisions of Sections 25-F, 25-G and 25-H of the Industrial Disputes Act by the department. Though the factum of persons junior to the applicant being retained by the department and fresh persons being engaged by the department was not specifically denied in the reply, however, the stand of the department was that the claimant never approached the respondents after August, 1994 and his whereabouts were not known to the respondents. On these basis, the department denied the claim of the workman.

5. On the basis of the pleadings of the parties, the learned Court below framed the following issues:

> *1. Whether the service of the petitioner has been illegally terminated without complying the provisions of the I.D. Act? If so, its effect? OPP*
>
> *2. If issue No. 1 is proved in affirmation, to what relief the petitioner is entitled to? OPP*
>
> *3. Whether the petitioner has abandoned the job at his own as alleged? OPR*
>
> *4. Relief.*

6. On the basis of the material produced on record by the parties, learned Court below returned the following findings to the said issues:

> *Issue No. 1:* *Yes.*
>
> *Issue No. 2:* *LR of the original petitioner Shri Lachhi Ram, his son Ram Lal is ordered to be given service forthwith against the reinstatement of his father without back wages and seniority.*
>
> *Issue No. 3:* *No.*
>
> *Relief:* *Reference answered in affirmative per operative part of award.*

7. On the basis of findings so returned, learned Labour Court passed the award in favour of the legal representatives of the claimant who died during the pendency of the Reference Petition in the terms as has already been mentioned above.

8. Mr. V.S. Chauhan, learned Additional Advocate General has argued that the award passed by the learned Court below is liable to be quashed and set aside on the ground that the same is perverse for the reason that the relief which had been granted by the learned Labour Court was beyond its jurisdiction. According to Mr. Chauhan, even if it was assumed that the services of the claimant were terminated by the department in violation of the statutory provisions of the Industrial Disputes Act, even then at the most learned Labour Court could have had granted the relief in favour of the workman from the date when he raised the industrial dispute till the date of his superannuation and there was no authority vested with the learned Labour Court to have had directed that Shri Ram Lal, son of claimant Shri Lachhi Ram be given the service forthwith against the job of his father from the date of passing of the award.

9. Mr. Neel Kamal Sood, learned counsel for the respondent, on the other hand argued that there was no infirmity with the award passed by the learned Labour Court and it cannot be said that the relief which had been granted by the learned Labour Court was beyond its authority or jurisdiction.

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

11. In my considered view, there is considerable force in the arguments of learned Additional Advocate General that learned Labour Court could not have granted relief in the mode and manner in which it had been granted by the impugned award. The death certificate of late Shri Lachhi Ram reveals that he died on 12.04.2008. The petitioner-State has placed on record alongwith the death certificate of deceased Lachhi Ram the relevant extract of the *Pariwar* register of deceased Lachhi Ram issued under signatures of Secretary, Gram Panchayat Mangoo, Tehsil Arki, District Solan, as per which, the year of birth of Shri Lachhi Ram is mentioned as 1944. This fact has not been disputed or denied by the learned counsel for the respondent. Petitioner-State has also produced on record as Annexure P-4, a copy of the demand notice issued by late Shri Lachhi Ram, which is dated 01.08.2002. Taking the date of birth of deceased Lachhi Ram as the year 1944, he would have had superannuated from service on attaining the age of 60 years (which is the superannuation age for Class-IV employees) in the year, 2004.

12. It is also an undisputed fact that though according to late Shri Lachhi Ram, his services were arbitrarily terminated in the year, 1994, but the industrial dispute was raised by him as late as in the year, 2002 by way of issuance of demand notice dated 01.08.2002.

13. It has been held by the Hon'ble Supreme Court in **Raghubir Singh** Vs. **General Manager, Haryana Roadways, Hissar** (2014) 10 Supreme Court Cases 301 that even if there are delay and latches on the part of workman in raising the industrial dispute and getting the same referenced for adjudication, the Labour Court is statutorily duty bound to answer the points of dispute referred to it by adjudicating the same on merits of the case and it ought to have moulded the relief appropriately in favour of the workman. Relevant paragraph of the said judgment is quoted hereinbeow:

> *"45. It is an undisputed fact that the dispute was raised by the workman after he was acquitted in the criminal case which was initiated at the instance of the respondent. Raising the industrial dispute belatedly and getting the same referred from the State Government to the Labour Court is for justifiable reason and the same is supported by law laid down by this Court in Calcutta Dock Labour Board (supra). Even assuming for the sake of the argument that there was a certain delay and latches on the part of the workman in raising the industrial dispute and getting the same referenced for adjudication, the Labour Court is statutorily duty bound to answer the points of dispute referred to it by adjudicating the same on merits of the case and it ought to have moulded the relief appropriately in favour of the workman. That has not been done at all by the Labour Court. Both the learned single Judge as well as the Division Bench of the High Court in its Civil Writ Petition and the Letters Patent Appeal have failed to consider this important aspect of the matter. Therefore, we are of the view that the order of termination passed by the respondent, the award passed by the Labour Court and the judgment & order of the High Court are liable to be set aside. When we arrive at the aforesaid conclusion, the next aspect is whether the workman is entitled for reinstatement, back wages and consequential benefits. We are of the view that the workman must be reinstated. However, due to delay in raising the industrial dispute, and getting it referred to the Labour Court from the State Government, the workman will be entitled in law for back wages and other consequential benefits from the date of raising the industrial dispute i.e. from 02.03.2005 till reinstatement with all consequential benefits."*

14. Further, the Hon'ble Supreme Court in **Jasmer Singh** Vs. **State of Haryana and another** (2015) 4 Supreme Court Cases 458 has held as under:-

> *"21. The said relief in favour of the appellant-workman, particularly the full back wages is supported by the legal principles laid down by this Court in the case of Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya wherein the Division Bench of this Court to which one of us was a member, after*

considering three-Judge Bench decision, has held that if the order of termination is void ab initio, the workman is entitled to full back wages.

22. The relevant para of the decision is extracted hereunder:- (Deepali Gundu case, SCC p.344, para22)

"22. The very idea of restoring an employee to the position which he held before dismissal or removal or termination of service implies that the employee will be put in the same position in which he would have been but for the illegal action taken by the employer. The injury suffered by a person, who is dismissed or removed or is otherwise terminated from service cannot easily be measured in terms of money. With the passing of an order which has the effect of severing the employer employee relationship, the latter's source of income gets dried up. Not only the concerned employee, but his entire family suffers grave adversities. They are deprived of the source of sustenance. The children are deprived of nutritious food and all opportunities of education and advancement in life. At times, the family has to borrow from the relatives and other acquaintance to avoid starvation. These sufferings continue till the competent adjudicatory forum decides on the legality of the action taken by the employer. The reinstatement of such an employee, which is preceded by a finding of the competent judicial/quasi judicial body or Court that the action taken by the employer is ultra vires the relevant statutory provisions or the principles of natural justice, entitles the employee to claim full back wages. If the employer wants to deny back wages to the employee or contest his entitlement to get consequential benefits, then it is for him/her to specifically plead and prove that during the intervening period the employee was gainfully employed and was getting the same emoluments. Denial of back wages to an employee, who has suffered due to an illegal act of the employer would amount to indirectly punishing the concerned employee and rewarding the employer by relieving him of the obligation to pay back wages including the emoluments."

15. In my considered view, learned Tribunal was bound to answer the points of disputes referred to it by adjudicating the same on merit and appropriate relief could have been granted keeping in view the reference made and reliefs claimed by the workman in the claim petition. Reference before the learned Labour Court was not to this effect as to whether son of deceased workman Lachhi Ram was entitled for appointment after the death of Shri Lachhi Ram on the basis of alleged illegal termination of Shri Lachhi Ram by the respondent-department. This very important aspect of the matter has been ignored by the learned Tribunal below.

16. Therefore, the learned Labour Court has erred in directing the department to offer employment to son of the deceased/claimant from the date of passing of the award. At the best the relief which could have been granted by the learned Labour Court in favour of the deceased claimant was re-engagement and back wages from the date when he raised the industrial dispute till the date of his superannuation. No more relief could have been granted by the learned Labour Court in view of the fact that the claimant had raised the industrial dispute at a very belated stage. Not only this, the learned Court below could not have directed the present petitioner to offer appointment to Shri Ram Lal, son of original petitioner Shri Lachhi Ram, as has been directed by it. This direction has been passed in excess of the jurisdiction conferred upon the learned Labour Court under the Industrial Disputes Act while deciding a matter pertaining to violation of Sections 25-F, 25-G and 25-H of the Industrial Disputes Act.

17. However, keeping in view the fact that the matter pertains to a workman who died during the pendency of the adjudication of the reference petition and there is a definite finding arrived at by the learned Labour Court to the effect that the termination of the deceased claimant was in violation of the statutory provisions of Industrial Disputes Act, in my considered view, the interest of justice will be served by directing the petitioner-department to pay to the respondents (legal representatives of deceased claimant) the back wages of deceased claimant

w.e.f. the date he raised the industrial dispute, i.e. 01.08.2002 till the date of his superannuation in the year, 2004.

18. The writ petition is accordingly allowed in the above terms and the award passed by the learned Labour Court to the effect that son of deceased workman be given appointment from the date of death of deceased workman is quashed and set aside. The findings arrived at by the learned Labour Court to the effect that the termination of deceased workman was in violation of the statutory provisions of the Industrial Disputes Act are not disturbed and the petitioner-department is directed to pay to the respondents the back wages of deceased workman as were accruable to him w.e.f. 01.08.2002 till the date of his superannuation in the year 2004. The amount due to the respondent be released within a period of three months from today, failing which, the petitioner-department shall be liable to pay interest on the same at the rate of 6% per annum from the date of this judgment till the date of actual payment. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Vichiter Singh and others ....Petitioners.
Versus
Jaipal Singh and others. ...Respondents.

CWP No. 421 of 2010.
Decided on: 14.7.2016.

Constitution of India, 1950- Article 226- One G filed an application for partition of the land, which was allowed by Assistant Collector 1st Grade- present petitioner R challenged the order by filing an appeal – order of partition was upheld – order was challenged by R in revision petition, which was allowed and the case was remanded to Assistant Collector 1st Grade for a fresh decision- Assistant Collector 1st Grade passed an order of partition, which was again challenged by filing an appeal- appeal was dismissed- a revision was preferred and the case was recommended to Financial Commissioner (Appeals) with observations that opportunity of being heard was not given to the petitioner – Financial Commissioner set aside the recommendation made by the Collector and upheld the order of partition- held, that Financial Commissioner had rightly held that Collector Sirmaur had no jurisdiction to entertain an appeal or a revision- however, Financial Commissioner had erred in upholding the order of partition- parties should have been given an opportunity to assail the order before the appropriate authority- writ petition allowed and the order modified to the extent that parties will have liberty to assail the order before appropriate authority under Land Acquisition Act. (Para-5 to 7)

For the petitioners.	Mr. Karan Singh Kanwar, Advocate.
For respondents 14(a) to (f).	Mr. R.K. Gautam, Sr. Advocate with Ms. Megha Kapoor Gautam, Advocate.
For respondent No.16.	Mr. V.S. Chauhan, Addl. Advocate General.
For remaining respondents	Ex parte.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J *(Oral)*

The present petition has been filed praying for the following reliefs:-

"i) Issue a writ of certiorari or direction in the nature of writ of certiorari quashing/ setting aside order dated 22.1.2007 (Annexure p-10), passed by respondent No.16 and report dated 7.11.2009 (Annexure P-II);

ii) Issue a writ of Mandamus or direction in the nature of writ of Mandamus restraining respondents from proceeding further against the petitioners on the basis of order dated 22.1.2007 (Annexure P-10) and report dated 7.11.2009 (Annexure P-II)."

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

3. Brief facts necessary for adjudication of the present case are that Gulzar Singh filed an application for partition of land subject matter of the petition which was allowed by Assistant Collector 1st Grade on 26.12.1992. Present petitioner Ratna challenged the said order by way of an appeal which was filed before Collector Sub Division, Paonta Sahib. Collector Sub Division, Paonta Sahib upheld the order of Assistant Collector 1st Grade and dismissed the appeal on 8.6.1993. This order was challenged by Ratna by way of revision petition before District Collector Sirmaur who vide order dated 24.2.1995 allowed the revision petition and remanded the case back to Assistant Collector 1st Grade, Paonta Sahib for fresh decision.

4. Assistant Collector again adjudicated upon the matter and passed an order of partition on 7.2.1997. This order was again challenged in appeal by Ratna Ram in the Court of Collector Paonta Sahib, Sub Division vide Rev. Appeal No. 7 of 2010 which was decided on 31.3.1998, vide which order the said appeal was dismissed by Collector Paonta Sahib, Sub Division. Order dated 3.3.1998 was thereafter challenged by way of revision petition before District Collector who vide order dated 17.7.1999 recommended the same to Financial Commissioner (Appeals) with observations that opportunity of being heard was not granted to the petitioner and that Naksha 'A' was incomplete and further that Farad Kabza had not been prepared and there were cuttings and overwriting in the field book prepared during the partition proceedings.

5. Learned Financial Commissioner vide order dated 22.1.2007 has set aside the orders/recommendations made by Collector Sirmaur on the ground that the order passed by the said authority was without any jurisdiction because an order which had been passed by Collector Sub Division, Paonta Sahib while exercising the powers conferred upon him under the Land Revenue Act could have been challenged by way of an appeal or revision under Sections 14 and 17 of the Land Revenue Act only before Divisional Commissioner. On these bases the Learned Financial Commissioner held that serious illegality has been committed by the District Collector, Sirmaur in entertaining the revision petition and as the recommendation made by District Collector on 17.7.1999 was beyond jurisdiction (as he had no authority to entertain and adjudicate the appeal/revision against the order of Sub Divisional Collector who enjoyed parallel powers of Collector under HP Land Revenue Act), therefore, there was no occasion for the Learned Financial Commissioner to adjudicate upon the issues which were raised in the revision petition before the Collector or the recommendations made by District Collector on 17.7.1999. The learned Financial Commissioner thereafter went on to uphold the order of partition dated 26.12.1992 passed by Assistant Collector 1st Grade as well as the order passed in appeal by Collector Sub Division, Paonta Sahib dated 8.6.1993.

6. In my considered view, the findings which have been returned by the Learned Financial Commissioner with regard to the factum of Collector Sirmaur having acceded his jurisdiction in entertaining and adjudicating upon the appeal/revision which were filed before the said authorities against the order passed by Sub Divisional Collector, Paonta Sahib while exercising the powers of Collector under the Land Revenue Act cannot be said to be incorrect or perverse. The Learned Financial Commissioner has rightly held that Collector Sirmaur had no jurisdiction to entertain either an appeal or revision under the provisions of Section 14 or 17 of the HP Land Revenue Act against an order which was passed by an authority also exercising the powers of Collector under the Act. Therefore, there is no infirmity or perversity with the findings which have been so returned by the Collector.

7. Though the Learned Financial Commissioner has rightly held that Collector Sirmaur had no jurisdiction to entertain and adjudicate either appeal or a revision against an order which was passed by an authority exercising the powers of Collector under the Land Revenue Act, however, the Learned Financial Commissioner has erred in thereafter upholding the order of partition dated 26.12.1992 passed by AC 1st Grade and the order passed in appeal against the said order by Sub Divisional Collector, Paonta Sahib on 8.6.1993. Once the Learned Financial Commissioner had come to the conclusion that the orders passed by Collector Sirmaur were beyond jurisdiction then the Learned Financial Commissioner should have had set aside the order so passed or recommendation so made by Collector Sirmaur without further venturing to either make any observation or pass any order on merit. In fact the appropriate course would have had been to grant liberty to the petitioner to assail the order passed by Collector, Sub Division Paonta Sahib before the appropriate authority in accordance with the provisions of Sections 14 and 17 of the HP Land Revenue Act rather than returning a finding to the effect that order of partition dated 26.12.1992 and subsequent order passed by Sub Divisional Collector dated 8.6.1993 were upheld.

Therefore, in view of my findings returned above, the writ petition is disposed of by upholding the order passed by Learned Financial Commissioner to the extent it has set aside the order passed by Collector Sirmaur on the ground of want of jurisdiction but the subsequent part of the order, vide which the Learned Financial Commissioner has upheld order of partition dated 26.12.1992 as well as order passed by Sub Divisional Collector dated 8.6.1993 are set aside with liberty granted to the petitioner to assail the said orders before the appropriate authority under the provisions of Land Revenue Act. No order as to cost.

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

Birbal and others .....Appellants

Versus

Prabhu Chand and others ....Respondents

FAO No.:329 of 2011.
CO No.: 54 of 2013
Decided on : 15.07.2016

Motor Vehicles Act, 1988- Section 149- Tribunal awarded compensation of Rs. 2,04,500/-, along with interest at the rate of 7.5% per annum – feeling aggrieved from the award, present appeal and cross-objection have been preferred- held, that Tribunal had rightly assessed and awarded compensation of Rs. 2,04,500/-, which cannot be said to be on the lower side- 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 at the time of accident, but no evidence was led to prove the same - appeal as well as the cross objections dismissed and the impugned award upheld. (Para-4 to 8)

For the appellant: Mr.Rohit Bharol, Advocate.
For the respondents: Mr.Naresh Verma, Advocate, for respondent No.1.
Mr.Suneet Goel, Advocate, for respondent No.3.
Nemo for respondent No.2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

This appeal is directed against the award, dated 15th April, 2011, passed by the Motor Accident Claims Tribunal, Kinnaur Civil Division at Rampur Bushahr, H.P. (for short, "the

Tribunal") in Claim Petition No.76 of 2008, titled Birbal and others vs. Prabhu Chand and others, whereby compensation to the tune of Rs.2,04,500/-, alongwith interest at the rate of 7.5% per annum from the date of filing of the claim petition till realization, came to be awarded in favour of the claimants and the insurer was saddled with the liability, (for short the "impugned award").

2. Feeling aggrieved, the claimants by the medium of instant appeal have challenged the impugned award on the ground of adequacy of compensation and the insurer has filed the Cross Objections laying challenge to the impugned award on the ground that the Tribunal has wrongly saddled it with the liability.

3. Thus, following two questions are to be determined in the instant appeal:

i) Whether the amount of compensation awarded by the Tribunal is inadequate?

ii) Whether the insurer came to be rightly saddled with the liability?

4. At the time of accident, the deceased was 10 years of age. The Tribunal in paragraph 17 of the impugned award, after discussing the facts and exercising the guess work, held that the claimants were entitled to Rs.2,04,500/- as compensation. The Tribunal has rightly made the assessment and has rightly awarded the compensation, cannot be said to be on the lower side. Accordingly, the amount of compensation awarded by the Tribunal is upheld.

5. Coming to the next question, 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 at the time of accident, has not led any evidence to prove the said fact. Learned counsel for the insurer argued that the insurer has filed an application, being CMP No.91 of 2013, under Section 41 Rule 27 read with Section 151 of the Code of Civil Procedure for placing on record a surveyor report, in order to prove that the driver of the offending vehicle, at the time of accident, was not having a valid and effective driving licence.

6. The said application (CMP No.91 of 2013) deserves to be dismissed for the simple reason that the insurer cannot be permitted to defeat the right of the claimants at this belated stage. Moreover, it was for the insurer to plead and prove, by leading evidence, before the Tribunal that the driver of the offending vehicle was not having valid and effective driving licence at the time of accident, which it has not done despite affording sufficient opportunities. Therefore, once the insurer has failed to prove before the Tribunal that the driver was not having a valid and effective driving licence at the time of accident, it does not lie in the mouth of the insurer to argue at this stage that the driver was not having a valid and effective driving licence. Accordingly, the application (CMP No.91 of 2013) is dismissed and the finding returned by the Tribunal on issue No.3 are upheld.

7. Learned counsel for the insurer also argued that the claim petition was not maintainable and the owner has committed willful breach, has not led any evidence, as discussed hereinabove. Accordingly, the findings on issues No.4 and 5 are also upheld.

8. Onus to prove, that the claim petition was collusive, was on the insurer, has not led any evidence to prove the said factum. Moreover, the findings returned by the Tribunal on issue No.6 are not questioned by the learned counsel for the insurer during the course of hearing. Accordingly, the same are upheld.

9. Having said so, the appeal as well as the cross objections are dismissed and the impugned award is upheld.

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

FAO (MVA) No. 129 of 2011 a/w
FAO No. 239 of 2012
Date of decision: 15th July, 2016.

FAO No. 129/2011.

Chander Shekhar .....Appellant.
Versus
Shri Lal Singh and others .....Respondents

FAO No. 239/2012.

Lal Singh .....Appellant.
Versus
Oriental Insurance Co. Ltd. and others .....Respondents

Motor Vehicles Act, 1988- Section 149- Deceased was travelling in the vehicle along with vegetables- this fact was admitted by owner and driver- hence, she cannot be said to be an unauthorized passenger- insurer had not led any evidence to prove the breach of terms and conditions of the policy- thus, insurer is liable to pay the amount. (Para-2 to 14)

Cases referred:

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, ILR 2015 (III) HP 1149

For the appellant(s): Mr. Satyen Vaidya, Sr. Advocate with Mr. Vivek Sharma, Advocate, for the appellant in FAO No. 129 of 2011 and Mr. G.S. Rathoure, Advocate, for the appellant in FAO No. 239 of 2012.

For the respondent(s): Mr. G.S. Rathour, Advocate, for respondent No. 1 in FAO No. 129 of 2011 and Mr. G.C. Gupta, Sr. Advocate with Ms. Meera Devi, Advocate, for respondent No. 1 in FAO No. 239 of 2012 and for respondent No. 2 in FAO No. 129 of 2011.
Mr. Satyen Vaidya, Sr. Advocate Mr. Vivek Sharma, Advocate, for respondent No. 2 in FAO No. 239 of 2012.
Nemo for other respondents.

The following judgment of the Court was delivered:

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

These appeals are outcome of the judgment and award dated 13.1.2011, made by the Motor Accident Claims Tribunal, (III) Shimla, H.P., in MAC petition No. 67-S/2 of 2006, titled *Sh. Lal Singh alias Lali versus Oriental Insurance Co. Ltd and others*, for short "the Tribunal", whereby compensation to the tune of Rs.7,93,000/- alongwith interest @ 6% per annum, came to be awarded in favour of the claimant, and owner came to be saddled with the liability, hereinafter referred to as "the impugned award", for short.

2. Owner has questioned the impugned award by the medium of FAO No. 129 of 2011, on the ground of saddling him with the liability and the claimant, by the medium of FAO No. 239 of 2012 has questioned the impugned award on the ground of adequacy of compensation.

3. Thus, the questions to be determined in these appeals are:

(i) Whether the Tribunal has rightly saddled the owner with the liability and discharged the insurer?;

(ii) Whether the amount awarded is adequate?

4. It was the positive case of the claimant before the Tribunal that deceased Meera Devi was the wife of claimant Lal Singh, who was dealing with vegetables. As per averments contained in para 10 of the claim petition, she was travelling in the offending vehicle alongwith her goods. It is apt to reproduce para 10 of the claim petition herein.

> *"10. The deceased was travelling in the vehicle No. HP-62-0289 from Dhali alongwith her goods when the vehicle reached near village Shankli it met with an accident."*

5. Owner-Respondent No.2 has admitted paras 8 and 10 of the claim petition. It is apt to reproduce paras 8 and 10 of the reply herein.

> *"8.Contents of para-8 of the petition are admitted.*
>
> *9.....*
>
> *10. Contents of para-10 are also admitted. The deceased was travelling in vehicle No. HP-62-0289. She boarded the vehicle alongwith her goods and she paid freight to the driver of the replying respondent and she was going to Shankli alongwith her goods."*

6. The driver has also admitted para 10 of the petition. It is apt to reproduce para 10 of the reply filed by the driver-respondent No.3 herein.

> *"Contents of paras 8, 9 and 10 of the petition are not denied."*

7. It is an admitted fact that the deceased was travelling in the vehicle as owner of the goods and has paid freight. There was no need to frame such an issue. It appears that the Tribunal has framed the said issue, in view of the reply of the insurer.

8. I have gone through the pleadings and the evidence on record. One comes to an inescapable conclusion that it is admitted fact that the deceased was travelling in the offending vehicle as owner of the goods and has paid freight. Thus, she cannot be said to be travelling in the offending vehicle as unauthorized passenger. Accordingly, the findings returned by the Tribunal on issue No. 6 are set aside and it is held that the deceased was travelling in the offending vehicle as owner of the goods.

9. **Issue No.7**. It was for the insurer to plead and prove that the owner has committed willful breach. The insurer has failed to prove that the owner has committed willful breach. Having said so, the findings returned by the Tribunal on issue No. 7 are upheld.

10. The Tribunal has decided issues No. 3 to 5 and 7 to 9 in favour of the insurer. There is no challenge to these issues. Thus, the findings returned on these issues are upheld.

11. As discussed hereinabove, findings on issue No. 6 are set aside. The question is who is to be saddled with the liability?

12. The factum of insurance is admitted. Thus, the insurer has to satisfy the award.

13. Adverting to FAO No. 239 of 2012. The question is whether the amount awarded is adequate or otherwise.

14. The amount awarded is adequate and cannot be said to be meager, for the following reasons.

15. The Tribunal has rightly made the discussions in paras 15 and 16 of the impugned award, are upheld. However, interest was to be awarded at rate of 7.5% per annum, for the following reasons.

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. Accordingly, interest @7.5% per annum is awarded from the date of claim petition till realization of the amount.

18. The insurer is directed to satisfy the award and is directed to deposit the amount within eight weeks from today. On deposit, the Registry is directed to release the awarded amount 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. Statutory amount of Rs.25,000/- is awarded as costs in favour of the claimant.

19. Viewed thus, the appeal being FAO No. 129 of 2011 is allowed, the impugned award is modified, as indicated hereinabove and FAO No. 239 of 2012 is dismissed.

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

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

Deen Mohammad & another ......Appellants.
Versus
State of H.P. ....Respondent.

Cr. Appeal No. 105 of 2016.
Reserved on: July 14, 2016.
Decided on: July 15, 2016.

N.D.P.S. Act, 1985- Section 20 and 29**-** A Maruti Alto Car occupied by accused was checked - a white coloured bag was found lying near the gear- 2.5 kg charas was recovered from the bag- the accused was tried and convicted by the Trial Court – held in appeal, car was intercepted at 1:10 p.m. at an isolated place – PW-5 was sent to procure witnesses but none could be found- statements of official witnesses inspire confidence- recovery was effected from the bag kept in the car- provision of Section 50 was not required to be complied with - the prosecution case was proved beyond reasonable doubt and the accused was rightly convicted by the Trial Court- appeal dismissed. (Para 15-19)

For the appellants: Mr. B.L.Soni, Advocate.
For the respondent: Mr. M.A.Khan, Addl. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

The accused have come in appeal against the judgment dated 5.3.2016, rendered by the learned Special Judge (II), Kangra at Dharamshala, H.P., in Sessions Case No. 2-N/VII/2014, whereby the appellants-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 Act), have been convicted and sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs. 1,00,000/-each for offence under Section 20 read with Section 29 of the Act. In default of payment of fine, each of them was ordered to suffer rigorous imprisonment for a period of six months.

2. The case of the prosecution, in a nut shell, is that on 30.8.2013, police party headed by ASI Ajeet Kumar, In-charge, PP Kandwal was on patrolling in the area for crime detection along with HC Bir Singh, HHC Naresh Kumar, LHC parvinder Kumar and Const. Shashi Pal at Bhadroya Chowk, Old Link Road, Damtal at 1:10 AM. One Alto Car No. HP-44-4100 occupied by the accused came from Kandwal side. It was stopped for checking. A white bag was found lying near the gear lever. On checking the bag, charas was recovered. The driver disclosed his identity as Deen Mohammad. The place was isolated and as such independent witnesses could not be associated. Charas weighed 2.5. kg. It was sealed in a cloth parcel with five seals of seal impression “A”. The IO filled in the NCB form in triplicate and drew facsimile of seal “A” on a separate piece of cloth. The seal after use was handed over to HC Bir Singh. The case property was taken into possession vide separate seizure memo in the presence of witnesses. Rukka was prepared and handed over to HHC Naresh Kumar with direction to deposit the same at PS Nurpur. On receipt of rukka, FIR was registered. The case property was produced before SHO Tilak Singh, PS Nurpur, who resealed the same with five seals of seal impression “T”. The facsimile of seal “T” was also taken on a separate piece of cloth. SHO Tilak Singh filled in the relevant columns of NCB form. 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 sixteen witnesses. The accused were also examined under Section 313 Cr.P.C. According to them, they were falsely implicated. The learned trial Court convicted the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. B.L.Soni, Advocate, has vehemently argued that the prosecution has failed to prove its case against the accused. According to him, neither independent witnesses were associated nor Section 50 of the Act was complied with. On the other hand, Mr. M.A.Khan, Addl. AG has supported the judgment of the learned trial Court dated 5.3.2016.

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 HHC Parvinder Kumar testified that he was posted as general duty Constable at PP Kandwal in the year 2013. On 30.8.2013, the police had laid naka at Bhadroya Chowk at 1:10 AM. One Alto car bearing registration No. HP-44-4100 came from Kandwal side towards them. It was signaled to stop. It was driven by accused Deen Mohammad. Chain Lal was also sitting in the Car. One bag was found near the gear liver. On checking it was found to be containing charas in the shape of sticks and balls. Charas weighed 2.5. kg. I.O. prepared the samples and sealed the same at five places with impression “A”. Rukka was also sent to the Police Station through HHC Naresh Kumar. In his cross-examination, he deposed that they had

laid naka to apprehend some contraband. Some vehicles were coming and going through their naka and they were checking the vehicles. There was a toll tax barrier at a distance of one km. approximately. He admitted that 2-3 persons were present at toll tax barrier throughout. The personal search of the accused was carried out by the I.O. and thereafter recovery memo was prepared.

7. PW-4 HC Bir Singh also deposed the manner in which the Car was intercepted and contraband was recovered. The spot where the accused were apprehended was a lonely place and due to night independent witnesses could not be associated in the proceedings. The contraband was recovered. It weighed 2.5 kgs. All the codal formalities were completed at the spot. He signed memos Ext. PW-4/A and PW-4/B. In his cross-examination, he admitted that they had started from the Police Post with the motive to recover contraband and liquor etc. They had laid naka at Bhadroya Chowk. He admitted that near the spot toll tax barrier was at a distance of half a kilometer. He also admitted that employees of the barrier remained there throughout day and night. No person from the barrier was associated by them as independent witness. Kandwal was at a distance of 11 km. from the spot.

8. PW-5 HHC Naresh Kumar also deposed the manner in which the Car was intercepted, accused were apprehended and charas was recovered from the car. All the codal formalities were completed at the spot. Rukka was prepared by IO and it was sent through him to the Police Station. At Police Station, FIR was registered. Personal search of the accused was taken and thereafter recovery memo was scribed. He was sent to bring scale and weights.

9. PW-6 Raghubir Singh deposed that police persons came to him and demanded scale and weights at 8:00 AM. He was not having scale and weights. He was declared hostile and cross-examined by the learned Public Prosecutor. In his cross-examination, he deposed that he has signed some documents at the instance of the police.

10. PW-8 ASI Joginder Singh deposed that on 30.8.2013 ASI Ajeet Kumar presented one parcel sealed with seal impression "A" at five places containing 2.5 kg charas along with the NCB form to Addl. SHO Tilak Singh. It was resealed by SHO Tilak Singh with seal impression "T" at five places. The seal of impression was also taken on separate piece of cloth by SHO. Thereafter seal was handed over to him. Re-seal memo was prepared. The case property was handed over to MHC Pardeep Kumar to be deposited in the malkhana.

11. PW-10 HHC Subhash Chand deposed that on 1.9.2013, MHC PS Nurpur Pardeep Kumar vide RC No. 256/2013 dated 1.9.2013 handed over to him one parcel containing charas sealed with seal impressions "A" and "T" at five places along with NCB form for chemical examination at FSL, Junga. He deposited the parcel at FSL, Junga on 2.9.2013 under receipt.

12. PW-11 HC Pardeep Kumar deposed that on 30.8.2013 SHO Tilak Singh deposited one sealed parcel sealed with impression "A" and resealed with seal impression "T" at five places along with NCB form with sample seals "A" and "T" which he entered in the malkhana register. The extract of the register is Ext. PW-11/A. The case property was sent to FSL, Junga through Const. HHC Subhash Chand vide RC PW-11/B.

13. PW-13 SI Tilak Singh deposed that he registered FIR PW-13/A. The I.O. in the case also produced case property before him. He resealed the same and handed it over to MHC to be deposited in the malkhana.

14. PW-16 ASI Ajeet Kumar was the I.O. He also deposed the manner in which the Car was intercepted, accused were apprehended and charas was recovered from the car. All the codal formalities were completed at the spot. Rukka was prepared by him and it was sent through HHC Naresh Kumar to the Police Station. At Police Station, FIR Ext. PW-13/A was registered. He went to the Police Station Nurpur and handed over the case property to SHO for resealing. SHO resealed the same and also filled in the relevant columns of NCB-I form. In his cross-examination, he deposed that he sent HHC Naresh Kumar to bring independent witnesses.

There was a toll tax barrier at a distance of 100 meters from Bhadroya Chowk. Village Hagwal was in close proximity to the place of naka i.e. Bhadroya Chowk.

15. What emerges from the analysis of the evidence discussed hereinabove is that the accused were apprehended at 1:10 AM on 30.8.2013 at Bhadroya Chowk. The car occupied by the accused was intercepted. Charas was found in the bag. All the codal formalities were completed at the spot. Charas weighed 2.5. kg. It was produced before the SHO, who resealed the same and deposited it with the MHC of the Police Station. The case property was sent to FSL, Junga through Const. HHC Subhash Chand vide RC PW-11/B. The samples were found intact and seal impression also tallied with the original seal at FSL, Junga.

16. Mr. B.L. Soni, Advocate for the accused has vehemently argued that the independent witnesses have not been associated at the time of search, seizure and sealing proceedings. He also argued that toll tax barrier was at a distance of 100 meters from the spot. However, the fact of the matter is that the car was intercepted at 1:10 AM at Bhadroya Chowk. It was an isolated and secluded place. PW-16 ASI Ajeet Kumar has sent PW-5 Const. Naresh Kumar to procure independent witnesses. PW-5 HHC Naresh Kumar has also deposed that the place where the accused were apprehended was isolated and no independent witnesses could be associated. PW-4 HC Bir Singh has also deposed that the place where the accused were apprehended was lonely place and due to night independent witnesses could not be associated. Thus, every effort has been made to join independent witnesses.

17. The statements of the official witnesses inspire confidence. It is not one of those cases where the independent witnesses were available but not associated. In the instant case, the place was secluded and thus, there was no possibility of independent witnesses being available at 1:10 AM.

18. Mr. B.L.Soni, Advocate, has vehemently argued that the police has not complied with Section 50 of the Act at the time of personal search of the accused. Mr. M.A. Khan, Addl. Advocate General for the State has drawn the attention of the Court to recovery memos Ext. PW-4/A and PW-4/B. It is evident from recovery memos Ext. PW-4/A and PW-4/B that the accused were searched after their arrest. Since the charas has been recovered from the Car, Section 50 of the Act was not at all required to be complied with.

19. Thus, the prosecution has proved the case against the accused to the hilt and this Court has no occasion to interfere with the well reasoned judgment of the learned trial Court dated 5.3.2016.

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

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

H.P. General Industries Corporation Ltd. through its Managing Director.......Petitioner

Versus

Kavita Bhaskar w/o Sh. Rakesh Bhaskar ......Non-petitioner

Review Petition No. 11/2016
Reserved on : 18th May 2016
Date of order: 15th July 2016

Code of Civil Procedure, 1908- Order 47 Rule 1- A- Civil Suit for recovery was filed by the petitioner which was dismissed as withdrawn with liberty to file a claim before the arbitrator- A CMPMO was filed against the order which was disposed of - an application for review has been filed - held, that an objection was taken that Civil Suit is not maintainable in view of the

arbitration clause - therefore, it is not permissible to say that the liberty was wrongly granted to the plaintiff- there is no error apparent on the face of the record- petition dismissed. (Para 6-9)

Cases referred:
R.N.Gosain A Vs. Yashpal Dhir, AIR 1993 Apex Court 352
Satyanarayan Laxminarayan Hegde and others Vs. Mallikarjun Bhavanappa Tirumale, AIR 1960 SC 137
Thungabhadra Inds. Ltd. Vs. Government of Andhra Pradesh, AIR 1964 SC 1372
A. T. Sharma Vs. A. P. Sharma and others, AIR 1979 SC 1047
Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi, AIR 1980 SC 674
Meera Bhanja Vs. Nirmala Kumari Choudhury, AIR 1995 SC 455
B. H. Prabhakar and Others Vs. M.D. Karnataka State Coop., JT 2000 (7) SC 359

For petitioner : Ms. Sunita Sharma, Advocate
For non-petitioner : Ms. Vandana Misra, Advocate

The following order of the Court was delivered:

P. S. Rana, J.

Present review petition is filed under Order XLVII Rule 1 Code of Civil Procedure 1908 for review of order dated 01.10.2015 passed in CMPMO No.405 of 2014 title Kavita Bhaskar vs. H.P. General Industries Corporation Limited.

Brief facts of the case:

2. Non-petitioner Smt. Kavita Bhaskar filed civil suit for recovery of Rs.21,318/- (Rupee Twenty one thousand Three hundred eighteen) alongwith interest and future interest @18% per annum w.e.f. 13.10.2009 against petitioner H.P. General Industries Corporation Limited. It is pleaded that non-petitioner Smt. Kavita Bhaskar carries business of sale and supply of hospital equipments and surgical items. It is pleaded that written agreement was executed inter se parties for supply of material to H.P. General Industries Corporation Limited vide invoice Nos. 2176, 2177 & 2178 dated 16.03.2009 amounting to Rs.2,95,800/- (Rupee Two lac ninety five thousand eight hundred). It is pleaded that H.P. General Industries Corporation Limited withheld an amount to the tune of Rs.21,318/- (Rupee twenty one thousand three hundred eighteen). Thereafter Smt. Kavita Bhaskar filed civil suit for recovery of amount. During pendency of civil suit Smt. Kavita Bhaskar filed application under Order XXIII Rule 1(3) Code of Civil Procedure 1908 pleaded therein that H.P. General Industries Corporation Limited took preliminary objection No.2 in written statement that as per terms and conditions of written agreement there is provision for appointment of Arbitrator as per Arbitration and Conciliation Act 1996 and Smt. Kavita Bhaskar be permitted to withdraw civil suit with permission to file claim before learned Arbitrator under Arbitration and Conciliation Act 1996.

3. Learned Trial Court dismissed the application filed by Smt. Kavita Bhaskar. Smt. Kavita Bhaskar filed CMPMO No.405 of 2014 under Article 227 of Constitution of India and same was disposed of on 01.10.2015 by the High Court and Smt. Kavita Bhaskar was permitted to withdraw civil suit with liberty to file statement of claim before Arbitrator under Arbitration and Conciliation Act 1996. Present review petition is filed for review of order dated 01.10.2015 passed in CMPMO No. 405 of 2014 by the High Court.

4. Court heard learned Advocate appearing on behalf of petitioner and learned Advocate appearing on behalf of non-petitioner and Court also perused the entire records carefully.

5. Following points arise for determination:

1) Whether review petition filed by petitioner is liable to be accepted as mentioned in memorandum of grounds of review petition?

2) Final order.

Findings upon point No.1 with reasons:

6. Submission of learned Advocate appearing on behalf of petitioner that learned Trial Court has rightly dismissed application under Order XXIII Rule 1 (3) Code of Civil Procedure 1908 and order warrants review is rejected being devoid of any force for reasons hereinafter mentioned. It is proved on record that petitioner namely H.P. General Industries Corporation Limited himself took preliminary objections in written statement that civil suit is not maintainable in view of Arbitration clause in agreement. It is well settled law that parties cannot be allowed to approbate and reprobate at the same time. Person cannot be allowed to take benefit and then turn round and say that same is void. See AIR 1993 Apex Court 352 title **R.N.Gosain A Vs. Yashpal Dhir.**

7. Submission of learned Advocate appearing on behalf of petitioner that Smt. Kavita Bhaskar did not file application to refer the matter to Arbitrator as per Section 8 of Arbitration and Conciliation Act 1996 for appointment of Arbitrator and on this ground review petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Petitioner namely H.P. General Industries Corporation Limited himself took preliminary objections in written statement that civil suit filed by Smt. Kavita Bhaskar is not maintainable in view of Arbitration clause in written agreement executed inter se parties. It is held that H.P. General Industries Corporation Limited is estopped from raising objection due to own act and conduct.

8. Submission of learned Advocate appearing on behalf of petitioner that no opportunity was granted to H.P. General Inds. Corpn. Ltd. to take pleas of limitation and on this ground review petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. As per Section 23 of Arbitration and Conciliation Act 1996 Smt. Kavita Bhaskar would state the facts supporting claim, points at issue and the relief or remedy sought and thereafter H.P. General Industries Corporation Limited shall state defence. It is held that as per Section 23 of Arbitration and Conciliation Act 1996 petitioner H.P. General Industries Corporation Limited is at liberty to take all defence before Arbitrator in accordance with law. It is held that it is not expedient in the ends of justice to review earlier order passed by the High Court.

9. It is well settled law that for review purpose an error must be apparent on the face of record. It is well settled law that error must be evident. See AIR 1960 SC 137 title **Satyanarayan Laxminarayan Hegde and others Vs. Mallikarjun Bhavanappa Tirumale**. See AIR 1964 SC 1372 title **Thungabhadra Inds. Ltd. Vs. Government of Andhra Pradesh**. Also see AIR 1979 SC 1047 title **A. T. Sharma Vs. A. P. Sharma and others**. Also see AIR 1980 SC 674 title **Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi**. Also see AIR 1995 SC 455 title **Meera Bhanja Vs. Nirmala Kumari Choudhury.** Also see JT 2000 (7) SC 359 title **B. H. Prabhakar and Others Vs. M.D. Karnataka State Coop.** In view of above stated facts it is held that there is no error apparent on the face of record in the present case. Point No.1 is answered in negative.

Point No.2 (Final Order).

10. In view of findings upon point No.1 above review petition is dismissed. No order as to costs. Review Petition No. 11/2016 is disposed of. Pending application(s) if any also disposed of.

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

ICICI Lombard Motor Insurance …..Appellant

Versus

Balak Ram Chauhan and others …. Respondents

FAO No.: 517 of 2015.

Decided on : 15.07.2016

Motor Vehicles Act, 1988- Section 166- Deceased was a bachelor and was a student of Engineering- Tribunal has fallen into an error in assessing his income as Rs. 4,500/- per month-

by guess work, it can be safely held that he would have been earning not less than Rs. 6,000/- per month -claimants have lost source of dependency to the tune of Rs. 3,000/- per month- deceased was 22 years of age at the time of death- multiplier of '16' is applicable- claimants are entitled to Rs. 3,000 x 12 x 16 = Rs. 5,76,000/- under the head loss of source of dependency- claimants are also entitled to Rs. 10,000/- each under the heads 'loss of love and affection', 'loss of estate' and 'funeral expenses'- thus, total compensation of Rs. 5,76,000/- + Rs. 30,000/- = Rs. 6,06,000/- awarded in favour of the claimants- Tribunal had rightly saddled the insurer with the liability– appeal allowed. (Para-4 to 8)

Motor Vehicles Act, 1988- Section 171- Tribunal had awarded interest @ 9% per annum but the interest was to be awarded as per the prevailing rates- hence, rate of interest reduced from 9% to 7.5% per annum. (Para-9 and 10)

Cases referred:

Delhi Transport Corporation and another, AIR 2009 SC 3104
Reshma Kumari & others versus Madan Mohan and another, 2013 AIR (SCW) 3120
United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, (2002) 6 Supreme Court Cases 281;
Santosh Devi versus National Insurance Company Ltd. and others, 2012 AIR SCW 2892
Amrit Bhanu Shali and others versus National Insurance Company Limited and others, (2012) 11 Supreme Court Cases 738
Savita versus Binder Singh & others, 2014 AIR SCW 2053
Kalpanaraj & Ors. versus Tamil Nadu State Transport Corpn., 2014 AIR SCW 2982
Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, (2015) 4 Supreme Court Cases 433
Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, (2015) 4 Supreme Court Cases 434
Oriental Insurance Company versus Smt. Indiro and others, ILR 2015 (III) HP 1149

For the appellant: Mr.Jagdish Thakur, Advocate.
For the respondents: Mr.V.D. Khidta, Advocate, for respondents No.1 and 2.
Nemo for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

Subject matter of this appeal is the award, dated 30th September, 2013, passed by the Motor Accident Claims Tribunal, Shimla, District Shimla, H.P. (for short, "the Tribunal") in Claim Petition No.44-S/2 of 2009, titled Balak Ram and another vs. Gullu Transport Company and another, whereby compensation to the tune of Rs.6,32,000/-, alongwith interest at the rate of 9% per annum from the date of filing of the claim petition till deposit, came to be awarded in favour of the claimants and the insurer was saddled with the liability, with the right of recovery, (for short the "impugned award").

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

3. Feeling aggrieved, the insurer has filed the instant appeal on the following counts:

i) The Tribunal has wrongly saddled the insurer with the liability, with right of recovery;

ii) The multiplier is on the higher side;

iii) The deceased was a bachelor, therefore, 50% was to be deducted towards his personal expenses and the Tribunal has fallen into an error in deducting 1/3rd amount.

4. I have examined the pleadings and have gone through the impugned award. Admittedly, the deceased was bachelor and was a student of Engineering. It can be presumed that the deceased may have a bright future ahead. The Tribunal has fallen into an error in assessing the income of the deceased at Rs.4,500/- per month. Hypothetically and after exercising guess work, the income of the deceased can be said to be Rs.6,000/- per month.

5. Admittedly, the deceased, at the time of death, was a bachelor, therefore, in view of ***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,*** 1/2 is to be deducted from the said income towards his personal expenses. Accordingly, it is held that the claimants have lost source of dependency to the tune of Rs.3,000/- per month.

6. The deceased was 22 years of age at the time of death. Therefore, 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 '16' is appropriate and is applied accordingly.

7. In view of the above, the claimants are awarded Rs.3,000 x 12 x 16 = Rs.5,76,000/- under the head loss of source of dependency. In addition, the claimants are also awarded Rs.10,000/- each under the heads 'loss of love and affection', 'loss of estate' and 'funeral expenses'.

8. Having regard to the above discussion, the claimants are held entitled to Rs.5,76,000/- + Rs.30,000/- = Rs.6,06,000/- as compensation.

9. As far as interest is concerned, the Tribunal has awarded interest at the rate of 9% per annum. It is beaten law of land that the rate of interest should be awarded as per the prevailing rates, in view of the judgments rendered by the Apex Court in cases titled as ***United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others,*** **reported in** ***(2002) 6 Supreme Court Cases 281; Santosh Devi versus National Insurance Company Ltd. and others,*** **reported in** ***2012 AIR SCW 2892; Amrit Bhanu Shali and others versus National Insurance Company Limited and others,*** **reported in** ***(2012) 11 Supreme Court Cases 738; Smt. Savita versus Binder Singh & others,*** **reported in** ***2014 AIR SCW 2053; Kalpanaraj & Ors. versus Tamil Nadu State Transport Corpn.,*** **reported in** ***2014 AIR SCW 2982; Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others,*** **reported in** ***(2015) 4 Supreme Court Cases 433,*** **and** ***Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another***, reported in ***(2015) 4 Supreme Court Cases 434***, and discussed by this Court in a batch of FAOs, ***FAO No. 256 of 2010, titled as Oriental Insurance Company versus Smt. Indiro and others***, being the lead case, decided on **19.06.2015**.

10. Having said so, it is held that the amount of compensation shall carry interest at the rate of 7.5% per annum from the date of filing of the claim petition till the deposit thereof.

11. The argument of the learned counsel for the appellant/insurer that the Tribunal has fallen into an error in saddling the insurer with the liability, with right or recovery, is devoid of any force for the simple reason that the vehicle was insured and the claimants were third party. The Tribunal has rightly saddled the insurer with the liability, with right of recovery.

12. In view of the above, the appeal is allowed and the impugned award is modified as indicated above. The Registry is directed to release the amount in favour of the claimants forthwith, and the excess amount, if any, be refunded to the insurer through payee's account cheque.

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

Smt. Kamlesh Kaur and others …Appellants.

Versus

Shri Rajinder Kumar and others …Respondents.

FAO No. 316 of 2011
Decided on: 15.07.2016

Motor Vehicles Act, 1988- Section 166- Deceased was working as Patwari in the revenue department and was drawing salary of Rs. 13,747/- - claimants also pleaded that deceased was an agriculturists having dairy farm and he was earning Rs.6,000/- per month from agricultural vocations and dairy farm – thus, it can be safely said that deceased was earning not less than Rs.16,000/- per month- 1/4th amount was to be deducted towards personal expenses- multiplier of '15' is applicable and the claimants are entitled to Rs. 12,000/- x 12 x 15 = Rs. 21,60,000/- under the head 'loss of income/dependency' and Rs. 10,000/- each under the heads 'loss of consortium', 'loss of estate', 'loss of love and affection' and 'funeral expenses'- thus, claimants are entitled to total compensation of Rs. 22,00,000/- along with interest @ 7.5% per annum from the date of filing the claim petition till its realization. (Para-5 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. J.L. Bhardwaj, Advocate.
For the respondents: Mr. J.R. Poswal, Advocate, for respondents No. 1 and 2.
Mr. Praneet Gupta, 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 18th March, 2011, made by the Motor Accident Claims Tribunal, Solan, Camp at Nalagarh (for short "the Tribunal") in MAC Petition No. 18-NL/2 of 2009, titled as Smt. Kamlesh Kaur and others versus Shri Rajinder Kumar and others, whereby compensation to the tune of ₹ 17,05,000/- 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 insurer was saddled with liability (for short "the impugned award").

2. The insurer, driver and 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 claimants have questioned the impugned award only on the ground of adequacy of compensation.

4. Thus, the core question to be determined in this appeal is – whether the amount awarded is inadequate? The answer is in the affirmative for the following reasons:

5. Admittedly, the deceased was a government servant – was working as Patwari in Revenue Department and at the relevant point of time, his monthly salary was ₹ 13,747/-, as per salary certificate, Ext. PW-5/A.

6. Though, the claimants have pleaded and proved that in addition to his service, the deceased was also an agriculturist, having a dairy farm and was earning ₹ 6,000/- per month from agricultural vocations and dairy farm, but, the Tribunal has not taken the said income into account.

7. Keeping all factors in view read with the salary certificate, Ext. PW-5/A, roughly it can be said that the deceased was earning not less than ₹ 16,000/- per month.

8. One-fourth was to be deducted towards the personal expenses of the deceased while keeping in view the law laid down by the Apex Court in the case titled as **Sarla Verma (Smt) and others versus Delhi Transport Corporation and another,** reported in **(2009) 6 Supreme Court Cases 121,** which was upheld by a larger Bench of the Apex Court in **Reshma Kumari & Ors. versus Madan Mohan & Anr.,** reported in **2013 AIR SCW 3120.** Accordingly, it is held that the claimants have lost source of dependency to the tune of ₹ 12,000/- per month.

9. In view of the averments contained in the claim petition read with the age of the deceased, ratio laid down by the Apex Court in **Sarla Verma's** and **Reshma Kumari's cases (supra)** and the Second Schedule appended with the Motor Vehicles Act, 1988 (for short "MV Act"), multiplier of '15' is to be applied.

10. Thus, the claimants are held entitled to ₹ 12,000/- x 12 x 15 = ₹ 21,60,000/- under the head 'loss of income/dependency'.

11. The claimants 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'.

12. Viewed thus, it is held that the claimants are entitled to compensation to the tune of ₹ 21,60,000/- + ₹ 10,000/- + ₹ 10,000/- + ₹ 10,000/- + ₹ 10,000/- = ₹ 22,00,000/- with interest @ 7.5% per annum from the date of the claim petition till its realization.

13. The insurer is directed to deposit the enhanced awarded amount before the Registry of this Court 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.

14. Having glance of the above discussions, the impugned award is modified, as indicated hereinabove, and the appeal is disposed of accordingly.

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

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

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

Mast Ram .....Appellant
Versus
Pammi Devi .....Respondent

FAO No.: 334 of 2011.
Decided on :15.07.2016

Motor Vehicles Act, 1988- Section 140- Tribunal allowed interim compensation and awarded Rs. 50,000/- under no fault liability in favour of the claimants - owner was directed to deposit the said amount- feeling aggrieved, present appeal has been preferred- held, that order passed by the Tribunal is illegal and wrong - interim award can be granted on the basis of *prima facie* proof that accident is outcome of rash and negligent driving of the driver of a motor vehicle- insurer directed

to satisfy the award with a condition that in case it is proved at the conclusion of the case, that the vehicle was not insured or the owner had committed willful breach, the owner shall reimburse the amount to the insurer. (Para- 3 to 6)

Case referred:

National Insurance Co. vs. Jyoti Ram and another, I L R 2014 (V) HP 226

For the appellant: Ms.Anita Jalota, Advocate.
For the respondents: Mr.Jagdish Thakur, Advocate, for respondent No.4.
Nemo for other respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

This appeal is directed against the order, dated 28th June, 2011, passed by the Motor Accident Claims Tribunal, Kinnaur Civil Division at Rampur Bushahr, H.P. (for short, "the Tribunal") in CMP No.274-R/6 of 2009, in Claim Petition No.111-R/2 of 2009, titled Pammi Devi & another vs. Ajay Kumar and others, whereby application under Section 140 of the Motor Vehicles Act, 1988 (for short, the Act), was allowed and interim compensation under no fault liability to the tune of Rs.50,000/- was granted in favour of the claimants and the owner was directed to deposit the said amount, (for short the "impugned order").

2. Feeling aggrieved, the owner has filed the instant appeal challenging the impugned order on the ground that the Tribunal has fallen into an error in saddling him with the liability.

3. It appears that the impugned order passed by the Tribunal is patently illegal and wrong for the simple reason that In terms of section 140, 141, 158(6) and 166(4) of the Act, the Claims Tribunal is required to satisfy itself while determining the petition under section 140 of the Act in respect of the following points.

i. The accident has arisen out of the use of motor vehicle;

ii. The said accident resulted in death or permanent disablement;

iii. The claim is made against the owner and insurer of the motor vehicle involved in the accident.

4. No other ground can be pressed into service at the time of determining a petition under Section 140 of the Act.

5. This Court, in **FAO No.80 of 2007, titled National Insurance Co. vs. Jyoti Ram and another, decided on 19 September, 2014**, and connected matters, after relying upon the pronouncements of the Apex Court, has held that Section 140 of the Act mandates that the interim award can be granted on the basis of *prima facie* proof to the effect that the accident is outcome of rash and negligent driving of the driver of a motor vehicle, the vehicle is insured and the victim has sustained disability or has succumbed to the injury.

6. Having said so, the impugned order is set aside and the insurer is directed to pay the amount, as granted by the Tribunal, by providing that in case, at the conclusion of the case, it is proved that the vehicle was not insured or the owner had committed willful breach, the owner shall reimburse the said amount to the insurer. The amount deposited be refunded to the appellant through payee's account cheque. The impugned order is modified as indicated above and the appeal is disposed of. The Registry is directed to send down the record forthwith.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Narotam .... Appellant

Versus

Smt. Laxmi Devi & Ors. .... Respondents

RSA No. 380 of 2006
Reserved on: 15.06.2016
Date of decision: 15.07.2016

Indian Succession Act, 1925- Section 63- Plaintiff filed a Civil Suit for declaration with injunction pleading that they are owners in possession of the suit land - Will stated to have been executed by 'C' was a forged document – suit was decreed by the Trial Court- an appeal was preferred which was dismissed- held in second appeal, the Will was attested by two witnesses L & K - L had supported the Will but K had not appeared in the witness box although she was arrayed as defendant no. 3- she asserted in written statement that her signatures and signatures of testators were procured by way of misrepresentation - 'M" had appended his signatures as identifier; therefore, he cannot be treated to be a attesting witnesses- the Courts had rightly held that no valid Will was executed by the deceased- appeal dismissed. (Para 13-33)

Cases referred:

Punni Vs. Sumer Chand and others, 1994 (2) C.L.J. (H.P.)-290
H. Venkatachala Iyengar Vs. B.N. Thimmajamma, AIR 1959 SC 443
Suraj Vs. Dalip Singh alias Kuldeep Singh, Latest HLJ 2006 (HP) 1229
Kashibai and another Vs. Parwatibai and others, 1996 (1) S.L..J. 315,
Prabhi Devi & Ors. Vs. Rajesh Kumar & others, Latest HLJ 2006 (HP) 377
Adivekka and others Vs. Hanamavva Kom Venkatesh (Dead) by LRS. and another, (2007) 7 Supreme Court Cases 91
Fithu Ram alias Pritam Chand Vs. Jit Singh and another, Latest HLJ 2015 (HP) 986

For the appellant: Mr. G.R. Palsra, Advocate.
For the respondents: Mr. Sanjeev Kuthiala, Advocate, for respondents No. 1 and 2.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.:

By way of the present appeal, the appellant/ defendant has challenged the judgment and decree passed by the Court of learned Presiding Officer, Fast Track Court, Mandi, in Civil Appeal No. 140/2003, 21/2005, dated 09.05.2006, vide which, learned Appellate Court has upheld the judgment and decree passed by the Court of learned Sub Judge Ist Class, Court No. 3, Mandi, in Civil Suit No. 144/99, dated 31.07.2003.

2. This appeal was admitted on 17.05.2007 on the following substantial questions of law:-

> "1. Whether an identifier can be attesting witness of the will Ex. DW2/A?
>
> 2. Whether there is totally misreading of the evidence of the appellant by both the ld. Courts below especially DW2, DW3, DW4 and DW6, which has caused great miscarriage of justice to the appellant?"

3. Brief facts necessary for the adjudication of the case are that respondents/plaintiffs, hereinafter referred to as the plaintiffs, filed a suit for declaration with consequential relief of injunction on the ground that late Chhitru was owner in possession of the

suit land to the extent of 1/4th share and he died on 18.01.1999 when he was more than 95 years of age. The plaintiffs, defendants No.2 and proforma defendant No. 4, were the daughters of late Chhitru, whereas defendant No. 3 was his widow, who had no male issue. The entire land of late Chhitru was being used, looked after and cultivated by all his daughters and widow collectively before the death of late Chhitru. They were still possessing it jointly at the time of filing of the suit. Accordingly, they were entitled to inherit the same in equal shares being first class legal heirs of late Chhitru. However, defendant No.1, husband of defendant No. 2, started proclaiming after the death of Chhitru that deceased Chhitru had executed a Will in his favour dated 01.01.1999, vide which, the entire property of late Chhitru had been bequeathed in his favour. As per the plaintiffs, late Chhitru never expected any Will in favour of defendant No. 1 and alleged document was a forged document and even if it stood proved that the thumb mark appended on the Will was of late Chhitru, even then the same was a result of fraud, misrepresentation and undue influence exercised by defendant No. 1 on late Chhitru. Accordingly, on these basis, the plaintiffs filed a suit for declaration that the alleged Will dated 01.01.1999 was null and void having been procured by fraud, misrepresentation by practicing undue influence and further, the plaintiffs be declared owners of the suit property alongwith other heirs of deceased Chhitru.

4. There are two written statements on record one filed on behalf of defendants No. 1 to 3, which is verified by defendant No. 1 and another written statement independently filed by defendant No. 3, which is duly verified by defendant No. 3.

5. In the written statement, which has been filed on behalf of defendants No. 1 to 3, it has been stated therein that after the death of Chhitru, defendant No. 1 was exclusive owner in possession of the suit land on the basis of registered Will dated 01.01.1999, which was executed by deceased Chhitru in favour of defendant No. 1 with his own free will and volition in a sound disposing state of mind. It was further mentioned in the written statement that the registered Will was validly executed by Chhitru in favour of defendant No. 1 in presence of his wife Smt. Kala Devi, defendant No. 3 and that the Will was valid and genuine one which was executed by the testator with his own free will and volition in lieu of services rendered to him by defendant No. 1 and also by defendant No. 2. It was further mentioned in the written statement that deceased Chhitru had himself come to the office of Sub Registrar, Mandi and executed and got the Will registered i.e. Will No. 1 dated 01.01.1999 in favour of defendant No. 1. It was further mentioned that testator had come to the petition writer in Mandi and got the Will scribed and thereafter, he put his thumb impression and the witnesses signed the same in presence of each other and Chhitru and witnesses thereafter went to the office of Sub Registrar, Mandi. The scribe had read over the contents of the Will to the testator, who after hearing and admitting the same as correct, had put his thumb impression thereon. Thus, it was stated that the Will in question was a genuine and valid Will.

6. Defendant No. 3 in her written statement admitted the case of the plaintiffs and stated therein that Chhitru was an extremely old man and he was illiterate and at the time of his death, he was not at all mentally sound. It was further stated in the written statement that the replying defendant (defendant No. 3), who was old illiterate lady. On 01.01.1999, defendants No. 1 and 2 told her and Chhitrru that they would get Chhitru checked up in Zonal Hospital, Mandi, as he was quite ill and on this pretext, they brought him to Mandi and thereafter, defendants No. 1 and 2 asked the replying defendant to transfer the property of late Chhitru in four equal shares in favour of his daughters, which was consented to by the replying defendant. She has further stated that Chhitru was not at all in understanding position and thereafter, papers in this regard were prepared over which her signatures as well as the signatures of Chhitru were obtained on the pretext that the property shall be divided amongst all the four daughters. However, later on defendant No. 3 came to know that defendant No.1 had got transferred the property of Chhitru in his name which document according to defendant No. 3 had been procured by defendant No. 1 fraudulently and accordingly, the said document was liable to be declared wrong, null and void.

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

1. Whether Shri Chhitru has executed a valid Will dated 1-1-1999 in favour of the defendant No. 1? ... OPD
2. Whether the plaintiffs have no locus standi to file the present suit? ... OPD
3. Whether the plaintiffs are estopped by their acts and deeds? ... OPD
4. Whether the alleged Will is a forged document? ... OPP
5. If issue No. 4 is not proved, whether the alleged Will is result of undue influence, misrepresentation and fraud? ... OPP
6. Relief.

8. On the basis of material placed on record by the respective parties, the said issues were answered as under:-

Issue No. 1	No.
Issue No. 2	No.
Issue No. 3	No.
Issue No. 4	Yes.
Issue No. 5	Yes.
Relief:	Suit of the plaintiffs is decreed as per operative portion of the judgment with no order as to cost.

9. The learned trial Court concluded that the Will dated 01.01.1999 was null and void being forged and procured by fraud, misrepresentation of facts and by practicing undue influence and accordingly, it decreed the suit filed by the plaintiffs. While arriving at the said decision, on the basis of the material on record, the learned trial Court concluded that it stood apparent from the statement of Lata Devi DW-6 that her father had got Will scribed and thereafter, they went to the office of Tehsildar where their statements were recorded and the Will was registered. The learned trial Court further held that DW-6 was not able to prove due execution of Will by stating that the Will was got written by the testator before document script writer and the testator thereafter signed the said Will in front of two witnesses including DW-6. The learned trial Court also held that it was not stated by DW-6 who was also the attesting witness that the witnesses signed the said Will after the same was signed by the testator. On these basis, learned trial Court concluded that due execution of the Will by the testator remained doubtful especially keeping in view the fact that DW-6 was the wife of the beneficiary of the Will i.e. defendant No. 1 and herself was defendant No.2 in the suit. The learned trial Court also held that it was clear from the statements of the witnesses on record that the deceased Chhitru was an old and illiterate man. There were cuttings on Ext.DW2/A and no separate note qua cutting and addition was given therein and same had not credibly explained by the defendants. It further held that in the said Will on the thumb impression of second witness namely Kala Devi it was not recorded that whose thumb impression it was. Accordingly, it was held by the learned trial Court that it was evident that the Will is forged and result of undue influence and misrepresentation and forgery.

10. Feeling aggrieved by judgment passed the learned trial Court, the defendant therein filed an appeal, which was dismissed by the learned Appellate Court vide its judgment dated 09.05.2006. The learned Appellate Court held that the Will propounded by defendant No. 1 Ext. DW2/A had been scribed by Bhagi Rath and M.P. Kaushal was an identifier, whereas Lata Devi and Kala Devi were shown to be the two attesting witnesses. It further held that the Will dated 01.01.1999 was stated to have been presented for registration on the same day by the testator and was registered in the office of Sub registrar, Sadar Mandi on the identification of M.P.

Kaushal. Learned Appellate Court also held that the perusal of the statement of defendant No. 1 Narottam Singh (DW-5) demonstrated that he was not the attesting witness to the execution of the Will. This witness simply stated that the deceased Chhitru executed the Will in his favour as he used to look after the deceased. Learned Appellate Court further held that the said witness had not mentioned in his statement that the Will Ext. DW2/A was executed by the deceased in the mode and manner as is provided under Section 63 of the Indian Succession Act. Said witness had not uttered a single word that the Will bears the signature/thumb impression of deceased Chhitru which was affixed by the deceased in the presence of two attesting witnesses and that two attesting witnesses had signed/thumb marked the Will in the presence of the testator. The learned Appellate Court further held that the Will was attested by two attesting witnesses Lata Devi and Kala Devi. Kala Devi was not examined by the defendants to prove the execution of the Will. On the other hand, in her written statement, Kala Devi had admitted the claim of the plaintiffs and had also pleaded that the Will was a result of fraud practised upon her and deceased Chhitru by defendant No. 1. The learned Appellate Court further held that even DW-6 Lata Devi had not stated that the Will was duly executed as per the provisions of Section 63 of the Indian Succession Act. The learned Appellate Court also held that the argument of the learned counsel for the appellant/ defendant that the execution of the Will in accordance with law stood proved from the statement of DW-2 Pratap Singh, Sub Registrar, DW-4 M.P. Kaushal, identifier, and DW-3 Bhagi Rath Sharma, was also without merit. The learned Appellate Court held that the statement of DW-4 cannot be relied upon as the said witness had not appended his signatures upon the Will in order to attest the same but he simply signed the same as an identifier. It further held that a perusal of the statements of the scribe of the Will DW-3 and DW-6 also made it abundantly clear that none of these witnesses stated that DW-4 was present at the time of writing of the Will and further that the deceased had affixed his thumb impression upon the Will in the presence of DW-4 and the attesting witnesses had signed/thumb marked the Will in the presence of DW-4. Accordingly, the learned Appellate Court held that the statement of DW-4 to the effect that the entire proceeding regarding the execution of the Will was conducted in his presence was not corroborated by the scribe DW-3 as well as by DW-6. The learned Appellate Court also held that the said witnesses cannot be treated as the attesting witnesses keeping in view the fact that he has signed the Will as an identifier and not as an attesting witness. The learned Appellate Court thus also held that the defendants had failed to prove the valid execution of the Will Ext. DW2/A by Chhitru by leading convincing and satisfactory evidence and that the learned trial Court had rightly concluded that the Will in issue had not been validly executed and the same was null and void. However, the findings returned by the learned trial Court to the effect that the impugned Will was a forged document, were set aside on the ground that there was no evidence placed on record by the plaintiffs to prove that the Will in issue was a forged document or the same was a result of misrepresentation and fraud. Accordingly, the learned Appellate Court reversed the findings on Issues No. 4 and 5 but it still held that the suit of the plaintiffs was liable to be decreed as the defendants had failed to prove that deceased Chhitru had executed valid Will in favour of defendant No. 1 on 01.01.1999.

11. Feeling aggrieved by the said judgment passed by the learned Appellate Court, the present appeal has been preferred by the appellant.

12. I have heard learned counsel for the parties and have also gone through the records of the case as well as the judgments passed by the learned Courts below.

13. The first substantial question of law on which the present appeal was admitted is whether an identifier can be attesting witness of the will Ex. DW2/A.

14. When I come to the facts of the present case, it is apparent from the perusal of Ext. DW2/A that two attesting witnesses to the execution of the said alleged Will are (a) Lata Devi i.e. defendant No. 2 and (b) Kala Devi i.e. defendant No. 3. M.P. Kaushal has signed the said Will as an identifier. He has not signed the said Will as an attesting witness.

15. Section 63 of the Indian Succession Act clearly laws down that every testator shall execute his Will according to the following rules:-

(a) The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

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

16. In the present case, the two attesting witnesses admittedly are Lata Devi and Kala Devi. Whereas, Lata Devi DW-6 has supported the case of the defendants with regard to the execution of the Will by the testator. The second attesting witness, namely, Kala Devi, who has been impleaded as defendant No. 3 in the suit, has not entered the witness box to support the execution of the Will and on the contrary, in her written statement, she has stated that her as well as testator signatures were procured on the alleged Will by defendant No. 1 by way of misrepresentation. It is not even the case of defendants No. 1 and 2 that M.P. Kaushal had both attested the Will and signed the same as an identifier also or that the Will was executed in his presence.

17. In my considered view had it being clarified in the Will itself that M.P. Kaushal had appended his signatures as an attesting witness as well as identifier then it would have been a different matter. However, in the absence of the same, it cannot be inferred that M.P. Kaushal was also an identifier as well as an attesting witness. Accordingly, in the facts of the present case, it cannot be held that the identifier was also the attesting witness. This Court has held in ***Smt. Punni Vs. Sumer Chand and others***, ***1994 (2) C.L.J. (H.P.)-290***, which judgment has also been relied upon by the learned Appellate Court that unless sufficient and cogent evidence is led to show that the person putting his signature on document signed it for the purpose of attesting it or certifying that he has received from the executant a personal acknowledgment of his signature, he cannot be regarded as an attesting witness.

18. In the present case, there is no evidence led by the defendants to substantiate that M.P. Kaushal had put his signatures on the document for the purpose of attesting it. Therefore, by no stretch of imagination, he could be treated or termed to be an attesting witness. This substantial question of law is answered accordingly.

19. The second substantial question of law on which the present appeal was admitted is whether there is total misreading of the evidence of the appellant by both the learned Courts below especially DW2, DW3, DW4 and DW6, which has caused great miscarriage of justice to the appellant.

20. It has been held by the Hon'ble Supreme Court in ***H. Venkatachala Iyengar Vs. B.N. Thimmajamma***, ***AIR 1959 SC 443***, that in the cases in which execution of the Will is surrounded by suspicious circumstances, it may raise a doubt as to whether the testator was acting of his own free will. The Hon'ble Supreme Court has further held that in such circumstances, the initial onus is on the propounder to remove all reasonable doubts in the matter. The presence of suspicious circumstances makes initial onus heavier. Such suspicion

cannot be removed by the mere assertion of the propounder that the will bears signature of the testator or that the testator was in a sound and disposing state of mind at the time when the will was made.

21. In the present case, in my considered view, the propounders of the Will have failed to discharge this initial onus as they have not been able to remove all reasonable doubts in the matter.

22. Though the purpose of the Will is to deprive the natural heirs from the devolution of the property as per natural succession, however, if the Will is suspicious, then the onus is upon the propounder of the Will to remove that suspicion and if the propounder succeeds in removing the suspicious circumstances, then the Court has to give effect to the Will, even if it has cut off whole or in part near relations.

23. The statement of DW-2 Pratap Singh, Tehsildar, is of no assistance to the appellant because this witness has only deposed with regard to the registration of the Will. He is not a witness to the execution of the Will nor it is borne out from his deposition that the Will was executed by the testator as per the provisions of Section 63 of the Indian Succession Act in his presence.

24. Similarly, DW-2 Bhagi Rath Sharma has deposed that he wrote the Will as per the wish of the testator. In his cross-examination, this witness has deposed that whatever document the said scribe writes, he enters the same in his register. It is also borne out from the record and his testimony that he had not produced any register before the learned trial Court to substantiate that any entry was made by him in his register with regard to his scribing the Will on the instructions of deceased Chhitru Ram.

25. Similarly, the testimony of DW-4 M.P. Kaushal, also is of no help to the appellant and his testimony does not inspire any confidence and apparently seems to be incorrect. He has deposed that he knew the testator personally and it is he who took the testator to the scribe DW-3 and the testator got the Will scribed in his presence. Thereafter, he has stated that he appended his signatures on the same "**Batour Shanakhat Karta", "Batour Pehchan Karta"**. Thereafter, he has stated that Lata Devi and wife of Chhitru appended their signatures and thumb impressions respectively in his presence. He has further deposed that he also identified Chhitru before the Tehsidlar. However, DW-6 Lata Devi has not uttered even a single word that Chhitru had gone to DW-4 and thereafter, DW-4 took them to the scribe. On the contrary, what the said witness has stated is that they came by bus and went to the scribe where her father got the Will prepared and thereafter, they went to Tehsil where their statements were recorded and where the Will was registered. In her cross-examination, she has stated that at the time of execution of the Will, her father was 90 years old. She has also stated that her father died 18 days after the execution of the Will. Thus, it is apparent from the statement of this witness that the factum of presence of DW-4 at the time of execution of Will is no where stated by her. Not only this, none of the witnesses have deposed that the alleged Will was executed by the testator as per the provisions of Section 63 of the Indian Succession Act.

26. Further, if we peruse the statement of DW-5 Narottam Singh in his cross-examination, he has stated that his father-in-law was 95 years old and his mother-in-law was 85 year old and both of them were illiterate. It is further apparent and evident from his statement that he has played major role in the execution of the said Will. Even this witness has not stated that the testator of the Will was taken to the scribe by DW-4 and that the Will was executed in front of DW-4. Therefore, by no stretch of imagination, it can be said that there is any misreading of the evidence of the appellant by the learned Courts below, which has caused any miscarriage of justice to the appellant. This substantial question of law is answered accordingly.

27. Mr. G.R. Palsra, learned counsel for the appellant while relying upon the judgment of this Court in ***Suraj Vs. Dalip Singh alias Kuldeep Singh***, ***Latest HLJ 2006 (HP)***

1229, has argued that keeping in view the fact that DW-6 was one of the attesting witnesses and she had supported the Will, the Will stood proved in accordance with law. He has also relied upon the judgment of Hon'ble Supreme Court of India in ***Kashibai and another Vs. Parwatibai and others***, ***1996 (1) S.L..J. 315***, in which it has been held that an attesting witness is a person who in the presence of an executant of a document puts his signature or mark after he has either seen the executant himself or someone on direction of the executant has put his signature or affixed his mark on the document so required to be attested or after he has received from the executant a personal acknowledgment of his signature or mark or the signature or mark of such other person. Mr. Palsra has also relied upon the judgment of this Court in ***Prabhi Devi & Ors. Vs. Rajesh Kumar & others***, ***Latest HLJ 2006 (HP) 377***, in which the Will was held to be validly proved by one attesting witness as well as by the scribe.

28. I am afraid, the judgments relied upon by the learned counsel for the appellant are of no assistance in the facts and circumstances of the present case because the execution of the Will by the testator as per the provisions of Section 63 of the Indian Succession Act has not been proved by the beneficiaries of the Will. Not only this, the so called attesting witness is the wife of the propounder of the Will and is an interested witness, who has taken active role in the execution of the alleged Will.

29. The Hon'ble Supreme Court has held in ***Adivekka and others Vs. Hanamavva Kom Venkatesh (Dead) by LRS. and another***, ***(2007) 7 Supreme Court Cases 91***, that where there are suspicious circumstances, the onus would be on the propunder to remove suspicion by leading appropriate evidence. Section 63 of the Succession Act lays down the mode and manner in which an unprivileged Will is to be executed. Section 68 of the Evidence Act postulates the mode and manner in which proof of execution of document is required by law to be attested. It in unequivocal terms states that execution of Will must be proved at least by one attesting witness, if an attesting witness is alive subject to the process of the Court and capable of giving evidence. The proof of Will is not required as a ground of reading the document but to afford the judge reasonable assurance of it as being what it purports to be.

30. This Court held in ***Fithu Ram alias Pritam Chand Vs. Jit Singh and another***, ***Latest HLJ 2015 (HP) 986***, that when a Will is surrounded by suspicious circumstances and the defendant has failed to remove the suspicious circumstances and both the Courts below have correctly appreciated the oral as well as documentary evidence, then there is no need to interfere with the judgments and decrees passed by both the learned Courts below.

31. This Court has similarly held in ***Smt. Punni Vs. Sumer Chand and others***, ***AIR 1995 Himachal Pradesh 74***, as under:-

> "10. Section 59 of the Indian Succession Act deals with the testator's testamentary capacity. Section 63 lays down certain formalities, which are required to be observed in the execution and attestation of the Will. For the purpose of decision in this appeal, Section 63 of the Indian Succession Act is relevant, which is reproduced hereunder:-
>
> "63. Execution of unprivileged wills. --Every testator, not being a soldier employed in an expedition nor engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his will according to the following rules:-
>
> (a) The testator shall sign or shall affix his marks to the will, or it shall be signed by some other person in his presence and by his direction.
>
> (b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give a effect to the writing as a will.

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

11. As regards attestation, Clause (c) aforementioned requires that the Will shall be attested by two or more witnesses. It is not necessary that both of them be present simultaneously at the time of putting their signatures but the requirement is that each of the attesting witness must have seen the testator sign or affix his mark to the Will or has received from the testator a personal acknowledgment of his signature or mark on the Will. There is also an additional requirement that each of the attesting witness shall also sign the Will in the presence of the testator. In Girja Datt Singh v. Gangotri Datt Singh, AIR 1955 SC 346, it was held that in order to prove the due attestation of the will the propouder of the will has to prove that the two attesting witnesses saw the testatory sign the will and that they themselves signed the same in the presence of the testator. As regards the proof and attestation, reference was made to Section 68 of the Evidence Act and it was held this it is necessary to comply with the provisions of the Evidence Act to prove the due execution and attestation of the Will by calling at least one attesting witness in case he is alive and one cannot presume from the mere signatures appearing at the foot of the endorsement of registration or at the foot of the document that the witnesses had appended their signatures to the documents as attesting witnesses. On the proof of a Will, onus of proof as also the nature of evidence required to be led, in H. Venkatachala Iyengar v. B.N. Thimmajamma, AIR 1959 SC 443, it was held that (at pp. 451 and 452 of AIR):

"... It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribed by Section 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.

However, there is one important feature which distinguishes wills from other documents. Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a Court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills the court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. Ordinarily, when the evidence adduced in

support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated."

12. The court also dealt with the requirement, which a propounder has to comply, namely, leading, sufficient and cogent evidence in dispelling any suspicious circumstances attending the due execution of the Will, which need not be reiterated here. Out of the tests, on which emphasis was laid on the determination of the question as to whether a testament produced before the court is or is not the last Will of the testator, is the full and solemn satisfaction that it has been validly executed by the testator, who is no longer alive. Reiterating that no hard and fast or inflexible rules can be laid down for the appreciation of evidence, it was observed that (AIR 1959 SC 443 at p. 452):

"…. a propounder of the will has. to prove the due and valid execution of the will and that if there are any suspicious circumstances surrounding the execution of the will the propounder must remove the said suspicions from the mind of the court by cogent and satisfactory evidence. It is hardly necessary to add that the result of the application of these two general and broad principles would always depend upon the facts and circumstances of each case and on the nature and quality of the evidence adduced by the parties. It is quite true that, as observed by Lord Du Pared in Harmes v. Hinkson, (1946) 50 Cal WN 895 : AIR 1946 PC 156 'where a will is charged with suspicion, the rules enjoin a reasonable scepticism, not an abdurate persistence in disbelief. They do not demand from the Judge, even in circumstances of grave suspicion, a resolute and impenetrable incredulity. He is never required to close his mind to the truth'. It would sound platitudinous to say so, but it is nevertheless true that in discovering truth even in the such cases the judicial mind must always be open though vigilent, cautious and circumspect."

32. When we apply the ratio of the above mentioned judgments keeping in view the facts of the present case, the only conclusion which can be drawn is that both the learned Courts below have rightly come to the conclusion that there was no valid Will executed by deceased Chhitru.

33. In view of the findings returned above and law discussed above, I do not find any merit in the present appeal and the same is dismissed. No order as to costs. Miscellaneous application(s) pending, if any, stand disposed of.

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

National Insurance Company Ltd. …..Appellant

Versus

Smt. Beant Kaur & others …Respondents

FAO No. 308 of 2011
Decided on : 15.7.2016

Motor Vehicles Act, 1988- Section 149- It was contended that driving licence was fake and reliance was placed upon the report- held, that copy of driving licence shows that it was valid from 27.2.2007 till 26.2.2012- insurer has not proved the report- further, the mere the fact that licence was fake is not sufficient to absolve the owner from liability- it was for the insurer to plead and prove that the owner had not taken steps which he was required to take and the driver was not having a valid and effective driving licence – however, no such evidence was led and the insurer was rightly held liable. (Para-9 to 12)

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

Oriental Insurance Company Ltd. versus Smt. Rikta alias Kritka & others, ILR 2014 (VI) HP 1263

For the Appellant : Mr. Lalit K. Sharma, Advocate.

For the respondents: Mr. Gaurav Gautam, Advocate vice Ms. Archana Dutt, Advocate, for respondents No. 1 & 2.
Mr. Amrinder Singh Rana, Advocate, for respondent No. 5.
Mr. B.M. Chauhan, Advocate, for respondent No. 6.
Nemo for the other respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Challenge in this appeal is to the award dated 3rd May, 2011, 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. 25-MAC/2 of 2008, whereby compensation to the tune of Rs.2,30,400/-with interest @ 7.5% per annum from the date of filing of the claim petition till its realization came to be awarded in favour of the claimants-respondents No. 1 & 2 and the insurer-appellant was saddled with liability, (hereinafter referred to as 'the impugned award').

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

3. The insurer has questioned the impugned award on the ground that the owner has committed willful breach and the driver was not having a valid and effective driving licence at the time of accident, thus the Tribunal has fallen in an error.

4. The claimants had filed the claim petition before the Tribunal for grant of compensation to the tune of Rs.7,00,000/-, as per the break-ups given in the claim petition.

5. The respondents resisted the claim petition on the grounds taken in their memo of objections.

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

"1. Whether Balwant Singh was rash and negligent in driving motor-cycle HP-17A-1273 and while driving as such, he caused the death of Om Prakash, as alleged? ….OPP

2. In case issue No. 1 is proved in affirmative, to what amount of compensation the petitioners are entitled and from whom?...OPP

3. Whether the driver of the motor-cycle HP-17A-273 did not possess a valid and effective driving licence, as alleged? …OPR-3

4. Whether the vehicle in question was being plied in violation of terms and conditions of the insurance policy, as alleged? …OPR-3

5. Relief."

7. The parties led evidence. The Tribunal after scanning the evidence, oral as well as documentary, held that the claimants have proved that driver, namely, Balwant Singh, had driven the offending vehicle, i.e. motor-cycle bearing registration No. HP-17A-1273, rashly and negligently and caused the accident. There is no dispute regarding Issue No. 1. Accordingly, the findings returned by the Tribunal on Issue No. 1 are upheld.

8. Before I deal with Issue No. 2, I deem it proper to deal with issues No. 3 & 4, which are subject matter of this appeal.

9. It was for the insurer to plead and prove that the driver was not having a valid and effective driving licence at the time of accident, has not led any evidence. The copy of driving licence is exhibited as Ext. R-1/C on record, which does disclose that the driving licence was valid from 27.2.2007 to 26.2.2012.

10. Learned Counsel for the insurer argued that in terms of Ext. R-X, the driving licence was fake.

11. The argument of the learned Counsel is devoid of any force for the reason that insurer has not proved the report (Ext.R-X). The mere report cannot absolve the insurer from the liability. It was for the insurer to plead and prove that the owner had not taken steps which he was required to take and the driver was not having a valid and effective driving licence, has failed to do so.

12. 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."

13. The Apex Court in the case titled as **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217** has laid down the same principle.

14. 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.

15. Having said so, it is held that the Tribunal has rightly decided issues No. 3 & 4 against the insurer. Thus, the findings returned by the Tribunal on Issues No. 3 & 4 are upheld.

16. Accordingly, the impugned award is upheld and the appeal is dismissed.

17. The Registry is directed to release the compensation 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.

18. 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.

National Insurance Company Ltd. ...Appellant.

Versus

Sh. Jagat Singh and others ...Respondents.

FAO No. 309 of 2011
Decided on: 15.07.2016

Motor Vehicles Act, 1988- Section 149- Claimants pleaded that deceased was doing job of labourer in the offending vehicle- accident had taken place due to negligence of B- Tribunal held that B was driving the vehicle at the time of accident- insurer examined U who stated that driving licence was fake- however, he has not given reason for arriving at this conclusion- mere fact that licence is fake is no ground for absolving the insurer from liability, unless it is proved that insured had committed willful breach and had not taken precaution while engaging driver- insurer was rightly held liable to pay compensation- appeal dismissed. (Para-10 to 24)

Cases referred:

National Insurance Co. Ltd. versus Swaran Singh & others, AIR 2004 Supreme Court 1531
Pepsu Road Transport Corporation versus National Insurance Company, 2013 AIR SCW 6505

For the appellant: Mr. Deepak Bhasin, Advocate.

For the respondents: Mr. Bimal Gupta, Senior Advocate, with Ms. Soma Thakur, Advocate, for respondents No. 1 to 4.
Mr. S.D. Gill, Advocate, for respondents No. 5 to 9 and 11 to 13.
Name of respondent No. 10 stands already deleted.

The following judgment of the Court was delivered:

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

Subject matter of this appeal is judgment and award, dated 6th June, 2011, made by the Motor Accident Claims Tribunal-I, Sirmaur District at Nahan, H.P. (for short "the Tribunal") in MAC Petition No. 36-MAC/2 of 2008, titled as Shri Jagat Singh and others versus Shri Chet Ram through his LRs and another, whereby compensation to the tune of ₹ 2,62,000/- 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 insurer was saddled with liability (for short "the impugned award").

2. The legal representatives of the owner-insured of the offending vehicle and the claimants have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. The insurer has called in question the impugned award on the following two grounds:

(i) That the driver of the offending vehicle was not having a valid and effective driving licence at the time of the accident; and

(ii) That the deceased was an unauthorized occupant.

4. In order to determine this appeal, it is necessary to give a brief resume of the case, the womb of which has given birth to the appeal in hand.

5. The claimants have specifically pleaded in the claim petition that deceased, namely Shri Vinod Kumar, was a bachelor, conductor by profession and was also doing the job of labourer in the offending vehicle, i.e. Pick-up Van, bearing registration No. HP-71-0777.

6. The positive case set up by the claimants before the Tribunal was that the driver, namely Shri Balwant Singh, while driving the offending vehicle rashly and negligently on 8th April, 2007, at about 2.00 A.M. near Village Sainj, Tehsil Renuka Ji, District Sirmaur, caused the accident, in which deceased-Vinod Kumar, who was travelling in the offending vehicle as a conductor/labourer, sustained injuries and succumbed to the injuries. The driver of the offending vehicle also died in the said accident.

7. The claimants claimed compensation, as per the break-ups given in the claim petition, on the grounds taken in the memo of the claim petition.

8. The respondents in the claim petition resisted the same on the grounds taken in the respective memo of objections.

9. Following issues came to be framed by the Tribunal on 30th April, 2009:

"1. Whether Vinod Kumar had died on account of rash and negligent driving of pick-up No. HP-71-0777 driven by its driver Balwant Singh deceased on 8-4-2007 near village Sainj at about 2.00 A.M., as alleged? OPP

2. In case issue No. 1 is proved in affirmative, whether the petitioners are entitled to receive compensation, if so, to what amount and from whom? OPP

3. Whether the deceased was an unauthorized person in the goods vehicle and as such his risk was not covered under the insurance policy, as alleged? OPR-2

4. Whether the driver of the vehicle in question did not possess a valid and effective driving licence at the time of accident, as alleged? OPR-2

5. Whether the vehicle in question was being plied in violation of the terms and conditions of the insurance policy, as alleged? OPR-2

6. Whether the petition has been filed in collusion with respondent No. 1, as alleged? OPR-2

7. Relief."

10. The claimants have examined HC Dharam Mohan as PW-1, Smt. Champa Devi as PW-2, Dr. Suman Lata as PW-3, Shri Gopal Singh as PW-5, Shri Jagat Singh, s/o late Shri Kanshi Ram as PW-6 and one of the claimants, namely Shri Jagat Singh, appeared in the witness box as PW-4. The insurer has examined Shri Updeshmanj Khola as RW-1 and SI Chet Ram as RW-3. One of the legal representatives of owner-insured, namely Shri Rajesh Kumar, himself appeared in the witness box as RW-2.

Issue No. 1:

11. The Tribunal, while determining issue No. 1, has held that the claimants have proved by leading evidence that the driver, namely Shri Balwant Singh, had driven the offending vehicle rashly and negligently on 8th April, 2007, at about 2.00 A.M. near Village Sainj and caused the accident, in which deceased-Vinod Kumar sustained injuries and succumbed to the injuries. There is no dispute viz-a-viz the said findings. Accordingly, the findings returned by the Tribunal on issue No. 1 are upheld.

12. Before dealing with issue No. 2, I deem it proper to determine issues No. 3 to 6.

Issue No. 3:

13. It was for the insurer to plead and prove that deceased-Vinod Kumar was an unauthorized occupant in the offending vehicle at the time of the accident, has not led any evidence to this effect. However, it has examined the Investigating Officer, namely SI Chet Ram, as RW-3, who has specifically stated that he had investigated the case relating to the commission of crime, presented the final report in terms of Section 173 of the Code of Criminal Procedure (for short "CrPC") under Sections 279 and 304-A of the Indian Penal Code (for short "IPC") before the Court of competent jurisdiction and had not investigated the case with respect to the fact as to in which capacity the deceased was travelling in the offending vehicle. Thus, he has not stated anything about the issue in dispute.

14. The claimants have specifically pleaded that the deceased was travelling in the offending vehicle as conductor and was also doing the job of loading and unloading the material in the said vehicle. Father of deceased-Vinod Kumar, namely Shri Jagat Singh, stepped into the witness box as PW-4 and has proved the contents of FIR about the said factum. The said factum has also been proved by one Shri Jagat Singh, s/o late Shri Kanshi Ram, who stepped into the witness box as PW-6 and stated that deceased-Vinod Kumar had worked as a conductor/labourer with his vehicle with effect from 10th June, 2006 to 31st December, 2006, thereafter, the owner-insured of the offending vehicle, late Shri Chet Ram, had asked him to send deceased-Vinod Kumar to work as conductor/labourer with the offending vehicle. There is no rebuttal by the insurer to this effect, thus, the said factum has remained unrebutted. Viewed thus, the Tribunal has rightly decided issue No. 3 against the insurer, is, accordingly, upheld.

Issue No. 4:

15. It was for the insurer to discharge the onus to prove that the driver of the offending vehicle was not having a valid and effective driving licence at the time of the accident, has not led any evidence, except examining one Shri Updeshmanj Khola as RW-1, but he has not given any details as to on what basis he has come to the conclusion that the driving licence was fake.

16. Though, there is not even a single iota of evidence on the file to hold or presume that the driving licence of the driver of the offending vehicle was fake, even that cannot be made a ground for exonerating the insurer from its liability unless the insurer pleads and proves that the owner-insured has committed willful breach and has not taken all precautions while engaging the driver.

17. My this view is fortified by the judgment rendered by the Apex Court in the case titled as **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:

> *"105. ....*
>
> *(i) ....*
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> *(ii) ....*
>
> *(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.*
>
> *(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.*
>
> *(v)........................*
>
> *(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."*

18. The Apex Court in another case titled as **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **2013 AIR SCW 6505,** has laid down the same principle. It is profitable to reproduce para 10 of the judgment 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's case (supra). 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. Viewed thus, the findings returned by the Tribunal on issue No. 4 are upheld.

Issue No. 5:

20. In view of the findings returned on issues No. 3 and 4 hereinabove, the findings returned by the Tribunal on issue No. 5 are also upheld.

Issue No. 6:

21. It was for the insurer to prove that the claimants have filed the claim petition in collusion with the owner-insured, has not led any evidence to this effect, thus, has failed to do so. Accordingly, the findings returned by the Tribunal on issue No. 6 are upheld.

Issue No. 2:

22. The quantum of compensation is not in dispute. However, I have gone through the record and the impugned award, the awarded amount cannot be said to be excessive in any way. Thus, it is held that the Tribunal has rightly awarded ₹ 2,62,000/- to the claimants and saddled the insurer with liability. Accordingly, the findings returned by the Tribunal on issue No. 2 are also upheld.

23. Having glance of the above discussions, the impugned award is upheld and the appeal is dismissed.

24. Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the impugned award through payee's account cheques or by depositing the same in their respective bank accounts.

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

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

Smt. Neelam Jha and another .....Appellants.

Versus

M/s. Abha Food Industries and others .....Respondents

FAO (MVA) No. 115 of 2011
Date of decision: 15th July, 2016.

Motor Vehicles Act, 1988- Section 166- Deceased was an employee and was drawing salary of Rs. 11,500/- his one half income is to be deducted towards personal expenses- multiplier of '15' is to be applied- claimants are entitled to Rs. 5500x12x15= Rs. 9,90,000/- and Rs. 10,000/- each under the heads 'loss of estate' and 'loss of funeral expenses'- thus, claimants are entitled to total compensation of Rs. 10,10,000/- along with interest @ 7.5% per annum. (Para- 6 to 12)

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
Munna Lal Jain and another versus Vipin Kumar Sharma and 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, ILR 2015 (III) HP 1149

For the appellants: Mr. Jagdish Thakur, Advocate.
For the respondents: Mr.Vivek Chandel, Advocate, for respondent No.1.
Mr. Subhash Sharma, Advocate, for respondent No.3.
Nemo for respondent No.2.

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 31.1.2011, made by the Motor Accident Claims Tribunal, Una, H.P., in MAC Case No. 10 of 2010, titled *Smt. Neelam Jha and another versus Mr. Abha Food Industries Prop and others*, for short "the Tribunal", whereby compensation to the tune of Rs.5,14,000/- alongwith interest @ 8% per annum, came to be awarded in favour of the claimants and against respondents No. 1 and 2, hereinafter referred to as "the impugned award", for short.

2. Mr. Subhash Sharma, Advocate, for respondent No. 3 stated at the Bar that respondent No. 3 Sher Singh has died during the pendency of the appeal. His statement is taken on record. He has produced the copy of death certificate of Sher Singh, across the Board, made part of the file.

3. Owner of the motor cycle No. UP-23-6402 is neither proper party nor necessary party because award has been passed against the owner of the Scooter No. PB-10BT-7631. Thus, there is no need to bring the legal representatives of respondent No. 3 on record.

4. Claimants, by the medium of this appeal, have questioned the impugned award on the ground of adequacy of compensation.

5. Thus, the only issue to be determined in this appeal is whether the amount awarded is adequate or otherwise. The answer is in negative for the following reasons.

6. Admittedly, deceased was an employee and drawing salary to the tune of Rs.11,500/- as held by the Tribunal in para 14 of the impugned award. One half was to be deducted towards his personal expenses, keeping in view the 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***.

7. Keeping in view the age of the deceased read with ***Munna Lal Jain and another*** versus ***Vipin Kumar Sharma and others*** reported in ***2015 AIR SCW 3105***, the multiplier is to be applied according to the age of the deceased.

8 The Tribunal has fallen in an error in applying the multiplier of "14. The multiplier of "15" is applicable in view of the judgments referred to supra.

9. It appears that the Tribunal has awarded interest @8% per annum. However, interest @ 7.5% was to be awarded for the following reasons.

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. Accordingly, the interest @7.5% is awarded.

12. Thus, it is held that the claimants have lost the source of dependency to the tune of Rs.5500x12x15= Rs.9,90,000/-. The claimants are also entitled to compensation under the two heads as under:

(i)	Loss of estate	:	Rs.10,000/-
(ii)	Funeral expenses	:	Rs.10,000/-
		Total	***Rs.10,10,000/-***

Thus , in all the claimants are entitled to Rs. 10,10,000 alongwith interest at the rate of 7.5% per annum, from the date of claim petition till its realilsation.

13. The insurer is directed to satisfy the award and is directed to deposit the amount within eight weeks from today. On deposit, 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.

14. Viewed thus, the appeal is allowed, the impugned award is modified and the compensation is enhanced, as indicated hereinabove.

15. 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.

Oriental Insurance Company Limited .....Appellant
Versus
Smt. Sheela & others ..... Respondents

FAO No.351 of 2011
Date of decision: 15.07.2016

Motor Vehicles Act, 1988- Section 149- Claimants, being dependents of deceased filed the claim petition for grant of compensation – Tribunal awarded sum of Rs. 5,65,000/- along with interest at the rate of 7.5% per annum as compensation in favour of the claimants and insurer was saddled with the liability - feeling aggrieved, insurer preferred the present appeal- held, that owner and the driver had admitted in their reply that the deceased was traveling in the offending vehicle as owner of goods- hence, the deceased cannot be called to be a gratuitous passenger - amount awarded by the Tribunal is meager, since the claimants have not questioned the impugned award the same is reluctantly upheld- appeal dismissed. (Para-5 to 10)

For the appellant: Mr.Lalit K. Sharma, Advocate.
For the respondents: Mr.Neeraj Gupta, Advocate, for respondents No.1, 2 & 4.
Mr.Vivek Darhel, Advocate, for respondents No.5 and 6.
Mr.Satyen Vaidya, Senior Advocate, with Mr.Vivek Sharma, Advocate, for respondent No.7.
Respondent No.8 already ex-parte.
Mr.Praneet Gupta, Advocate, for respondent No.9

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 26th May, 2011, passed by the Motor Accident Claims Tribunal, Solan, District Solan, H.P., (for short, "the Tribunal") in Claim Petition No.26-S/2 of 2008, titled Smt. Sheela & others vs. Sh.Bhupinder Kumar & others, whereby a sum of Rs.5,65,000/- alongwith interest at the rate of 7.5% per annum came to be awarded as compensation in favour of the claimants and the insurer was saddled with the liability, (for short the "impugned award").

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

3. Feeling aggrieved, the appellant-insurer has questioned the impugned award on the grounds taken in the memo of appeal.

4. During the course of hearing, the learned counsel for the appellant/insurer argued that the owner had committed willful breach of the terms and conditions of the insurance policy inasmuch as the deceased was traveling in the offending vehicle as gratuitous passenger. The argument advanced by the learned counsel for the appellant is misconceived for the reasons enumerated hereinbelow.

5. The claimants, being dependants of deceased Anwar Hussain filed the claim petition for grant of compensation to the tune of Rs.30.00 lacs as per break-ups given in the claim petition.

6. Respondents resisted the claim petition by filing replies. Respondents No.1 and 2, i.e. the owner and the driver, have admitted in their reply that the deceased was traveling in the offending vehicle as owner of goods. It is apt to reproduce paras 5 and 6 of the reply herein:

> *"5. That the contents of para no.8 to 13 of the petition need no reply being matter of record. However, it is, submitted that the deceased was traveling in the vehicle in the capacity of owner of goods.*
>
> *6. That the contents of para no.14 to 18 of the petition need no reply being matter of record. The vehicle of the replying respondent was duly insured with the Oriental Insurance Company Limited, The Mall Solan. The photocopy of the cover note is annexed herewith for the kind perusal of the Hon'ble Court."*

7. Thus, there was admission on the part of the owner and the driver of the offending vehicle that the deceased was traveling in the offending vehicle as owner of goods. Therefore, it does not lie in the mouth of the insurer to claim that the deceased was not traveling in the offending vehicle as owner of goods and was a gratuitous passenger.

8. Having said so, the Tribunal has rightly returned findings on all the issues, particularly issues No.4 to 6 and the same are upheld.

9. The amount awarded by the Tribunal is meager amount, but, unfortunately, since the claimants have not questioned the impugned award to that effect, the same is reluctantly upheld.

10. Having glance of the above discussion, there is no merit in the appeal and the same is dismissed. Consequently, the impugned award is upheld.

11. The Registry is directed to release the award amount in favour of the claimants through their bank accounts, strictly as per the terms and conditions contained in the impugned award.

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

****

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

Oriental Insurance Company Ltd. …..Appellant

Versus

Smt. Maya Devi & others ….. Respondents

FAO No.320 of 2011
Date of decision: 15.07.2016

Motor Vehicles Act, 1988- Section 149- It was contended that driver did not have a valid driving licence- however, no evidence was led to prove this fact- insurer has to plead and prove that the owner of the offending vehicle has committed willful breach of the terms contained in the policy and mere plea here and there cannot be a ground for seeking exoneration- insurer cannot be permitted to lead evidence at the belated stage to defeat the claim of the claimant- appeal dismissed. (Para-10 to 14)

Cases referred:

National Insurance Co. Ltd. versus Swaran Singh & others, AIR 2004 Supreme Court 1531
Pepsu Road Transport Corporation versus National Insurance Company, (2013) 10 Supreme Court Cases 217

For the appellant: Mr.Ashwani K. Sharma, Senior Advocate, with Mr.Nishant Kumar, Advocate.

For the respondents: Mr.Dinesh Thakur, Advocate vice Mr.N.S. Chandel, Advocate, for respondent No.1.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 19th March, 2011, passed by the Motor Accident Claims Tribunal, Ghumarwin, District Bilaspur, Himachal Pradesh (Camp at Bilaspur), (for short, "the Tribunal") in M.A.C. No.84 of 2005, titled Maya Devi vs. Smt. Shakuntla Devi & others, whereby a sum of Rs.2,50,000/- alongwith interest at the rate of 7.5% per annum came to be awarded as compensation 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 it relates to them.

3. Feeling aggrieved, the appellant-insurer has questioned the impugned award on the grounds taken in the memo of appeal.

4. Learned counsel for the appellant argued that the Tribunal has fallen into an error in saddling 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. The second ground of attack

was that the amount awarded by the Tribunal was excessive. The argument of learned counsel for the appellant, though attractive, is devoid of any force, for the following reasons.

5. The claimant filed the claim petition for grant of compensation to the tune of Rs.5,10,000/- as per the break-ups given in the claim petition, was resisted by the respondents and following issues came to be framed:-

> "1. Whether Jatin Kumar died due to rash and negligent driving of resident No.2, driver of bus No.HP-23A-1021, as alleged? OPP
>
> 2. If issue No.1 is proved in affirmative, whether the petition is entitled for compensation and if so, to what amount and from whom? OPP.
>
> 3. Whether the petition is not maintainable? OPR-3
>
> 4. Whether bus NO.HP-23A-1021 was being plied without valid registration, fitness certificate and route permit as alleged, if so to what effect? OPR-3
>
> 5. Whether the driver of bus No.HP-23A-1021 was not having a valid and effective driving licence? OPR-3.
>
> 6. Whether the petition is barred by limitation? OPR-1
>
> 7. Whether the petitioner has no locus standi to file the petition? OPR-1.
>
> 8. Relief."

6. The Tribunal, after scanning the evidence, oral as well as documentary, held that the claimant has proved that the driver, namely, Prakash Chand was driving the offending vehicle rashly and negligently and caused the accident. There is also no dispute about the findings recorded by the Tribunal on issue No.1, which are accordingly upheld.

7. Before I deal with issue No.2, I deem it proper to deal with issues No.3 to 7.

Issue No.3

8. Onus to prove this issue was on the insurer, has not led any evidence. I wonder why this issue was framed by the Tribunal. The Tribunal has lost sight of the fact that the Motor Vehicles Act, 1988 (for short, the Act) has gone through a sea change and sub section (6) to Section 158 and sub section (4) to Section 166 have been added. Section 158(6) provides that the Incharge of the Police Station concerned has to submit a report about the traffic accident to the Tribunal having the jurisdiction and that report has to be treated as Claim Petition by the Tribunal in terms of Section 166(4) of the Act. Thus, even filing of claim petition is not mandatory for grant of compensation in terms of the said amendment. Therefore, it does not lie in the mouth of the insurer to urge on flimsy grounds that the claim petition was not maintainable. Accordingly, the findings returned by the Tribunal on issue No.3 are upheld.

Issue No.4

9. It was for the insurer to plead and prove that the offending vehicle was being plied without valid documents, has not led any evidence. Notwithstanding that, this issue was not pressed by the learned counsel for the appellant during the course of hearing. Accordingly, the findings returned by the Tribunal this issue are upheld.

Issue No.5

10. 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 at the time of accident, has not led any evidence. It is beaten law of the land that the insurer has to plead and prove that the owner of the offending vehicle has committed willful breach of the terms contained in the policy and mere plea here and there cannot be a ground for seeking exoneration.

11. My this view is fortified by the Apex Court judgment in the case of **National Insurance Co. Ltd. versus Swaran Singh & others,** reported in **AIR 2004 Supreme Court 1531.** It is apt to reproduce relevant portion of para 105 of the judgment hereinbelow:

> *"105. ....*
>
> *(i) ....*
>
> *(ii) ....*
>
> *(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in subsection (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.*
>
> *(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings; but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.*
>
> *(v)........................*
>
> *(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."*

12. It is also profitable to reproduce para 10 of the latest judgment of the Apex Court in the case of **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217** hereinbelow:

> *"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran ingh case. If despite such information with the owner that the licence possessed by his driver is 8 :fake, no action is taken by the insured for*

appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."

13. Learned counsel for the insurer argued that the insurer has filed an application, being CMP No.657 of 2011, under Section 41 Rule 27 read with Section 151 of the Code of Civil Procedure for examining the witness from the office of District Transport Officer, Ranchi, in order to prove that the driver of the offending vehicle, at the time of accident, was not having a valid and effective driving licence.

14. The said application (CMP No.657 of 2011) deserves to be dismissed for the simple reason that the insurer cannot be permitted to defeat the right of the claimants at this belated stage. Moreover, it was for the insurer to plead and prove, by leading evidence, before the Tribunal that the driver of the offending vehicle was not having valid and effective driving licence at the time of accident, which it has not done despite affording sufficient opportunities. Therefore, once the insurer has failed to prove before the Tribunal that the driver was not having a valid and effective driving licence at the time of accident, it does not lie in the mouth of the insurer to argue at this stage that the driver was not having a valid and effective driving licence. In case the application is allowed, the parties and the proceedings would be relegated back to the sage as was in the year 2004, when the accident had taken place, which would be against the aim and object of granting compensation. It is beaten law of the land that while deciding claim petitions, summary procedure is to be adopted and the claim petitions are to be concluded as early as possible, and if such procedure, as is sought by the learned counsel for the appellant, is adopted, that would be against the mandate of legislation. Accordingly, the application (CMP No.657 of 2011) is dismissed and the findings returned by the Tribunal on issue No.5 are upheld.

<u>Issue No.6</u>

15. As has been observe above, the Act has gone a sea change and the rigours of Limitation Act for filing Claim Petitions under the Act have been taken away. Accordingly, the findings returned by the Tribunal on this issue are upheld.

<u>Issue No.7</u>

16. The petitioner is a victim of a vehicular accident, therefore, by no stretch of imagination it can be said that the claim had no locus standi to file the claim petition. Accordingly, the findings returned by the Tribunal on this issue are also upheld.

17. As far as issue No.2 is concerned, the learned counsel for the appellant argued that the deceased was only 3-1/2 years of age at the time of accident and therefore, only Rs.1.00 lac was to be awarded. It was further submitted that the Tribunal has assessed the compensation which is highly excessive and deserves to be reduced accordingly.

18. The argument is beyond comprehension for the reason that the claimant is a mother, who lost her son in the vehicular accident, who was only 3-1/2 years of age at the time of accident. The Apex Court in its pronouncements has held that in such cases compensation can be awarded upto Rs.5.00 lacs. Therefore, there is no merit in the argument advanced by the learned counsel for the appellant and the same is repelled being without any force.

19. Having said so, there is no merit in the appeal filed by the appellant and the same is dismissed. Consequently, the impugned award is upheld. The Registry is directed to release the amount, alongwith up-to-date interest, in favour of the claimant forthwith through her bank account.

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

Prakash Chand & anr …Petitioners
Versus
Durga Singh & anr …Respondents

CMPMO No. 229 of 2016
Date of decision: 15.7.2016

Code of Civil Procedure, 1908- Section 47- Order 21 Rule 97 to 101- An eviction petition was filed on the ground of arrears of rent and subletting the premises, which was allowed ex-parte- civil suit was filed for restraining the landlord from interfering in the possession of the defendant- suit was dismissed- appeal was partly allowed – a further appeal was filed, which was allowed and the suit was ordered to be dismissed- objections were filed, which were also dismissed- held, that petitioners had filed a civil suit and had delayed the execution- petitioners have abused the process of the court by filing objections after the dismissal of the suit - they have stopped the delivery of the possession and have not even paid the arrears of rent for which they were held liable- false pleas and defences abusing the process of the Court should be dealt with heavy hands - Court's proceedings are sacrosanct and should not be polluted by unscrupulous litigants- Court should be careful that process of the Civil Court and law of procedure are not abused by the judgment-debtors in such a way as to make Courts of law instrumental in defrauding creditors- it is the duty of the Court to put a ceiling on unnecessary delay in the matter of enjoying the fruits by a decree holder – landlord directed to be put in physical possession of the premises within a period of four weeks and petitioners directed to pay use and occupation charges at a rate to be determined by the executing court- direction issued to award meaningful cost in favour of landlord and in case of failure to pay the amount, Executing Court directed to attach the property of the petitioners and to sell the same. (Para- 11 to 40

<u>Cases referred:</u>

Maria Margarida Sequeria Fernandes v. Erasmo Jack de Sequeria, (2012) 5 SCC 370
Dalip Singh v. State of U.P., (2010) 2 SCC 114,
Satyender Singh Vs. Gulab Singh, 2012 (129) DRJ, 128
Sky Land International Pvt Ltd Vs.Kavita P. Lalwani, (2012) 191 DLT 594
Kishore Samrite vs. State of Uttar Pradesh and others, (2013(2) SCC 398
Ramrameshwari Devi and others Vs. Nirmala Devi and others, (2011) 8 Supreme Court Cases 249
South Eastern Coalfields Ltd. Vs. State of M.P (2003) 8 SCC 648
Enviro-legal Action Vs. Union of India and others, (2011) 8 Supreme Court Cases 161
Kuer Jang Bahadur Vs. Bank of Upper India Ltd, Lucknow, AIR 1925 Oudh 448
T. Arivandandam Vs. T.V. Satyapal & anr (1977) 4 SCC 467
Babu Lal Vs. M/s Hazari Lal Kishori Lal & ors (1982) 1 SCC 525
Suresh Chander Jain Vs. Jai Krishna Swami & ors 1993 (2) ARC 484
Marshall Sons & Co. (I) Ltd. Vs. Sahi Oretrans (P) Ltd & anr, (1999) 2 SCC 325
Rajappa Hanamantha Ranoji Vs. Mahadev Channabasappa & ors (2000) 6 SCC 120
Ravinder Kaur Vs. Ashok Kumar & anr (2003) 8 SCC 289
Gayatri Devi & ors Vs. Shashi Pal Singh, (2005) 5 SCC 527,
Pushpa Devi Bhagat Vs. Rajinder Singh & ors (2006) 5 SCC 566
Shub Karan Bubna @ Shub Karan Prasad Bubna Vs. Sita Saran Bubna & ors (2009) 9 SCC 689
Satyawati Vs Rajinder Singh & anr, (2013) 9 SCC 491

For the Petitioners: Mr.Sanjeev Kuthiala, Advocate.
For the Respondents: Mr.G.D.Verma Senior Advocate with Mr. B.C. Verma, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J (Oral)

By the medium of this petition under article 227 of the Constitution of India, the following reliefs have been prayed:

> "(i) To call for the record of the case pertaining to execution petition No.55-1 of 2015/11 pending before the Ld. Rent Controller Court No.IV Shimla, HP titled as Durga Singh Vs. Sukhdev and after examining the legality and propriety of the impugned order annexure P-5 to quash and set aside the same.
>
> (b) To directing the executing court to decide the objections annexure P-4 in accordance with law after framing the issues and giving opportunity of evidence."

2. The necessary facts leading to the filing of the instant petition are that respondent/decree holder had filed an application for eviction against the proforma respondent Sukhdev Sharma with respect to the premises known as Set No.1, Upper Floor House, Cart Road, Ram Singh House, Shimla. The grounds on which the eviction was sought;

(i) arrears of rent and

(ii) sub letting the premises in favour of petitioners.

3. The proforma respondent did not choose to contest the proceedings and was thus proceeded ex parte and finally orders of eviction came to be passed on 8.12.1986.

4. On coming to know about the orders of eviction, petitioners filed a suit for declaration and injunction by arraying the proforma respondent as also the respondent/ decree holder as party on the ground that they were in fact tenants in the suit premises and eviction order passed to their detriment and in their absence was void and, therefore, landlord be permanently restrained from interfering in their possession.

5. The learned trial court dismissed the suit vide judgment and decree dated 9.7.1990, however, the appeal preferred before learned first appellate court was partly accepted and it was held that the order of learned Rent Controller was void and at the same time decree holder/respondent was restrained from evicting the petitioners. The judgment passed by the First appellate court was assailed by way of RSA No.127 of 1998 and this court vide its judgment and decree dated 27.9.2010 accepted the appeal and set aside the findings of the learned First Appellate court and even the cross objections filed by the petitioners were ordered to be dismissed. Consequently the suit filed by the petitioners was ordered to be dismissed.

6. In the execution petition filed by the decree holder for executing the eviction order, the petitioners filed objections under Section 47 read with order 21 Rule 97 and 101 of CPC which came to be dismissed on 28.5.2016, yet undeterred the petitioners have approached this court assailing the aforesaid order, primarily on the ground that the objection preferred by them could not have been ordered to be dismissed without framing issues.

7. At this stage, I may observe that when the case came up for consideration on 16.6.2016, it was represented by the learned counsel for the decree holder that the instant petition was more in the nature of a mercy petition and the petitioners be granted some time to remain in occupation of the premises as they were in the midst of construction of their own house and would shortly shift to the premises under construction. This fact is also pleaded in clause (d) of the ground raised in the petition which reads thus:

> *"(d) That another factor which the petitioners wanted to place before Ld. Executing court was that the petitioner was in the midst of getting his own construction made and had got his plans sanctioned through the competent local body/authorities, copy of the sanction of residential plan*

of the petitioners are annexed herewith as Annexure P-6, to the petition. After grant of sanction the petitioner have made sufficient construction and have raised the columns as also the lintel and the finishing work has to be completed which would be completed within a span of atleast one year. The composite

photographs are annexed herewith as Annexure P-7, to the petition. The Ld. Executing court could have granted reasonable period for the petitioners to vacate the premises in the alternative instead of ordering the eviction thereto (which submissions is made without conceding by the petitioner)."

8. After considering the representation, this court vide order dated 16.6.2016 stayed the operation and execution of the order and the case was fixed for 23.6.2016.

9. On 23.6.2016 it was pointed out by the learned Senior Counsel for the decree holder/respondent No.1 that the petitioners have not even paid the arrears of use and occupation charges. On such representation, this court passed the following orders:

"23.6.2016 Present: Mr.Sanjeev Kuthiala, Advocate for the petitioners.

Mr. G.D. Verma, Senior Advocate, with Mr. B.C. Verma, Advocate for respondent No.1.

It is represented by respondent No.1 that the petitioner has not paid the arrears of use and occupation charges. Before the petitioner can be heard in the matter, let the entire arrears of use and occupation charges @ Rs.2000/- per month be deposited by him within one week from today, failing which petition shall be dismissed without reference to the court. Needless to say that this amount has only been worked out on tentative basis and the final amount shall be worked out at the time of final hearing of the petition. List on 15.7.2016. In the meanwhile, call for the records of execution petition."

10. When the matter was taken today, it was conceded by the petitioners that the order dated 23.6.2016 has not been complied with. The matter could have been closed here, but what is more shocking is that the family members of the petitioners have even obstructed the bailiff in the discharge of his official duties when pursuant to the orders of the learned executing court he had gone to deliver possession.

11. However, at this stage without being prejudiced by the conduct of the petitioner and without even being swayed by the preemptory order passed by this court on 23.6.2016, I have considered the petition in its entirety and I do not find any merit in the same. Though the learned counsel for the petitioners would vehemently argue that the learned executing court was under obligation to frame issues, but what appears to have been conveniently ignored while raising such argument is the fact that the petitioners themselves had filed a civil suit questioning the order of eviction which ultimately was decided against them in the Regular Second Appeal No. 127 of 1998 decided by this court on 27.9.2010.

12. Even at that stage, petitioners very well knew that their remedy, if any available, was only under order 21 Rule 97 and 101 of read with Section 47 CPC. But in order to delay the eviction orders which would be finally passed against them, they intentionally filed the civil suit and have now filed the objection petition under the aforesaid provisions which obviously was required to be dismissed as the matter has already attained finality in RSA NO.127 of 1998 and cannot, therefore, be reopened.

13. The instant is an unfortunate case where the petitioners have succeeded for three decades in their diabolic plan to deny the decree holder the fruits of decree obtained by him.

The petitioners by their conduct have converted the litigation into a fruitful industry and have successfully managed to protect their possession.

14. It is the bounden duty of the court to ensure that dishonesty and any attempt to surpass the legal process must be effectively curbed and the courts must further ensure that there is no wrongful, unauthorized or unjust gain to anyone as a result of abuse of process of court.

15. The Hon'ble Supreme Court has repeatedly pointed out that rent acts have not been enacted only to protect the tenants from unjust eviction but have been enacted to equally enforce the lawful right of the landlords to obtain a possession of their own property in the event of satisfying the grounds prescribed for eviction. In this case the appellant is not even tenant and yet he has succeeded in depriving the landlord of his property for more than three decades.

16. It is proved on record that the defence set up by the appellant was absolutely false. **In Maria Margarida Sequeria Fernandes v. Erasmo Jack de Sequeria, (2012) 5 SCC 370,** the Supreme Court held that false claims and defences are serious problems with the litigation. The Supreme Court held as under:-

> *"False claims and false defences*
>
> *84. False claims and defences are really serious problems with real estate litigation, predominantly because of ever escalating prices of the real estate. Litigation pertaining to valuable real estate properties is dragged on by unscrupulous litigants in the hope that the other party will tire out and ultimately would settle with them by paying a huge amount. This happens because of the enormous delay in adjudication of cases in our Courts. If pragmatic approach is adopted, then this problem can be minimized to a large extent."*

17. In ***Dalip Singh v. State of U.P., (2010) 2 SCC 114***, the Supreme Court observed that a new creed of litigants have cropped up in the last 40 years who do not have any respect for truth and shamelessly resort to falsehood and unethical means for achieving their goals. The observations of the Supreme Court are as under:-

> *"1. For many centuries, Indian society cherished two basic values of life i.e., 'Satya' (truth) and 'Ahimsa' (non-violence). Mahavir, Gautam Buddha and Mahatma Gandhi guided the people to ingrain these values in their daily life. Truth constituted an integral part of the justice-delivery system which was in vogue in the pre-Independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post-Independence period has seen drastic changes in our value system. The materialism has over shadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings.*
>
> *2. In last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that 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."*

18. In ***Satyender Singh** Vs**. Gulab Singh, 2012 (129) DRJ, 128***, the Division Bench of Delhi High Court following Dalip Singh v. State of U.P. (supra) observed that the Courts are flooded with litigation with false and incoherent pleas and tainted evidence led by the parties due to which the judicial system in the country is choked and such litigants are consuming Courts" time for a wrong cause."

The observations of Court are as under:-

"2. As rightly observed by the Supreme Court, Satya is a basic value of life which was required to be followed by everybody and is recognized since many centuries. In spite of caution, courts are continued to be flooded with litigation with false and incoherent pleas and tainted evidence led by the parties. The judicial system in the country is choked and such litigants are consuming courts„ time for a wrong cause. Efforts are made by the parties to steal a march over their rivals by resorting to false and incoherent statements made before the Court. Indeed, it is a nightmare faced by a Trier of Facts; required to stitch a garment, when confronted with a fabric where the weft, shuttling back and forth across the warp in weaving, is nothing but lies. As the threads of the weft fall, the yarn of the warp also collapses; and there is no fabric left."

19. ***In Sky Land International Pvt Ltd*** *Vs.****Kavita P. Lalwani,*** **(2012) 191 DLT 594,** Delhi High Court held as under**:-**

"26.20 Dishonest and unnecessary litigations are a huge strain on the judicial system. The Courts are continued to be flooded with litigation with false and incoherent pleas and tainted evidence led by the parties. The judicial system in the country is choked and such litigants are consuming courts„ time for a wrong cause. Efforts are made by the parties to steal a march over their rivals by resorting to false and incoherent statements made before the Court.

xxx xxx xxx

26.22 Unless the Courts ensure that wrongdoers are denied profit or undue benefit from the frivolous litigation, it would be difficult to control frivolous and uncalled for litigations. In order to curb uncalled for and frivolous litigation, the Courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that the Courts" scarce and valuable time is consumed or more appropriately wasted in a large number of uncalled for cases. It becomes the duty of the Courts to see that such wrong doers are discouraged at every step and even if they succeed in prolonging the litigation, ultimately they must suffer the costs. Despite settled legal positions, the obvious wrong doers, use one after another tier of judicial review mechanism as a gamble, knowing fully well that the dice is always loaded in their favour, since even if they lose, the time gained is the real gain. This situation must be redeemed by the Courts."

20. The judicial system has been abused and virtually brought to its knees by unscrupulous litigants like the petitioners in this case. It has to be remembered that Court's proceedings are sacrosanct and should not be polluted by unscrupulous litigants. The petitioners have abused the process of the Court. What is 'abuse of the process of the Court' has been dealt with in detail by this Court in ***Amar Singh*** *vs****. Shiv Dutt and others, RFA No. 646 of 2012*** decided on 30.7.2014 wherein it was held:

"9. …………Therefore, the question at this stage, would than arise as to whether a party can be permitted to indulge in filing frivolous and vexatious proceedings and whether the same amount to abuse of process of Court.

10. 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."*
>
> *16. We are thus satisfied that the bogey of busybodies blackmailing adversaries through frivolous invocation of Article 136 is chimerical. Access to justice to every bona fide seeker is a democratic dimension of remedial jurisprudence even as public interest litigation, class action, pro bono proceedings, are. We cannot dwell in the home of processual obsolescence when our Constitution highlights social justice as a goal. We hold that there is no merit in the contentions of the writ petitioner and dismiss the petition."*

34. It has been consistently stated by this Court that the entire journey of a Judge is to discern the truth from the pleadings, documents and arguments of the parties, as truth is the basis of the Justice Delivery System.

35. With the passage of time, it has been realised that people used to feel proud to tell the truth in the Courts, irrespective of the consequences but that practice no longer proves true, in all cases. The Court does not sit simply as an umpire in a contest between two parties and declare at the end of the combat as to who has won and who has lost but it has a legal duty of its own, independent of parties, to take active role in the proceedings and reach at the truth, which is the foundation of administration of justice. Therefore, the truth should become the ideal to inspire the courts to pursue. This can be achieved by statutorily mandating the Courts to become active seekers of truth. To enable the courts to ward off unjustified interference in their working, those who indulge in immoral acts like perjury, prevarication and motivated falsehood must be appropriately dealt with. The parties must state forthwith sufficient factual details to the extent that it reduces the ability to put forward false and exaggerated claims and a litigant must approach the Court with clean hands. It is the bounden duty of the Court to ensure that dishonesty and any attempt to surpass the legal process must be effectively curbed and the Court must ensure that there is no wrongful, unauthorised or unjust gain to anyone as a result of abuse of the process of the Court. One way to curb this tendency is to impose realistic or punitive costs.

36. The party not approaching the Court with clean hands would be liable to be non-suited and such party, who has also succeeded in polluting the stream of justice by making patently false statements, cannot claim relief, especially under Article 136 of the Constitution. While approaching the court, a litigant must state correct facts and come with clean hands. Where such statement of facts is based on some information, the source of such information must also be disclosed. Totally misconceived petition amounts to abuse of the process of the court and such a litigant is not required to be dealt with lightly, as a petition containing misleading and inaccurate

statement, if filed, to achieve an ulterior purpose amounts to abuse of the process of the court. A litigant is bound to make "full and true disclosure of facts". (Refer : Tilokchand H.B. Motichand & Ors. v. Munshi & Anr. [1969 (1) SCC 110]; A. Shanmugam v. Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Pari palanai Sangam & Anr. [(2012) 6 SCC 430]; Chandra Shashi v. Anil Kumar Verma [(1995) SCC 1, 421]; Abhyudya Sanstha v. Union of India & Ors. [(2011) 6 SCC 145]; State of Madhya Pradesh v. Narmada Bachao Andolan & Anr. [(2011) 7 SCC 639]; Kalyaneshwari v. Union of India & Anr. [(2011) 3 SCC 287)].

37. The person seeking equity must do equity. It is not just the clean hands, but also clean mind, clean heart and clean objective that are the equi-fundamentals of judicious litigation. The legal maxim jure naturae aequum est neminem cum alterius detrimento et injuria fieri locupletiorem, which means that it is a law of nature that one should not be enriched by the loss or injury to another, is the percept for Courts. Wide jurisdiction of the court should not become a source of abuse of the process of law by the disgruntled litigant. Careful exercise is also necessary to ensure that the litigation is genuine, not motivated by extraneous considerations and imposes an obligation upon the litigant to disclose the true facts and approach the court with clean hands.

38. No litigant can play 'hide and seek with the courts or adopt 'pick and choose'. True facts ought to be disclosed as the Court knows law, but not facts. One, who does not come with candid facts and clean breast cannot hold a writ of the court with soiled hands. Suppression or concealment of material facts is impermissible to a litigant or even as a technique of advocacy. In such cases, the Court is duty bound to discharge rule nisi and such applicant is required to be dealt with for contempt of court for abusing the process of the court. [K.D. Sharma v. Steel Authority of India Ltd. & Ors. [(2008) 12 SCC 481].

39. Another settled canon of administration of justice is that no litigant should be permitted to misuse the judicial process by filing frivolous petitions. No litigant has a right to unlimited drought upon the court time and public money in order to get his affairs settled in the manner as he wishes. Easy access to justice should not be used as a licence to file misconceived and frivolous petitions. (Buddhi Kota Subbarao (Dr.) v. K. Parasaran, (1996) 5 SCC 530)."

12. Now, it is to be seen as to whether the conduct of the respondents was in fact in abuse of the process of the Court. What is "abuse of process of Court" of course has not been defined or given any meaning in the Code of Civil Procedure. However, a party to a litigation can be said to be guilty of abuse of process of the Court in any of the following cases as held by the Hon'ble Madras High Court in Ranipet Municipality Rep. by its.... Vs. M. Shamsheerkhan, reported in 1998 (1) CTC 66 at paragraph 9. To quote:

" 9. It is this conduct of the respondent that is attacked by the petitioner as abuse of process of Court. What is 'abuse of the process of the Court'? Of course, for the term 'abuse of the process of the Court' the Code of Civil Procedure has not given any definition. A party to a litigation is said to be guilty of abuse of process of the Court, in any of the following cases:-

(1) Gaining an unfair advantage by the use of a rule of procedure.

(2) Contempt of the authority of the Court by a party or stranger.

(3) Fraud or collusion in Court proceedings as between parties.

(4) Retention of a benefit wrongly received.

(5) Resorting to and encouraging multiplicity of proceedings.

(6) Circumventing of the law by indirect means.

(7) Presence of witness during examination of previous witness.

(8) Institution vexatious, obstructive or dilatory actions.

(9) Introduction of Scandalous or objectionable matter in proceedings.

(10) Executing a decree manifestly at variance with its purpose and intent.

(11) Institution of a suit by a puppet plaintiff.

(12) Institution of a suit in the name of the firm by one partner against the majority opinion of other partners etc."

The above are only some of the instances where a party may be said to be guilty of committing of "abuse of process of the Court".

22. The petitioners by keeping these proceedings alive has gained an undeserved and unfair advantage. The petitioners have been successful in dragging the proceedings for a very long time on one count or the other and because of their wrongful possession they have drawn delight in delay in disposal of the cases by taking undue advantage of procedural complications. The case at hand shows that frivolous defences and frivolous litigation is a calculated venture involving no risks situation. One has only to engage professionals to prolong the litigation so as to deprive the rights of a person and enjoy the fruits of illegalities. The Court has been used as a tool by the petitioners to perpetuate illegalities and have perpetuated an illegal possession. It is on account of such frivolous litigation that the court dockets are overflowing. Here it is apt to reproduce the observations made by the Hon'ble Supreme Court in paras 174, 175 and 197 of the judgment in Indian Council for Enviro-Legal Action vs. Union of India and others (2011) 8 SCC 161 which are as under:

174. In Padmawati vs Harijan Sewak Sangh, (2008) 154 DLT 411 (Del) decided by the Delhi high Court on 6.11.2008, the court held as under: (DLT p.413, para 6)

"6.The case at hand shows that frivolous defences and frivolous litigation is a calculated venture involving no risks situation. You have only to engage professionals to prolong the litigation so as to deprive the rights of a person and enjoy the fruits of illegalities. I consider that in such cases where Court finds that using the Courts as a tool, a litigant has perpetuated illegalities or has perpetuated an illegal possession, the Court must impose costs on such litigants which should be equal to the benefits derived by the litigant and harm and deprivation suffered by the rightful person so as to check the frivolous litigation and prevent the people from reaping a rich harvest of illegal acts through the Court. One of the aims of every judicial system has to be to discourage unjust enrichment using Courts as a tool. The costs imposed by the Courts must in all cases should be the real costs equal to deprivation suffered by the rightful person."

We approve the findings of the High Court of Delhi in the aforementioned case.

175. The Court also stated: (Padmawati case, DLT pp. 414-15, para 9)

"Before parting with this case, we consider it necessary to observe that one of the main reasons for over-flowing of court dockets is the frivolous litigation in which the Courts are engaged by the litigants and which is dragged as long as possible. Even if these litigants ultimately loose the lis, they become the real victors and have the last laugh. This class of people who perpetuate illegal acts by obtaining stays and injunctions from the Courts must be made to pay the sufferer not only the entire illegal gains made by them as costs to the person deprived of his right and also must be burdened with exemplary

costs. Faith of people in judiciary can only be sustained if the persons on the right side of the law do not feel that even if they keep fighting for justice in the Court and ultimately win, they would turn out to be a fool since winning a case after 20 or 30 years would make wrongdoer as real gainer, who had reaped the benefits for all those years. Thus, it becomes the duty of the Courts to see that such wrongdoers are discouraged at every step and even if they succeed in prolonging the litigation due to their money power, ultimately they must suffer the costs of all these years long litigation. Despite settled legal positions, the obvious wrong doers, use one after another tier of judicial review mechanism as a gamble, knowing fully well that dice is always loaded in their favour, since even if they lose, the time gained is the real gain. This situation must be redeemed by the Courts."

197. The other aspect which has been dealt with in great details is to neutralize any unjust enrichment and undeserved gain made by the litigants. While adjudicating, the courts must keep the following principles in view.

1. It is the bounden duty and obligation of the court to neutralize any unjust enrichment and undeserved gain made by any party by invoking the jurisdiction of the court.

2. When a party applies and gets a stay or injunction from the court, it is always at the risk and responsibility of the party applying. An order of stay cannot be presumed to be conferment of additional right upon the litigating party.

3. Unscrupulous litigants be prevented from taking undue advantage by invoking jurisdiction of the Court.

4. A person in wrongful possession should not only be removed from that place as early as possible but be compelled to pay for wrongful use of that premises fine, penalty and costs. Any leniency would seriously affect the credibility of the judicial system.

5. No litigant can derive benefit from the mere pendency of a case in a court of law.

6. A party cannot be allowed to take any benefit of his own wrongs.

7. Litigation should not be permitted to turn into a fruitful industry so that the unscrupulous litigants are encouraged to invoke the jurisdiction of the court.

8. The institution of litigation cannot be permitted to confer any advantage on a party by delayed action of courts."

23. 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."*

24. Prior to this the Hon'ble Supreme Court in ***South Eastern Coalfields Ltd. Vs. State of M.P (2003) 8 SCC 648*** had held that the litigation should not turn into a fruitful industry and observed as under :-

"28. …… Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to approach the courts, persuading the court to pass interlocutory orders favourable to them by making out a prima facie case when the issues are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order even

though the battle has been lost at the end. This cannot be countenanced. We are, therefore, of the opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated by award of interest at a suitable reasonable rate for the period for which the interim order of the court withholding the release of money had remained in operation."

25. The Hon'ble Supreme Court in Indian Council for ***Enviro-legal Action Vs. Union of India and others, (2011) 8 Supreme Court Cases 161*** observed:-

"191. In consonance with the principles of equity, justice and good conscience Judges should ensure that the legal process is not abused by the litigants in any manner. The court should never permit a litigant to perpetuate illegality by abusing the legal process. It is the bounden duty of the court to ensure that dishonesty and any attempt to abuse the legl process must be effectively curbed and the court must ensure that there is no wrongful, unauthorized or unjust gain for anyone by the abuse of the process of the court. One way to curb this tendency is to impose realistic costs, which the respondent or the defendant has in fact incurred in order to defend himself in the legal proceedings. The courts would be fully justified even imposing punitive costs where legal process has been abused. No one should be permitted to use the judicial process for earning undeserved gains or unjust profits. The court must effectively discourage fraudulent, unscrupulous and dishonest litigation.

192. The court's constant endeavour must be ensure that everyone gets just and fair treatment. The court while rendering justice must adopt a pragmatic approach and in appropriate cases realistic costs and compensation be ordered in order to discourage dishonest litigation. The object and true meaning of the concept of restitution cannot be achieved or accomplished unless the courts adopt a pragmatic approach in dealing with the cases.

193. This Court in a very recent case Ramrameshwari Devi v. Nirmala Devi had an occasion to deal with similar questions of law regarding imposition of realistic costs and restitution. One of us (Bhandari, J.) was the author of the judgment. It was observed in that case as under: (SCC pp. 268-69, paras 54-55)

> *"54. While imposing costs we have to take into consideration pragmatic realities and be realistic as to what the defendants or the respondents had to actually incur in contesting the litigation before different courts. We have to also broadly take into consideration the prevalent fee structure of the lawyers and other miscellaneous expenses which have to be incurred towards drafting and filing of the counter-affidavit, miscellaneous charges towards typing, photocopying, court fee, etc.*
>
> *55. The other factor which should not be forgotten while imposing costs is for how long the defendants or respondents were compelled to contest and defend the litigation in various courts. The appellants in the instant case have harassed the respondents to the hilt for four decades in a totally frivolous and dishonest litigation in various courts. The appellants have also wasted judicial time of the various courts for the last 40 years."*

26. The facts of the case are extremely disturbing where unscrupulous persons, having no connection with the premises in question, have clinged on to the premises and have successfully resisted the decree of eviction passed more than three decades ago in the year 1986.

27. The Hon'ble Privy Council, as far back as in the year 1925 had observed in the case of ***Kuer Jang Bahadur*** *Vs.* ***Bank of Upper India Ltd, Lucknow,*** **AIR 1925 Oudh 448** that the Courts in India have to be careful to see that process of the Civil Court and law of

procedure are not abused by the judgment-debtors in such a way as to make Courts of law instrumental in defrauding creditors, who have obtained decrees in accordance with their rights.

28. The Hon'ble Supreme Court in **T. Arivandandam Vs. T.V. Satyapal & anr (1977) 4 SCC 467** has held;

> *"2……The sharp practice or legal legerdemain of the petitioner, who is the son of the 2nd respondent, stultifies the court process and makes decrees with judicial seals brutum fulmen. The long arm of the law must throttle such litigative caricatures if the confidence and credibility of the community in the judicature is to survive….."*

29. The Hon'ble Supreme Court in ***Babu Lal*** *Vs*. ***M/s Hazari Lal Kishori Lal & ors*** **(1982) 1 SCC 525,** observed that

> *"...... procedure is meant to advance the cause of justice and not to retard it. The difficulty of the decree holder starts in getting possession in pursuance of the decree obtained by him. The judgment debtor tries to thwart the execution by all possible objections………"*

30. In **Suresh Chander Jain Vs. Jai Krishna Swami & ors 1993 (2) ARC 484,** the Hon'ble Supreme Court had occasion to examine a case where the tenant made repeated attempts to hold on to the tenanted premises inspite of the directions given by the court to vacate the premises and in this connection observed as under:

> *"This case is of sheer abuse of the process of the Court. The respondents suffered an ex-parte decree which this Court ultimately confirmed and dismissed the S.L.P. No. 8382 of 1992 on July 9, 1992. The respondents also had given an undertaking that they will vacate the premises within three months from the date of the High Court order. The High Court order was on July 1, 1992, reported in 1992 (2) ARC 246. They did not vacate. Again they launched upon the second front of litigation and filed a Writ Petition No. 3466606/92 which was dismissed by the High Court on August 18, 1992, reported in 1992 (2) ARC 645. Thereafter, a Regular Suit No. 400 of 1992 was got filed in the Court of the Civil Judge, Mahura through proxy for declaration and injunction. Civil Suit was dismissed on September 1, 1992 which was confirmed by the Division Bench of the High Court on September 30, 1992. Again in the third round of litigation in execution objecting as to jurisdiction was raised but disallowed by the Executing Court. Two proceedings were initiated against that order one before the Second Additional Civil Judge, Mathura and another by the writ petition in which the impugned orders came to be made. It is stated that the High Court has heard the matter and the orders were reserved. That order does not detain us from disposing of the matter on merits. As stated earlier, this process adopted by the respondents is in sheer abuse of the process of the Court and cannot be permitted to agitate the matter even on points of jurisdiction. The appeals are allowed with exemplary costs fixed at Rs. 15,000/-. The orders of the High Court as well as of the District Court are set aside. The Execution Court is directed to give police assistance and to deliver the possession of the property within a period of two weeks from the date of the receipt of this order."*

31. In ***Marshall Sons & Co. (I) Ltd.*** *Vs*. ***Sahi Oretrans (P) Ltd & anr*, (1999) 2 SCC 325,** it was observed by the Hon'ble Supreme as under:

> *"4……….it appears to us, prima facie, that a decree in favour of the appellant is not being executed for some reason or the other, we do not think it proper at this stage to direct the respondent to deliver the possession to the appellant since the suit filed by the respondent is still pending. It is true that proceedings are dragged for a long time on one count or the other and on occasion become highly technical*

accompanied by unending prolixity, at every stage providing a legal trap to the unwary. Because of the delay unscrupulous parties to the proceedings take undue advantage and person who is in wrongful possession draws delight in delay in disposal of the cases by taking undue advantage of procedural complications. It is also known fact that after obtaining a decree for possession of immovable property, its execution takes long time.......”

32. In **Rajappa Hanamantha Ranoji Vs. Mahadev Channabasappa & ors (2000) 6 SCC 120,** the Hon'ble Supreme Court made strong observation against such a tenant when it found that the tenant had adopted dubious method to deviate from the orders of the court and held as under:

“13.It is distressing to note that many unscrupulous litigants in order to circumvent orders of Courts adopt dubious ways and take recourse to ingenious methods including filing of fraudulent litigation to defeat the orders of Courts. Such tendency deserves to be taken serious note of and curbed by passing appropriate orders and issuing necessary directions including imposing of exemplary costs. As noticed, despite eviction order having become final nearly a quarter century ago, respondent no.1 still could not enjoy the benefit of the said order and get possession because of the filing of the present suit by the brother of the person who had suffered the eviction order. Under these circumstances, we quantify the costs payable by the appellant to respondent no.1 at Rs.25,000/-.”

33. In ***Ravinder Kaur*** *Vs.* ***Ashok Kumar & anr (2003)*** **8 SCC 289,** the Hon'ble observed as under**:**

“*22****........****Courts of law should be careful enough to see through such diabolical plans of the judgment debtors to deny the decree holders the fruits of the decree obtained by them. This type of errors on the part of the judicial forums only encourage frivolous and cantankerous litigations causing laws delay and bringing bad name to the judicial system.”*

34. In ***Gayatri Devi & ors*** *Vs.* ***Shashi Pal Singh, (*****2005) 5 SCC 527,** the Hon'ble Supreme made the following observations:

“*2.This appeal demonstrates how a determined and dishonest litigant can interminably drag on litigation to frustrate the results of a judicial determination in favour of the other side.”*

35. In ***Pushpa Devi Bhagat*** *Vs.* ***Rajinder Singh & ors*** **(2006) 5 SCC 566,** the Hon'ble Supreme made the similar observations, which read thus:

“29. At the cost of repetition, we may recapitulate the facts of this case. The suit was a simple suit for possession by a landlord against a tenant filed in the year 1993. Plaintiff's evidence was closed in 1998. The contesting defendant (defendant No.2) did not lead any evidence, and her evidence was treated as closed. The matter was dragged on for 3 years for defendant's evidence after the conclusion of plaintiff's evidence. It was noted on 19.5.2001 that no further adjournment will be granted for the evidence of defendants 4 and 5 (who are not contesting the matter), on the next date of hearing (23.5.2001). When the matter finally came up on 23.5.2001, no evidence was tendered. On the other hand, a statement was made agreeing to vacate the premises by 22.1.2002. The trial court took care to ensure that the statements of both counsel were recorded on oath and signed. Thereafter, it passed a consent decree. The attempts of tenants in such matters to protract the litigation indefinitely by raising frivolous and vexatious contentions regarding the compromise and going back on the solemn undertaking given to court, should be deprecated. In this context, we may refer to the observation made by this Court a similar situation in Smt. Jamilabai Abdul Kadar v. Shankarlal Gulabchand [AIR 1975 SC 2202] .”

36. In ***Shub Karan Bubna alias Shub Karan Prasad Bubna Vs. Sita Saran Bubna & ors*** **(2009) 9 SCC 689,** the Hon'ble Supreme Court has held as under:

> *"27 In the present system, when preliminary decree for partition is passed, there is no guarantee that the plaintiff will see the fruits of the decree. The proverbial observation by the Privy Council is that the difficulties of a litigant begin when he obtains a decree. It is necessary to remember that success in a suit means nothing to a party unless he gets the relief. Therefore to be really meaningful and efficient, the scheme of the Code should enable a party not only to get a decree quickly, but also to get the relief quickly. This requires a conceptual change regarding civil litigation, so that the emphasis is not only on disposal of suits, but also on securing relief to the litigant."*

37. In **Satyawati Vs Rajinder Singh & anr, (2013) 9 SCC 491,** three Judges' Bench of the Hon'ble Supreme Court have held as under:

> "*16. As stated by us hereinabove, the position has not been improved till today. We strongly feel that there should not be unreasonable delay in execution of a decree because if the decree-holder is unable to enjoy the fruits of his success by getting the decree executed, the entire effort of successful litigant would be in vain."*
>
> *"17 We are sure that the executing court will do the needful at an early date so as to see that the long drawn litigation which was decided in favour of the appellant is finally concluded and the appellant-plaintiff gets effective justice."*

38. From the aforesaid conspectus of law, it would be evidently clear that it is the duty of the court to put a ceiling on unnecessary delay in the matter of enjoying the fruits by a decree holder as is often said that a litigation in this country, particularly on the Civil side commences only after obtaining a decree while executing it. A person who approaches the court must be able to enjoy the fruits of a decree and he cannot be made to suffer indefinitely even after a contest of a claim in a Court of law.

39. Applying the above view and anxiety of the Hon'ble Privy Council, other Hon'ble Courts and also the principles laid down by the Hon'ble Supreme Court to the facts of the present case, this court is of the considered view that long litigation which has been decided in favour of respondent-landlord has only resulted in a decree in favour of landlord which can only become meaningful and efficient when the landlord not only gets the possession, but is also compensated for the entire period he has been deprived of the user of the property by granting of mesne profits.

40. The unscrupulous litigations like petitioners cannot simply walk away by not paying the use and occupation charges or the mesne profitis for the period they have enjoyed the property. Therefore, in such circumstances, I feel that the ends of justice would be met in case the learned executing court is directed to ensure that:

(i) *the landlord is put in physical possession of the premises within a period of four weeks from today.;*

(ii) *the petitioners are made to pay use and occupation charges at the rate to be determined by the learned executing court for the entire period when the respondent/ landlord has been deprived of his property;*

(iii) *In addition to the mesne profits, the executing court shall award meaningful cost in favour of landlord in terms of the judgment rendered by the Hon'ble Supreme Court in* ***Ramrameshwari Devi, South Eastern Coalfields Ltd*** *and* ***Enviro-Legal*** *cases (supra).*

(iv) *Till and so long, the possession of the premises is not handed over and further till and so long mesne profits, as determined by the executing court along with cost, are not paid to the landlord, petitioners shall not sell, mortgage, alienate, encumber or create a charge over the said property,*

known as Ram Singh House, Cart Road, Shimla-4, more specifically defined in Annexure P-6, or dispose of in any manner, save and except with the express leave and permission of the executing court and the undertaking, by affidavit, to this effect, will be filed by all the landlords/owners of the property before the executing court within a period of four weeks. The order shall be operative forthwith.

(v) *In the event of petitioners failing to pay mesne profit so determined, the executing court shall be at liberty to attach the properties of the petitioners and in case still failure on their part to pay the mesne profit, the same be put to sale strictly in accordance with law.*

With these observations, petition is dismissed, leaving the parties to bear their own costs.

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

Prasoon Sharma ……Appellant
Versus
Bhimi Devi and others ……Respondents

FAO No.: 456 of 2010.
Decided on : 15.07.2016

Motor Vehicles Act, 1988- Section 149 - Deceased was traveling in a Jeep which met with an accident due to rash and negligent driving - deceased died on the spot- an FIR was registered against the driver under Sections 279 and 304A of the Indian Penal Code- Claimants, being the dependants of the deceased claimed compensation of Rs. 10.00 lacs - Tribunal allowed the claim petition and saddled the owner with liability - feeling aggrieved from the award, owner filed the appeal - held, that onus was upon owner and driver to prove that claim petition was not maintainable but they had failed to do so- police report has to be treated as Claim Petition by the Tribunal in terms of Section 166(4) of the Act- even filing of claim petition is not mandatory for grant of compensation - claimants had not pleaded in the amended claim petition that the deceased was traveling in the vehicle as labourer for loading/unloading of goods or had hired the vehicle for transportation of goods- offending vehicle was a goods carriage vehicle and not a passenger vehicle- deceased was traveling in the offending vehicle as gratuitous passenger- owner/insured has violated the terms and conditions of the insurance policy and therefore, the owner/insured was rightly held liable to pay the compensation - appeal dismissed.

(Para-10 to 17)

For the appellant: Mr.D.N. Sharma, Advocate.
For the respondents: Mr.Adarsh Sharma, Advocate, for respondents No.1, 4 and 5.
Nemo for respondents No.2, 3 and 7.
Mr.Bunesh Pal, Advocate, for respondent No.6.

The following judgment of the Court was delivered:

<u>Mansoor Ahmad Mir, Chief Justice (Oral)</u>

Subject matter of this appeal is the award, dated 20th September, 2010, passed by the Motor Accident Claims Tribunal, Kullu, District Kullu, H.P. (for short, "the Tribunal") in Claim Petition No.49 of 2008, titled Bhimi Devi and others vs. Prasoon Sharma and others, whereby compensation to the tune of Rs.4,33,000/-, alongwith interest at the rate of 7% 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 were saddled with the liability jointly and severally, (for short the "impugned award").

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

3. Feeling aggrieved, the owner has filed the instant appeal on the ground that the Tribunal has fallen into an error in discharging the insurer from its liability.

4. Therefore, the only question to be determined in this appeal is – Whether the findings returned by the Tribunal viz. a viz. part of issue No.2 and issue No.5 are legally correct?

5. To answer the said question, it is useful to have a brief background of the facts of the case, which are enumerated hereinbelow.

6. On 14th May, 2008, Damodar Dass alias Dinesh Kumar, traveling in Jeep bearing No.HP-66-0495, which was being driven by its driver namely Bhupinder Singh rashly and negligently, and when the said Jeep reached near Najaan, it met with an accident, resulting into the death of said Damodar Dass on the spot. FIR bearing No.293, dated 15th May, 2008, was registered against the driver of the offending Jeep under Sections 279 and 304A of the IPC.

7. The claimants, being the dependants of the deceased, filed the claim petition claiming compensation to the tune of Rs.10.00 lacs, as per the break-ups given in the claim petition.

8. Original respondents resisted the claim petition by filing replies. On the pleadings of the parties, the Tribunal framed the following issues:

> *"1. Whether Damodhar alias Dinesh kumar died in a motor accident on 14.5.2008 at about 10.30 p.m. at Kala Joul (Najaan) involving vehicle No.HP-66-0495 driven by respondent No.2, in a rash and negligent manner? OPP*
>
> *2. If issue No.1 is proved in affirmative, to what amount of compensation the petitioners are entitled and from whom? OPP*
>
> *3. Whether the present claim petition is not maintainable as alleged, if so its effect? OPR 1 and 2*
>
> *4. Whether the driver of the vehicle No.HP-66-495 was not holding a valid and effective driving licence to drive the vehicle in question, if so, its effect? OPR-3*
>
> *5. Whether the deceased was unauthorized/gratuitous passenger, as alleged, if so its effect? OPR-3*
>
> *6. Relief."*

9. Parties led their evidence and the Tribunal allowed the claim petition and saddled the owner with the liability as discussed hereinabove.

10. The Tribunal, after referring to the pleadings of the parties and the evidence, held that the accident had occurred due to the rash and negligent driving of the driver of the offending Jeep, namely, Bhupinder Singh, which findings are borne out from the records. Otherwise also, the said findings are not disputed. Therefore, the findings returned by the Tribunal on issue No.1 are upheld.

11. Before issues No.2 and 5 are taken up for discussion, I deem it proper determine issues No.3 and 4 at the first instance. Onus to prove issue No.3 was upon the owner and the driver and it was for them to prove that the claim petition was not maintainable, have failed to do so. Even otherwise, the Motor Vehicles Act, 1988 (for short, the Act) has gone through a sea change and sub section (6) to Section 158 and sub section (4) to Section 166 have been added. Section 158(6) provides that the Incharge of the Police Station concerned has to submit a report about the traffic accident to the Tribunal having the jurisdiction and that report has to be treated as Claim Petition by the Tribunal in terms of Section 166(4) of the Act. Thus, even filing of claim

petition is not mandatory for grant of compensation in terms of the said amendment. Therefore, it does not lie in the mouth of the owner and the driver to urge on flimsy grounds that the claim petition was not maintainable. Accordingly, the findings returned by the Tribunal on issue No.3 are upheld.

12. As far as issue No.4 is concerned, it was for the insurer to plead and prove that the driver of the offending Jeep was not having a valid and effective driving licence, has not led any evidence. Driving licence of the driver was proved on record as PW-3/A which was valid and effective at the time of accident. Therefore, the Tribunal has rightly decided issue No.4 and the said findings are liable to be upheld.

13. Coming to issues No.2 and 5, the claimants filed the claim petition in September, 2008 and in paragraph 24 thereof, they pleaded that the deceased boarded the offending Jeep at Jorang, and when the said Jeep reached at Kala Joul near Najan, it met with the accident. The claimants nowhere pleaded that the deceased had hired the Jeep for transportation of goods and was sitting in the Jeep as owner of the goods or was traveling in the said Jeep as labourer for loading/unloading of goods

14. It is pertinent to mention here that the claimants, after noticing the reply, amended the claim petition. Even in the amended claim petition, the claimants have not pleaded that the deceased was traveling in the offending jeep as labourer for loading/unloading of goods or had hired the said Jeep for transportation of goods.

15. The driver and the owner filed the joint reply and in the reply there is no murmur that the deceased had hired the said Jeep for the purpose of carrying goods or was engaged as labourer for loading/unloading of goods.

16. Admittedly, the offending Jeep was a goods carriage vehicle and not a passenger vehicle. As discussed above, the learned counsel for the appellant/insured was not in a position to show from the records as to in which capacity the deceased was traveling in the offending Jeep. The Tribunal has rightly made discussion in paragraph 22 of the impugned award and has rightly held that the deceased was traveling in the offending Jeep as gratuitous passenger. Accordingly, the findings returned by the Tribunal on issue No.5 are upheld.

17. What follows from the above discussion is that the owner/insured has violated the terms and conditions of the insurance policy and therefore, the owner/insured has rightly been held liable to pay the amount of compensation. The quantum of compensation is not in dispute. Accordingly, the findings returned by the Tribunal on issue No.2 are also upheld.

18. Having said so, the impugned award is upheld and the appeal is dismissed. As stated by the learned counsel for the appellant, the appellant has deposited the entire amount in the Registry of this Court. The Registry is directed to release the amount, alongwith interest, in favour of the claimants forthwith, through their bank accounts, strictly in terms of the impugned award.

19. The appeal is disposed of accordingly.

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

FAOs No. 340 & 194 of 2011 a/w
Cross Objections No. 323 of 2011
Decided on : 15.7.2016

1. **FAO No. 340 of 2011**

Rajesh Kumar ...Appellant

Versus

Smt. Kamlesh Kumari & others ...Respondents

2. **FAO No. 194 of 2011**

National Insurance Company Ltd. ...Appellant

Versus

Sh. Rajesh Kumar & others ....Respondents

Motor Vehicles Act, 1988- Section 166- Claimant has tendered in evidence copies of cash memos, which disclose that the claimant has incurred the expenditure of Rs. 1,00,233/- on treatment- thus, claimant is entitled to Rs. 1,00,233/- under the head 'medical expenses'- claimant has suffered 20% permanent disability – he has undergone pain and suffering and is entitled to Rs. 50,000/- under the head 'pain and sufferings' and Rs. 50,000/- under the head 'loss of amenities of life'- claimant remained admitted in the hospital and services of attendant were required- hence, expenses of Rs. 25,000/- under the head 'attendant charges and other charges' awarded- thus, claimant is entitled to Rs. 1,00,233 + 50,000/- + 50,000/- + 25,000/- = Rs. 2,25,233/- along with interest @ 7.5% per annum from the date of filing of the claim petition till realization. (Para-18 to 23)

FAO No. 340 of 2011

For the Appellant : Mr. Suneet Goel, Advocate.

For the respondents: Mr. Ajay Sharma, Advocate, for respondents No. 1 & 2. Nemo for respondent No. 3.

FAO No. 194 of 2011

For the Appellant : Mr. Ashwani K. Sharma, Senior Advocate with Mr. Nishant Kumar, Advocate.

For the respondents: Mr. Suneet Goel, 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)*

Challenge in these appeals is to the award dated 15th January, 2011, passed by the Motor Accident Claims Tribunal, Hamirpur, H.P. (hereinafter referred to as 'the Tribunal'), in M.A.C. Petition No. 43 of 2008, whereby compensation to the tune of Rs.80,000/-with interest @ 7.5% per annum from the date of filing of the claim petition till its realization came to be awarded in favour of the claimant and the insurer was saddled with liability, (hereinafter referred to as '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. By the medium of FAO No. 194 of 2011, the insurer has questioned the impugned award on the ground that the Tribunal has fallen in an error in saddling it with liability.

4. In FAO No. 340 of 2011, the claimant has questioned the impugned award on the ground of adequacy of compensation.

5. Alongwith FAO No. 94 of 2011, driver and owner have also filed Cross Objection No. 323 of 2011, on the grounds taken in the memo of cross-objections.

6. In view of the above, I deem it proper to determine both these appeals by this common judgment.

7. The claimant had filed claim petition before the Tribunal for grant of compensation to the tune of Rs.80,000/- as per the break-ups given in the claim petition.

8. The claim petition was resisted by the respondents on the grounds taken in their memo of objections.

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

> *"1. Whether the petitioner has suffered injuries due to rash and negligent driving of Car No. HP-20C-0911 by its driver-respondent No. 2, as alleged? …OPP*
>
> *2. If issue No. 1 is proved in affirmative, whether the petitioner/claimant is entitled to compensation, if so, to what amount and which of the respondent? …OPP*
>
> *3. Whether the petition is not maintainable in the present form?….OPRs*
>
> *4. Whether respondent No. 2 was not holding a valid and effective driving licence to drive the vehicle in question at the time of accident?…..OPR-3*
>
> *5. Whether the petition is bad for non-joinder and mis-joinder of necessary parties?…OPR-3*
>
> *6. Relief."*

10. The claimant examined LHC Parma Nand (PW-1), Sanjeev Kumar (PW-2), Rajesh Kumar (PW-3), Smt. Anjana Kumari (PW-4), Dr. Ramesh Chauhan (PW-5) and Dr. Neelam Joshi (PW-6). On the other hand, the owner and driver stepped into the witness box as RW-1 and RW-2, respectively. The owner also examined her husbnad Dev Dutt Sharma as RW-3. The insurer has not led any evidence. Thus, the evidence led by the driver and owner has remained unrebutted.

11. Admittedly, the FIR No. 80 of 2008, dated 19.04.2008, under Sections 279 & 337 of the Indian Penal Code and Section 187 of the Motor Vehicles Act, was registered against driver Joginder Singh, who was facing trial before the learned Judicial Magistrate 1st Class, Nadaun, District Hamirpur.

12. The claimant has examined LHC Parma Nand (PW-1), who has proved FIR as Ext. PW-1/A. He has also examined Sanjeev Kumar, Criminal Ahlmad of the Court of learned Judicial Magistrate 1st Class, Nadaun, District Hamirpur, as PW-2, who has stated that FIR No. 80 of 2008, was lodged against Joginder Singh and final report in terms of Section 173 of the Code of Criminal Procedure was presented before the Court of learned Judicial Magistrate 1st Class, Nadaun, District Hamirpur, where said Joginder Singh is facing trail.

13. Thus, there is sufficient evidence on the file to the effect that driver Joginder Singh was driving the offending vehicle rashly and negligently and caused the accident. Accordingly, the findings returned by the Tribunal on Issue No. 1 are upheld.

14. Before I deal with Issue No. 2, I deem it proper to deal with Issues No. 3 to 5.

Issues No. 3 to 5.

15. The respondents have not led any evidence to prove Issues No. 3 to 5. Viewed thus, the findings returned by the Tribunal on issues No. 3 to 5 are upheld.

16. The factum of insurance is admitted. The insurer has not led any evidence to prove that the owner has committed any willful breach. Accordingly, the insurer has to satisfy the liability.

Issue No. 2.

17. The Tribunal has fallen in an error in assessing the compensation for the following reasons.

18. In para-46 of the impugned award, the Tribunal has recorded that the claimant has tendered in evidence copies of cash memos/receipts Ext. PW-6/A-5 to Ext. PW6/A-18, which

disclose that the claimant has incurred the expenditure to the tune of Rs.1,00,233/- on treatment. Thus, the claimant has proved that he was entitled to Rs.1,00,233/- under the head 'medical expenses'. The Tribunal has fallen in an error in awarding compensation to the tune of Rs.50,000/- under the head 'medical expenses'. Accordingly, the claimant is held entitled to the tune of Rs.1,00,233/- under the head 'medical expenses'.

19. It has come on the record that the claimant has suffered 20% permanent disability. Though, Dr. Ramesh Chauhan (PW-5) has stated that it has not affected his earning capacity, but the claimant has undergone pain and suffering and has to undergo the same throughout his life. Thus, I deem it proper to award compensation to the tune of Rs.50,000/- under the head 'pain and sufferings'.

20. The Tribunal has also fallen in an error in not awarding compensation under the head 'loss of amenities of life'. Thus, I deem it proper to award compensation to the tune of Rs.50,000/- under the head 'loss of amenities of life'.

21. It is also the admitted fact that the claimant remained admitted in the hospital and the services of an attendant were required which he had while he was admitted in the hospital and also for future. He also incurred expenses for visiting hospital. The Tribunal has awarded compensation to the tune of Rs.5,000/- under the 'attendant charges', which is too meager. Thus, I deem it proper to award compensation to the tune of Rs.25,000/- under the head 'attendant charges and other charges'.

22. Having said so, it is held that the claimant is entitled to compensation to the tune of Rs.1,00,233 + Rs.50,000/- + 50,000/- + 25,000/- total amounting to Rs.2,25,233/- with interest @ 7.5% per annum from the date of filing of the claim petition till realization.

23. The amount of compensation is enhanced and the impugned award is modified, as indicated above.

24. 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 claimant, strictly in terms of conditions contained in the impugned award, through payees account cheque or by depositing in his account.

25. Accordingly, the appeals are disposed of and the cross objections are dismissed.

26. 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 RAJIV SHARMA, J.

Rajinder Singh ……Appellant.
Versus
State of H.P. …….Respondent.

Cr. Appeal No. 225 of 2011.
Reserved on: July 13, 2016.
Decided on: July 15, 2016**.**

Indian Penal Code, 1860- Section 468, 471, 409, 120B- Prevention of Corruption Act, 1988- Section 13(2)- Accused R was posted as Clerk-cum-cashier in the office of Project Director, Desert Development Project Kaza- accused D (since dead) was posted as SDC - all the projects were under ADC - building of the Veterinary Dispensary was being constructed under Desert Development Project- Executive Engineer Kaza was executing the work- amount of Rs. 3 lacs was disbursed to PWD but the amount of Rs. 2 lacs was deposited- it was found that accused had

misappropriated a sum of Rs.1 lac- accused R was convicted by the trial Court for the commission of offences punishable under Sections 409 and 468 of I.P.C. and Section 13(2) of Prevention of Corruption Act and acquitted of the commission of offences punishable under Sections 467 and 120-B of I.P.C.- aggrieved from the judgment, present appeal has been preferred- held, that audit report shows that amount of Rs. 1,00,000/- was transmitted to PWD but was never paid as per account book- Rs. 3 lacs were shown to have been paid to PWD but actually Rs. 2 lacs were paid- thus, misappropriation of Rs. 1 lac was duly proved- the plea taken by the accused that he had paid Rs. 1 lac is not acceptable- there was no justification for making payment by cash- accused was a public servant and guardian of government property- he had misappropriated government money and had misconducted himself - accused was rightly convicted by the trial Court- appeal dismissed. (Para-30 to 33)

For the appellant: Mr. Varun Rana, Advocate.
For the respondent: Mr. Parmod Thakur, Addl. AG with 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 21.5.2011, rendered by the learned Special Judge (Addl. Sessions Judge), Mandi, H.P., in Corruption Case No. 3/2005(1999), whereby the appellant-accused (hereinafter referred to as the accused), was charged with and tried for offences punishable under Sections 468, 471, 409, 120B IPC and Section 5(2) (old)/Section 13(2) (new) of the Prevention of Corruption Act. The accused was acquitted under Sections 467 and 120B IPC. He was convicted and sentenced to undergo simple imprisonment for two years and to pay fine of Rs. 10,000/- and in default of payment of fine to further undergo simple imprisonment for two months for the commission of offence punishable under Section 409 IPC. He was also convicted and sentenced to undergo simple imprisonment for two years and to pay fine of Rs. 10,000/- and in default of payment of fine to further undergo simple imprisonment for two months for the commission of offence punishable under Section 468 IPC. He was further convicted and sentenced to undergo simple imprisonment for two years and to pay fine of Rs. 2,00,000/- and in default of payment of fine to further undergo simple imprisonment for one year for the commission of offence punishable under Section 13(2) of Prevention of Corruption Act. All the sentences were ordered to run concurrently.

2. The case of the prosecution, in a nut shell, is that accused Rajinder Singh was posted as Clerk-cum-cashier in the office of Project Director, Desert Development Project Kaza. Accused Dharam Chand was posted as SDC in the office of Assistant Engineer, Tindi. Deepak Shanan (PW-22) was posted as ADC Kaza. All the projects were under ADC under single line administration. Building of the Veterinary Dispensary was being constructed under Desert Development Project. Executive Engineer Kaza was executing the work. An amount of Rs. 1,00,000/- was provided to the Executive Engineer vide cheque No. A/147-0258098 dated 2.6.1987 and an amount of Rs. 1,00,000/- was provided vide cheque No. A/147-0258311 dated 1.4.1987. Receipt Ext. PW-4/F was issued by the Executive Engineer and this amount was duly reflected in the cashbook. Cheque No. A/147-0258093 was issued by the Project Director. It was endorsed in favour of Rajinder Singh Rawat. It was encashed on the same day. A sum of Rs. 1,00,000/- was stated to have been paid to the Executive Engineer Kaza. Temporary receipt Ext. PW-4/D was issued by the Executive Engineer. The receipt was written by Dharam Chand, SDC. It transpired that only Rs. 2,00,000/- was deposited with the PWD instead of Rs. 3,00,000/-. This fact came to the notice of Charan Dass (PW-1) when PW-1 Charan Dass went to Deepak Shanan to submit progress and expenditure report. A sum of Rs. 3,00,000/- was shown to have been disbursed to Public Works Department (PWD). Deepak Shanan told that a sum of Rs. Rs. 2,00,000/- was paid to PWD Authorities and not Rs. 3,00,000/-. Charan Dass verified the record and found that a sum of Rs. 3,00,000/- was deposited with PWD. Telegram was sent to Deepak

Shanan. Record was also produced before him. Letter Ext. PW-3/D was issued by the Executive Engineer, HP PWD that only a sum of Rs. 2,00,000/- was received and cheque No. 0258093 was mentioned in place of cheque No. 0258098. The audit was conducted by A.R.Sharma (PW-8) who found that Rs. 2,00,000/- was paid to HP PWD vide cheques Ext. P-3 and P-4. Rs. 1,00,000/- was shown to have been paid to HP PWD in the cashbook but no such amount was in fact paid to HP PWD. He submitted report Ext. PW-7/A. It was further found during the investigation that a sum of Rs. 34203/- was also misappropriated by the accused during the year 1986-87. Accused had taken detail from Rattan Singh, Store Keeper (PW-6) but Rs. 22,000/- and Rs. 250/- were not entered in the receipt columns. Whereas these were shown to have been paid vide voucher No. 56-57 dated 14.10.1987. Rs. 2200/- and Rs. 600/- were not entered in the receipt and payment column. Rs. 2408.25 received from ITDP department Project Officer and Rs. 3744.75 received from Rattan Singh, Storekeeper were not entered in the cashbook. Rs. 3000/- was shown to have been paid to Smt. Yankit Dolma (PW-19) twice. In this way, accused Rajinder Singh misappropriated Rs. 1,34,203/- during the year 1986-87, 1987-88. Accused Dharam Chand had entered into conspiracy to misappropriate a sum of Rs. 1,00,000/-. 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 twenty five witnesses. Accused Dharam Chand died during the pendency of trial. Accused Rajinder Singh was also examined under Section 313 Cr.P.C. The learned trial Court convicted and sentenced the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. Varun Rana Advocate, has vehemently argued that the prosecution has failed to prove its case against the accused and the accused could not be charged under Section 13(2) of the Prevention of Corruption Act, 1988. However, the fact of the matter is that the accused was charged under Section 5(2) of the previous Act and now Section 13(2) of the Prevention of Corruption Act, 1988, as per the charge framed by the learned Special Judge. Mr. Varun Rana, Advocate, has also argued that the statements recorded earlier in time could not be read in evidence. The fact of the matter is that the statements were duly exhibited when these witnesses were again re-examined. On the other hand, Mr. Neeraj K. Sharma, Dy. Advocate General has supported the judgment of the learned trial Court dated 21.5.2011.

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. This case has a chequered history. The prosecution has examined initially PW-1 Charan Dass as PW-4, PW-2 Surinder Singh as PW-3, PW-3 Shakti Singh as PW-20, PW-5 Navrata Ram as PW-10, PW-6 Rajinder Singh as PW-11, PW-9 J.S.Guleria as PW-5 and PW-11 R.P. Sharma as PW-19.

7. PW-1 Charan Dass testified that he was posted as Superintendent (Grade-II), Desert Development Project, Kaza. His statement was recorded vide Ext. PW-1/A before the learned Special Judge, Kullu on 2.1.2001 and he sought the permission to read the same in evidence in this case. PW-1 in his statement has deposed that he was posted as Superintendent (Grade-II), Desert Development Project, Kaza in the year 1987. He took charge from Rajinder Singh Rawat. Mr. Deepak Shanan at that time was ADC Kaza. He was ex-officio Director of DDP, Kaza. Under single line administration, all departments, at Kaza were under administrative control of ADC Kaza. All projects and plannings were done under direct control of veterinary dispensary, Kaza through PWD by depositing the amount. DDP Kaza used to get funds from the Central Government and State Government. After his joining as Superintendent Project Director, Kaza, Mr. Deepak Shanan asked for progress report of expenditure for sending to State Headquarter. He prepared the report. When he prepared the report, he found Rs. 3,00,000/- having been given to the PWD for deposit work. When the statement was shown by him to Mr. Shanan at Shimla he told that they had given only Rs. 2,00,000/- to the PWD authorities and not Rs. 3,00,000/-by showing Rs. 2,00,000/- having been given to the PWD by way of deposit. He after coming to Kaza again verified the record which showed deposit of Rs. 3,00,000/- with

PWD and qua which he sent telegram to headquarter at Shimla and also sent reports. At that time Deepak Shanan was posted as Dy. Secretary (Finance), H.P. Government, Shimla having dual charge of Project Director, DDP, Kaza. Thereafter, he took the record from Kaza to Shimla and showed the same to Deepak Shanan that as per record a sum of Rs. 3,00,000/- were deposited with PWD and not Rs. 2,00,000/-. He has seen the writing of the accused and he was conversant with his writing and signatures. He has seen the original cashbook Ext. P-1 and at page 93 there is entry of cheque No. 0258098 dated 2.6.1987 amounting to Rs. 1,00,000/-. It was entered on 30.6.1987 in the cashbook. The cheque was in the name of Executive Engineer, PWD, Kaza but as per entry the cheque was taken in cash book and this entry Ext. PW-4/A was in the hands of accused. Cheque of this entry is Ext. P-2. Cheque bearing No. 0258311 dated 1.9.1987 for Rs. 1,00,000/- Ext. P-3 was issued to Executive Engineer, PWD, Kaza and qua this cheque at page No. 113 of Ext. P-1 there is entry which is in the hands of accused vide Ext. PW-4/B. Cheque bearing No. 258093 dated 14.4.1987 of Rs. 2,00,000/- Ext. P-4 was issued in favour of self and entry of this cheque is at page 93 of Ext. P-1. This entry Ext. PW-4/C is in the hands of accused Rajinder Singh Rawat. Amount of cheque Ext. P-4 was withdrawn by Rajinder Singh Rawat and he identified his signatures on back of the cheque Ext. P-4. Amount of cheque Ext. P-4 as per receipt Ext. PW-4/D was received by Dharam Chand Thakur accused on behalf of Asstt. Engineer, HP PWD, Kaza. As per entry in Ext. P-1 at page 99, which is in the hands of accused Rajinder Singh Rawat, an amount of Rs. 1,00,000/- was handed over to Executive Engineer B & R Kaza in cash. This entry is Ext. PW-4/E. The cheque though Ext. P-4 was drawn for Rs. 2,00,000/-, payment in cash was made for Rs. 1,00,000/- to Asstt. Engineer, B & R, Kaza. Amount of cheque Ext. P-2 and P-3 was handed over to Asstt. Engineer, B & R, Kaza qua which receipt Ext. PW-4/F was obtained. In his cross-examination on 20.10.2003 by Y.R. Deshta, Advocate, he admitted that all the government transactions were made by way of cheques and drafts. He denied that whenever any cheque was received in the office the temporary receipt was issued by the department. Volunteered that whenever original cheque was received in the department, the original receipt was issued. He denied that when the cheque was encashed only thereafter permanent receipt was issued. Temporary receipt was replaced by permanent receipt on encashment. On issuance of permanent receipt, temporary receipt was returned. Entry in the cashbook was made only once against both the receipts.

8. PW-2 Surender Singh deposed that his statement was recorded vide Ext. PW-2/A before the learned Special Judge, Kullu on 1.1.2001 and he prayed that the same may be read in evidence in this case. He was not cross-examined at all.

9. PW-3 Shakti Singh deposed that he was posted as Branch Manager, SBI Kaza. His statement was recorded vide Ext. PW-3/A before the learned Special Judge, Kullu on 18.6.2001 and he prayed that the same may be read in evidence in this case. He was also not cross-examined. In Ext. PW-3/A, he deposed that on 26.10.1989, Vigilance Police, Kullu took from bank custody cheques Ext. P-2 to P-4 qua which memo was prepared.

10. PW-5 Narottam deposed that his statement was recorded vide Ext. PW-5/A before the learned Special Judge, Kullu on 3.1.2001 and prayed that the same may be read in evidence in this case. In Ext. PW-5/A, he deposed that letters Ext PW-8/A and PW-8/B were handed over by him to the Vigilance Department through memo Ext. PW-10/A.

11. PW-6 Rattan Singh deposed that his statement was recorded vide Ext. PW-6/A before the learned Special Judge, Kullu and he prayed that the same may be read in evidence in this case. In Ext. PW-6/A he deposed that he remained posted as storekeeper Desert Development Project Kaza from 1978 to 1985. He came on deputation as storekeeper in Desert Development Project Kaza in the year 1986. The charge of petrol and diesel of the project was with him. For purchase of petrol-diesel, he used to get money from head clerk Rajinder Singh Rawat. He used to give account to Rajinder Singh Rawat. Entire account and vouchers used to be given by him to Rajinder Singh Rawat. He did not recall to what extent and what amount was taken and settled with Rajinder Singh Rawat qua petrol and diesel. He proved details of

expenditure Ext. PW-11/A. At the time of preparing it, he handed over cash of Rs. 3744/- to Rajinder Singh Rawat who signed Ext. PW-11/A in his presence.

12. PW-7 Shamsher Singh deposed that on 23.10.1990, ACJM, Kullu had moved an application Ext. PW-7/A before him and requested him to take specimen signatures and handwriting of Rajinder Singh Rawat. He took specimen signature and handwriting of the accused vide Ext. PW-7/B in ten sheets which are Ext. PW-7/J to PW-7/L.

13. PW-8 Atma Ram deposed that his statement was recorded vide Ext. PW-8/A before the learned Special Judge, Kullu and he prayed that the same may be read in evidence in this case. In his cross-examination of Ext. PW-8/A, he testified that he went to Kaza to conduct audit of Desert Development Project Kaza. He conducted audit for the year 1987-88. After conducting audit, he submitted report to the Director, Rural Development Shimla. The report is Ext. PW-7/A. During audit he found that an amount of Rs. 2,00,000/- was to be paid to PWD out of which Rs. 1,00,000/- was paid under cheque No. A/147-0258098 dated 2.6.1987 and another cheque No. A/147-0258311 dated 1.9.1987 was issued. It was found that in accounts of Desert Development Project Kaza, an amount of Rs. 1,00,000/- was shown transmitted to PWD by way of draft for which temporary receipt was obtained from SDO Tindi and accounted for in the accounts. But it was found that the amount of Rs. 1,00,000/- shown paid to PWD through draft in fact was never paid and deposited in account of the PWD. As such in account books Rs. 3,00,000/- were shown to be paid to PWD but actually Rs. 2,00,000/- were paid and not Rs. 3,00,000/-. His audit report was based on cashbook, vouchers and other official documents.

14. PW-9 J.S.Guleria testified that his statement was recorded vide Ext. PW-9/A before the learned Special Judge, Kullu and he prayed that the same may be read in evidence in this case. In his cross-examination, he deposed that he called Ext. PW-4/D to be temporary as there is no meaning of it for the purpose of accounts. He deposed that permanent receipt is issued after receipt of the cheque and sending of the same under challan to the treasury. The receipt is sent to the concerned department after crediting of the amount in their account. Ext. PW-4/D is a temporary receipt given on demand. Temporary receipt is not meant for accounts purposes.

15. PW-11 R.P. Sharma, testified that his statement was recorded vide Ext. PW-11/A and he prayed that the same may be read in evidence in this case. In his examination-in-chief, as per Ext. PW-11/A, he stated that Deepak Shanan during that period was posted as ADC Kaza and vested with power of Director, Desert Project Development. For construction of Animal Husbandry building Kaza, a sum of Rs. 2,00,000/- in the shape of two cheques was received from Director, Desert Development, Kaza. Both cheques were in the name of his designation. Cheque Ext. P-2 and P-3 were endorsed by him in favour of Asstt. Engineer, Kaza. The amount of both cheques was drawn and credited to their accounts. Except amount or these two cheques, no other amount for construction of building was received from the Director. As per practice on receipt of cheque temporary receipt used to be issued by SDO or any official of the department and after encashment of cheque payment receipt or GR was issued. In his cross-examination, he deposed that there was no rule for issuance of temporary receipt but on demand issued by way of proof, there was instruction of the department to issue temporary receipt. No temporary receipt book was issued from the department.

16. PW-12 B.S.Parmar testified that letter Ext. PW-12/A was sent by him to the Police Department. Ext. PW-12/B was also sent by him to Director Desert Development Project, Spiti. Letter Ext. PW-12/C was also sent by him to S.P. (ACB) Zone, Kullu.

17. PW-13 Dorje Funchuk deposed that his statement was recorded before the Special Judge Kullu, vide Ext. PW-13/A. It was requested to be read in evidence in the present case also. He deposed that he was posted as Section Officer at Kaza from 1989 to October, 2003. Co-accused Rajinder Singh Rawat was posted as Superintendent at Kaza. Internal audit was conducted in the present case prior to his joining. Total embezzlement amounting to Rs.

1,34,000/- was found as per audit report. The audit was also conducted by AG Office. Dorje Chhering was Class-IV employee in Desert Development Project, Kaza. As per cashbook Ext. PW-13/B, an amount of Rs. 3,000/- was paid to Dorje Chhering as advance and entry was recorded at page 93 of document Ext. PW-13/B cashbook. At page 107 of the cashbook, there is specific entry that an amount of Rs. 3,000/- was paid to the wife of Dorje Chhering, namely, Yankit Dolma. In his statement recorded earlier vide Ext. PW-13/A, he deposed that when audit was conducted by A.G., further embezzlement of Rs. 34,203/- was detected. It was found during audit that Rs. 40,000/- paid by Rattan Singh to Office Superintendent Rajinder Singh Rawat accused was not found accounted for in the cashbook in the receipt side. To Dorje Chhering, an employee Rs. 3,000/- was paid as advance when he had fallen ill. It was found that advance of Rs. 3,000/- to Dorje Chhering was shown twice. In cashbook at page 93, there was entry of payment of advance of Rs. 3,000/- to Dorje Chhering. Second entry of this advance of Rs. 3,000/- was reflected at page 107 of Ext. P-1 on 28.9.1987 in the name of Ankit Dolma, wife of Dorje Chhering.

18. PW-14 N.C. Sood, deposed that he was posted as Dy. Government Examiner of Questioned Documents at Shimla since 1969. His statement was recorded before the Special Judge, Kullu and in the present case it may be read in evidence as Ext. PW-14/A. He proved opinion Ext. PW-14/B. According to his statement Ext. PW-14/A, the documents of the case were received in his office from S.P.(Vigilance) North Range, Dharamshala vide letter No. 2818 dated 28.7.1997. The specimen writing of Dharam Chand Thakur were marked as S-1/I to S-10/1 on Ext. PW-2/A (ten sheets). The admitted writing of Dharam Chand Thakur were marked as A1/I on Ext. PW-8/A and A2/1 on Ext. PW-8/B. According to him, the person who wrote the red enclosed writings and signatures stamped and marked as S-1/1 to S-10/1 and A-1/1 and A-2/1 also wrote the red enclosed writings and signatures similarly stamped and marked Q-1/1. He recorded his opinion as PW-8/C.

19. PW-16 Amar Nath deposed that he was summoned before the Court as PW-22 on 30.7.2003. His statement was recorded vide Ext. PW-16/A. In his examination-in-chief in Ext. PW-16/A, he deposed that he had partly investigated the case. He obtained admitted handwriting of Dharam Chand from PWD, Sub Division Kaza vide memo Ext. PW-10/A. He also filed an application before the CJM, Kullu for taking specimen handwriting and signatures of accused Dharam Chand. He also obtained record from inquiry file pertaining to embezzlement of Rs. 34230/- vide Exts. PW-9/A and PW-11/A.

20. PW-18 Sudarshanbir Thakur deposed that he was posted at Kaza from 1982 to 1987 in the HP PWD. Co-accused Dharam Chand Thakur was Assistant along with him. Temporary receipt Ext. PW-18/A was issued by co-accused Dharam Chand Thakur. Permanent receipt was to be issued after confirmation of the account from the competent authority. Temporary receipt Ext. PW-18/A was issued in receipt of cheque Ext. PW-18/B. Volunteered that actually the serial number of the cheque received was 0258098. Due to mistake the temporary receipt was issued qua cheque No. 0258093. In his cross-examination, he admitted that there was precedent in the office to issue temporary receipt as and when cheque or draft was received in the office. Original receipt was issued on the clearance of cheque by the competent authority.

21. PW-19 Yankit Dolma deposed that her husband Dorje Chhering was working as Beldar in DDP at Kaza. About 12 years ago her husband fell ill and he was taken to Shimla for treatment. Her husband might have taken an advance from the department. Co-accused Rajinder Singh Rawat did not call her. He did not obtain her signature or thumb impression upon any document. She was illiterate. She was declared hostile and cross-examined by the learned Public Prosecutor. She denied the suggestion that when her husband died, co-accused Rajinder Singh Rawat called her and obtained her thumb impression. Co-accused Rajinder Singh Rawat did not give her any amount. She has also given her statement before the Court of Special Judge, Kinnaur at Rampur Bushahr in the present case.

22. PW-20 Kamal Narain testified that on the basis of audit report, FIR Ext. PW-20/A was registered. He conducted the investigation. In his cross-examination, he deposed that cheques were received by the office of Executive Engineer, HP PWD Kaza. Volunteered that cheques issued in the name of Executive Engineer were received in the office of Asstt. Engineer. The cheque amount was deposited in the account of PWD Department. Entry of cashbook was verified by Project Director. The Project Director was equally liable in the present case because he had verified the entries.

23. PW-21 Kiran Kumar deposed that he remained posted as Range Officer in DDP Kaza from July, 1986 to October, 1988. Sh. Deepak Shanan was Project Director of DDP at that time. He used to take money from co-accused Rajinder Singh Rawat for payment of forest sectors. He received Rs. 81,000/- and Rs. 22,000/- from DDP Kaza. Rs. 81,000/- was received through cheque and Rs. 22,000/- was received in cash from Storekeeper Rattan Singh. Rs. 6,000/- was given to him by co-accused Rajinder Singh Rawat in cash.

24. PW-22 Deepak Shanan deposed that he remained posted as Project Director, Desert Development Project Kaza from August 1985 to March, 1988. Co-accused was working with him as Head Clerk. As Head Clerk, co-accused Rajinder Singh Rawat used to maintain cashbook and used to look after the accounts work of the Project. He used to conduct all the work which was related to bank. He did not remember the exact budget which was sanctioned for the construction of Animal Husbandry Building in the year 1987. The work of the building construction was entrusted to PWD. Cheque Ext. PW-20/B was filled by the co-accused Rajinder Singh Rawat and signed by him. An amount of Rs. 2,00,000/- was withdrawn by co-accused Rajinder Singh Rawat vide cheque Ext. PW-20/C. Co-accused Rajinder Singh Rawat had signed in the cheque Ext. PW-20/C in red circle at point Ext. PW-22/A. He identified signatures of co-accused Rajinder Singh Rawat. Cheque Ext. PW-20/B was sent to Executive Engineer, PWD, Kaza and cheque Ext. PW-18/B was also sent to him. Cashbook Ext. PW-20/E was prepared by the office which is in the hands of co-accused Rajinder Singh Rawat. The entry of Rs. 2,00,000/- was recorded by co-accused Rajinder Singh Rawat vide Ext. PW-22/B in register Ext. PW-20/E. Entry Ext. PW-22/C was also recorded by co-accused Rajinder Singh Rawat. He found that in the expenditure statement an amount of Rs. 3,00,000/- has been shown as deposit with Executive Engineer (B & R), Kaza for the construction of Animal Husbandry building. He distinctly found that only Rs. 2,00,000/- had been given to the Executive Engineer (B & R), Kaza. He asked the Head Clerk Charan Dass to re-examine the record and also cross-check with the PWD about the amount of deposit made with them. His statement was recorded before the learned Special Judge, Kullu vide Ext. PW-22/D. In his cross-examination, he admitted that cheques Ext. PW-18/B and PW-20/B were issued in the name of Executive Engineer, HP PWD, Kaza and payment was also withdrawn by them. These cheques have been signed by him. He has also verified the cashbook. He deposed that temporary receipt is issued when cheque or draft is received.

25. PW-23 S.K. Saxena deposed that he received the disputed documents for examination. He proved report Ext. PW-23/J. He came to the conclusion that the person who wrote the red enclosed writing stamped and marked S-1 to S-10 and A-1 to A-9 also wrote the red enclosed writings similarly stamped and marked as Q-1 to Q-7.

26. The statement of PW-1 Charan Dass was earlier recorded as PW-4 marked as PW-1/A. In his examination-in-chief vide Ext. PW-1/A, he testified that he has brought to the notice of Deepak Shanan that a sum of Rs. 3,00,000/- was paid and not Rs. 2,00,000/- for the construction of the Animal Husbandry building. He took record from Kaza to Shimla and showed the same to Deepak Shanan that as per record a sum of Rs. 3,00,000/- were deposited with PWD and not Rs. 2,00,000/-. He was well conversant with the hand writing and signatures of accused. He has seen the original cashbook Ext. P-1. At page 93 of the same, there was entry of cheque No. 0258098 dated 2.6.1987 amounting to Rs. 1,00,000/-. It was entered on 30.6.1987 in the cashbook. The cheque was in the name of Executive Engineer, PWD, Kaza but as per entry

the cheque was taken in cash book and this entry Ext. PW-4/A was in the hands of accused. The cheque of this entry was Ext. P-2. Cheque bearing No. 0258311 dated 1.9.1987 for Rs. 1,00,000/- Ext. P-3 was issued to Executive Engineer, PWD, Kaza and qua this cheque at page No. 113 of Ext. P-1 there was entry which was in the hands of accused vide Ext. PW-4/B. Cheque bearing No. 258093 dated 14.4.1987 of Rs. 2,00,000/- Ext. P-4 was issued in favour of self and entry of this cheque was at page 93 of Ext. P-1, cashbook. This entry Ext. PW-4/C was also in the hands of accused R.S. Rawat. Amount of cheque Ext. P-4 was withdrawn by R.S. Rawat and he identified his signatures on back of the cheque Ext. P-4. The amount of cheque Ext. P-4 as per receipt Ext. PW-4/D was received by accused Dharam Chand Thakur on behalf of Asstt. Engineer, HP PWD, Kaza. According to entry in Ext. P-1 at page 99, which was in the hands of accused R.S. Rawat, an amount of Rs. 1,00,000/- was handed over to Executive Engineer B & R Kaza in cash. This entry is Ext. PW-4/E. The cheque though Ext. P-4 was drawn for Rs. 2,00,000/-, payment in cash was made for Rs. 1,00,000/- to Asstt. Engineer, B & R, Kaza. The amount of cheques Ext. P-2 and P-3 was handed over to Asstt. Engineer, B & R, Kaza qua which receipt Ext. PW-4/F was obtained.

27. PW-3 Shakti Singh vide Ext. PW-3/A deposed that he was posted as Branch Manager, SBI Kaza. He deposed that on 26.10.1989, Vigilance Police, Kullu took from bank custody cheques Ext. P-2 to P-4 qua which memo was prepared. PW-5 Narottam deposed that letters Ext PW-8/A and PW-8/B were handed over by him to the Vigilance Department through memo Ext. PW-10/A. The specimen signatures and hand writing of the accused were taken before PW-7 Shamsher Singh. The statement of PW-9 J.S.Guleria was recorded vide Ext. PW-9/A before the learned Special Judge, Kullu. In his examination-in-chief, he deposed that he succeeded Sh. S.P. Thakur in PWD Sub Division, Kaza. The amount of cheques Ext. P-2 and P-3 was received in the office and receipt was issued vide Ext. PW-4/F. This receipt bears his signatures. Ext. PW-4/D was temporary receipt. He did not know who issued the said receipt.

28. PW-11 R.P. Sharma, is the material witness. In his statement Ext. PW-11/A he deposed that Deepak Shanan during that relevant period was posted as ADC Kaza and vested with power of Director, Desert Project Development. For the construction of Animal Husbandry building Kaza, a sum of Rs. 2,00,000/- in the shape of two cheques was received from Director, Desert Development, Kaza. Both cheques were in the name of his designation. Cheques Ext. P-2 and P-3 were endorsed by him in favour of Asstt. Engineer, Kaza. The amount of both cheques was drawn and credited to their accounts. Except this amount or these two cheques, no other amount for construction of building was received from the Director. Thus, the prosecution has duly proved that though a sum of Rs. 3,00,000/- was released but only Rs. 2,00,000/- was received as per the

statement of PW-19 R.P. Sharma, retired S.E., HP PWD.

29. PW-13 Dorje Funchuk deposed that as per the cashbook Ext. PW-13/B, an amount of Rs. 3,000/- was paid to Dorje Chhering as advance and entry was recorded at page 93 of document Ext. PW-13/B cashbook. He also testified that at page 107 of the cashbook, there is specific entry that an amount of Rs. 3,000/- was paid to the wife of Dorje Chhering, namely, Yankit Dolma. PW-14 N.C. Sood, was posted as Dy. Government Examiner of Questioned Documents at Shimla since 1969. He proved his opinion Ext. PW-14/B. According to his statement Ext. PW-14/A, the person who wrote the red enclosed writings and signatures stamped and marked as S-1/1 to S-10/1 and A-1/1 and A-2/1 also wrote the red enclosed writings and signatures similarly stamped and marked Q-1/1.

30. The statement of PW-8 Atma Ram was recorded vide Ext. PW-8/A before the learned Special Judge, Kullu. He has conducted the audit of Desert Development Project Kaza for the year 1987-88. After conducting audit, he submitted report to the Director, Rural Development Shimla. The report is Ext. PW-7/A. During the audit he found that in the accounts of Desert Development Project Kaza, an amount of Rs. 1,00,000/- was shown transmitted to PWD by way of draft for which temporary receipt was obtained from SDO Tindi and accounted for in

the accounts. But it was found that the amount of Rs. 1,00,000/- shown to be paid to PWD through draft in fact was never paid and deposited in accounts of the PWD. As such in account books Rs. 3,00,000/- were shown to be paid to PWD but actually Rs. 2,00,000/- were paid and not Rs. 3,00,000/-. It is, thus duly proved as per the report Ext. PW-7/A that an amount of Rs. 1,00,000/- was never paid to PWD. In fact, it was misappropriated by the accused.

31. PW-22 Deepak Shanan has also deposed that in the expenditure statement, an amount of Rs. 3,00,000/- has been shown as deposit with Executive Engineer (B & R), Kaza for the construction of Animal Husbandry building. He distinctly found that only Rs. 2,00,000/- had been paid to the Executive Engineer (B & R), Kaza. The statement of PW-22 Deepak Shanan is duly corroborated by PW-1 Charan Dass who has reconciled the records. PW-23 S.K. Saxena has proved report Ext. PW-23/J. He has admitted the signatures and writing of co-accused Rajinder Singh Rawat. According to his opinion, the person who wrote the red enclosed writing stamped and marked as S-1 to S-10 and A-1 to A-9 also wrote the red enclosed writing similarly stamped and marked as Q-1 to Q-7.

32. It is evident from the contents of explanation Ext. PW-4/H and PW-23/C that accused himself had personally paid Rs. 1,00,000/- cash out of the cheque on 15.6.1987 to the official against receipt issued by the Office of Assistant Engineer, Tindi. The entry was made by him on 30.6.1987. Thus, his plea that he has handed over the cheque to the Executive Engineer and receipt was issued to him by Dharam Chand Thakur, STC is not acceptable. As a matter of fact, entry was made by him on 30.6.1987 showing said receipt at Voucher No. 167 dated 30.6.1987. It is evident from entry Ext. PW-4/E that an amount of Rs. 1,00,000/- was paid to Executive Engineer (B & R) for construction of veterinary building. It is duly proved that this letter was in the hand writing of the accused. Thereafter, money was paid by accused in cash and not by way of cheque. Receipt Ext. PW-18/A is regarding draft/Cheque No. A/147-0258093, dated 2.6.1987 for sum of Rs. 1,00,000/-. It was deposited in SBI Kaza on 15.6.1987. This transaction talks of payment by draft and not by cash. It is reiterated that PW-11 R.P.Sharma has admitted that he was paid only Rs. 2,00,000/- by means of cheques Ext. P-2 and P-3. This amount infact was drawn and credited to the accounts of the Department. No other amount was received from the Directorate. Receipt Ext. PW-4/F was issued regarding the cheques. There is no record of temporary receipts.

33. PW-8 Atma Ram has also got verified from the HP PWD that it has received only Rs. 2,00,000/- and not Rs. 3,00,000/-. In fact, an amount of Rs. 2,00,000/- was withdrawn by the accused by means of self drawn cheques. There was no provision for making payment by cash. Ext. PW-18/A cannot be accepted as receipt for the receipt of amount by the PWD. Ext. PW-22/E is the receipt issued by Yankit Dolma. It is duly proved that an amount of Rs. 3,000/- was paid to Dorje Chhering and the amount was entered at Sr. No. 93 of the cashbook. There was entry again at page No. 107 that an amount of Rs. 3000 was paid to Yankit Dolma. A sum of Rs. 3744.75 was handed over to the accused by PW-6 Rattan Singh. This amount has not been shown in the cashbook. It was also misappropriated by the accused. Thus, in all, the accused has misappropriated an amount of Rs. 106744.75. The accused was public servant and he was custodian of the government money. He has misappropriated the government money and thus committed criminal misconduct as defined under Section 5(2) of the old Act and now Section 13(2) of the Prevention of Corruption Act, 1988. The accused has misappropriated a sum of Rs. 106744.75. The prosecution has proved the case against the accused beyond reasonable doubt.

34. Accordingly, there is no merit in this appeal and the same is dismissed. Bail bonds are cancelled.

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

Smt. Ratinder Garg and another …..Appellants.

Versus

Kamla and others …..Respondents

FAO (MVA) No. 123 of 2011

Date of decision: 15th July, 2016.

Motor Vehicles Act, 1988- Section 166- Tribunal held that vehicle was being driven by R and the insured had violated terms and conditions of the policy- held, that mandate of Motor Vehicles Act provides for grant of compensation to the victims without succumbing to the niceties and technicalities of procedure- claimant had also arrayed D as respondent who admitted that he was driving the vehicle at the relevant time- FIR was also lodged against D- challan was also filed against D- there is prima facie proof that D was driving the vehicle at the time of accident- findings recorded by Tribunal that R was driving the vehicle set aside - D had valid driving licence at the time of accident- therefore, insurer directed to satisfy the award. (Para-10 to 20)

Cases referred:

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

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

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

Cholamandlan MS General Insurance Co. Ltd. Vs Smt. Jamna Devi and others, ILR 2015 (V) HP 207

Tulsi Ram versus Smt. Mena Devi and others, I L R 2015 (V) HP 557

Anil Kumar versus Nitim Kumar and others, I L R 2015 (IV) HP 445 (D.B.)

For the appellants: Mr. J.L. Bhardwaj, Advocate.

For the respondents: Mr.Jai Dev Thakur, Advocate, for respondent No.1.
Mr. G.D. 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 judgment and award dated 7.6.2010, made by the Motor Accident Claims Tribunal, Kullu, H.P., in claim petition No. 15 of 2008, titled *Kamla versus smt. Ratinder Garag and others*, for short "the Tribunal", whereby compensation to the tune of Rs.1,65,000/- alongwith interest @ 7% per annum, came to be awarded in favour of the claimant, namely Kamla, hereinafter referred to as "the impugned award", for short.

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

3. Thus, the only question to be determined in this appeal is whether the offending vehicle was being driven by Dinesh or by Smt. Ratinder Garag, at the relevant point of time.

4. The claimant had filed claim petition before the Tribunal for the grant of compensation, as per the break-ups given in the claim petition, on the grounds taken in the memo of the claim petition.

5. During the pendency of the claim petition, an application under Order 1 Rule 10 of the Code of Civil Procedure, for short "CPC" was moved for arraying the Principal DAV School Ranghari Tehsil Manali District Kullu, H.P. owner of vehicle No. HP-58-3122 as party respondent,

which was granted and the Principal DAV School Ranghari Tehsil Manali District Kullu was arrayed as respondent No. 1 A in the claim petition.

6. The claim petition was resisted by the respondents and following issues came to be framed.

(i) *Whether the accident has taken place due to rash and negligent driving of respondent No.1, driver of the vehicle No. HP-58-3122, if so, its effect? OPP*

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

(iii) *Whether the vehicle in question was being driven by respondent No. 3 and not by driven by respondent No.1, if so, its effect? OPR1.*

(iv) *Whether the driver of the offending vehicle was not having valid and effective driving licence at the time of accident, if so, its effect? OPR-2.*

(v) *Whether the vehicle was being plied in contravention of the provisions of the policy, if so, its effect? OPR-2.*

(vi) *Relief.*

7. Parties have led the evidence.

8. The Tribunal, after scanning the evidence, held that the vehicle was being driven Smt. Ratinder Garag appellant No.1 herein. Thus, the insured/owner has violated the terms and conditions of the insurance policy and saddled the owner with the liability and exonerated the insurer.

9. It appears that the Tribunal has fallen in an error in marshalling out the facts of the case for the following reasons.

10. The grant of compensation is a social legislation for the benefit of the victims of the vehicular accident.

11. The mandate of Chapter XI of the Motor Vehicles Act provides for the grant of compensation to the victim without succumbing to the niceties and technicalities of procedure. It is beaten law of the land that technicalities or procedural wrangles and tangles have no role to play.

12. My this view is fortified by the judgment delivered by the apex court in ***Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another**,* reported in ***(2013) 10 Supreme Court Cases 646, N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc.*,** reported in ***AIR 1980 Supreme Court 1354*** **and** ***Oriental Insurance Co. versus Mst. Zarifa and others*,** reported in ***AIR 1995 Jammu and Kashmir 81.***

13. This Court has also laid down the similar principles of law in ***FAO No. 692 of 2008*** decided on 4.9.2015 titled ***Cholamandlan MS General Insurance Co. Ltd. Versus Smt. Jamna Devi and others***, ***FAO No. 287 of 2014*** along with connected matter, decided on 18.9.2015 titled ***Tulsi Ram versus Smt. Mena Devi and others***, ***FAO No. 72 of 2008*** along with connected matter decided on 10.7.2015 titled ***Anil Kumar versus Nitim Kumar and others*** and ***FAO No. 174 of 2013*** decided on 5.9.2014 titled ***Kusum Kumari versus M.D. U.P Roadways and others.***

14. The claimant has also arrayed Dinesh driver as party respondent in the claim petition but has stated that the vehicle was being driven by Smt. Ratinder Garag at the relevant point of time.

15. Dinesh driver has filed the reply and he has admitted that he was driving the vehicle at the relevant point of time. It is apt to reproduce reply to preliminary objections No. 1 and reply to para 24(i) of the claim petition herein.

> *"Preliminary objections:*
>
> *1.That there was no negligence of whatsoever nature on the part of the replying respondent No. 1 as alleged rather the vehicle was being driven by respondent No. 3, as respondent No. 3 is the driver of DAV Public School Rangri, Tehsil Manali, District Kullu (Himachal Pradesh). As such the respondent No. 1 is not liable to pay any compensation to the petitioner and claim petition against respondent No, 1 is liable to be dismissed."*
>
> *24(i)That para No. 24 (i) of the petition is denied for want of knowledge. Petitioners be put to strict proof of the same. It is also denied that the vehicle in question was being driven by the respondent No. 1 rather the same was being driven by respondent No. 3 and there is no negligence on the part of replying respondents. The accident took place due the negligence of the petitioner herself. Further, the vehicle in question is not registered in the name of the respondent No.1 whereas the same is registered in the name of Principal, DAV, Public School, Rangri, Tehsil Manali Distt. Kullu (Himachal Pradesh)."*

16. In view of the above, it is admission on the part of the driver that he was driving the vehicle at the time of accident. They have also admitted that the accident has taken place and claimant has sustained the injuries. FIR was lodged against Dinesh driver which culminated in to the final report under Section 173 of the Code of Criminal Procedure, for short "Cr.P.C." Challan was presented before the Court of Judicial Magistrate Manali in which he was acquitted by granting benefit of doubt.

17. The prosecution has also set up a case before the trial Court that driver Dinesh was driving the vehicle at the relevant point of time. The said judgment is on record, is a public document, thus admissible in evidence.

18. Having said so, there is prima facie proof on the file that Dinesh was driving the offending vehicle at the time of accident. Accordingly, findings returned by the Tribunal on issue No. 1 are set aside and it is held that Dinesh-respondent No.3 was driving the offending vehicle at the time of accident.

19. It is also admitted that the driver was having a valid and effective driving licence. The Tribunal has fallen in an error in discharging the insurer and saddling the owner with the liability. Viewed thus, the findings returned on issues No. 3, 4 and 5 are set aside.

20. The factum of insurance is also admitted. Thus, the insurer has to satisfy the award. The insurer is directed to satisfy the award and is directed to deposit the amount within eight weeks from today. On deposit, the Registry is directed to release the awarded amount in favour of the claimant, through payees' cheque account or by depositing the same in her bank account, strictly in terms of the conditions contained in the impugned award. Statutory amount of Rs.25,000/- is awarded as costs in favour of the claimant.

21. Having said so, the appeal is allowed, the impugned award is modified, as indicated hereinabove.

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

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

State of Himachal Pradesh. ....Appellant.

Versus

Mukesh Mohan ... Respondent.

Cr. Appeal No 76 of 2012.
Reserved on 28.6.2016.
Decided on: 15.7.2016.

N.D.P.S. Act, 1985- Section 20- Police party received a secret information that accused were standing in front of Punjabi Dhaba and on their search some contraband can be recovered- accused were found standing outside the Dhaba- search of the bag was conducted during which 1.1 kg charas was recovered- accused were tried and acquitted by the trial court- held, in appeal that independent witnesses have not supported the prosecution version- there were major contradictions in the testimonies of eye-witnesses, which make the prosecution case doubtful- trial Court had rightly held that prosecution version was not proved beyond reasonable doubt- appeal dismissed. (Para-22 to 28)

For the appellant.	:	Mr. Mr. Vikram Thakur, Dy. Advocate General with Mr. J. S. Guleria, Assistant Advocate General.
For the respondent.	:	Ms. Varun Thakur, Advocate.
	:	Ms. Kanta Thakur, Amicus Curiae.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.

By way of present appeal, the State has challenged the judgment passed by the Court of learned Special Judge-I, Sirmaur District at Nahan in Sessions Trial No. 23-ST/7 of 2010, vide which the learned Trial Court has acquitted the accused for the commission of offence under Section 20/61/85 of the Narcotic Drugs & Psychotropic Substance Act, 1985 (in short the 'Act').

2. The case of the prosecution was that on 18.12.2009 Inspector Om Parkash along with ASI Ranjeet Singh, HC Subhash Chand, Constables Mukesh Kumar, Mohd. Khalid and Kailash Panwar proceeded to Illaqua after making an entry in the Rapat Rojnamcha and at around 4:30 p.m., when they were present at Bus stand Sainwala, Inspector Om Parkash received secret information that accused Mukesh and Jagat Singh were standing in front of Punjabi Dhaba and if they were searched, some contraband can be recovered from their possession. Accused Mukesh was stated to be carrying a red and black coloured bag on his shoulder. On receipt of the said information, Inspector Om Parkash reduced into writing reasons of belief (Ext. PW8/A) and sent the same to Addl. Superintendent of Police, Nahan through constable Kailash Panwar. Thereafter Inspector Om Parkash associated independent witnesses Dilshad and Kamal Kumar as well as other police officials and proceeded towards the said Dhaba. At around 5:00 p.m., Inspector Om Parkash along with raiding party reached said Dhaba where two persons were standing outside the Dhaba and on asking their names, one of them disclosed his name Mukesh Mohan son of Yash Pal Singh, whereas second disclosed his name as Jagat Singh son of Dhongu Ram. A red and black coloured bag was hanging on the shoulder of accused Mukesh Mohan. Memo Ext. PW14/A seeking consent of accused Mukesh Mohan was issued by Inspector Om Parkash in presence of witnesses Dilshad Khan and Kamal Kumar and before searching the bag of accused Mukesh Mohan, the raiding party gave its personal search to accused vide memo Ext. PW4/A, which was signed by witnesses Raj Kumar and Jagdish. The

search of the bag revealed one polythene envelope and on opening the same, black coloured substance in the shape of sticks was found which turned out to be charas. The same was weighed and it turned out to be 1.100 grams. Two samples of 25 grams were separated from the recovered charas which were put into the empty match boxes and the same were packed in a cloth packet and both samples were sealed with seal impression 'H'. The remaining bulk charas was put in a cloth packet and the same was sealed with seal impression 'H' and the same seal was taken on a piece of cloth. The bulk charas, bag and two samples were taken into possession vide memo Ext. PW2/A which was signed by both independent witnesses as well as the accused. The seal after use was handed over to witness Dilshad Khan. NCB forms in triplicate were filled on the spot and seal impression 'H' was affixed on the said forms. Jama Talashi of accused was also conducted and articles mentioned in Ext.PW14/B were recovered. Accused was arrested and informed of grounds of his arrest. The case property was produced before ASI Agya Ram Officiating SHO, Police Station Nahan along with sample seal, who after checking the same resealed the sample parcels and remaining charas with seal impression 'K'. Case property was deposited with MHC, Police Station Nahan along with sample seals, who forwarded the sample parcels along with sample seals and connected documents to SFSL, Junga through HHC Surender Singh who deposited the same at SFSL, Junga and as per report of Chemical Examiner, Ext. PZ, the same was found to be containing contents of charas. FIR Ext. PW11/A was registered at Police Station, Nahan on the basis of Rukka, Ext. PW13/A sent through Constable Mohd. Khalid. On completion of the investigation, challan was presented and as a prima facie case was found against the accused, he was charged for commission of offences under the NDPS Act. The accused pleaded not guilty and claimed trial.

3. In order to substantiate its case, prosecution, in all, examined 14 witnesses, whereas, accused also examined one witness in defence.

4. HC Kamlesh Kumar entered the witness box as PW1 and stated that on 20.12.2009 a special report of the case was received from SIU, Nahan through Dak which was received by him which is Ext. PW1/A.

5. PW2 Dilshad Khan stated that he runs a Dhaba at Sainwala on Nahan-Kala Amb road. On 18.12.2009 he was associated by police in the case and at around 4-4:30 p.m, two persons were standing in front of his Dhaba. He further stated that police did not ask the name of those persons in his presence but he could identify those persons. This witness did not support the case of the prosecution and stated that none of accused was searched in his presence and he was busy in cooking and serving his customers. This independent witness was declared as hostile, as he resiled from his earlier statement and he was cross-examined by the Public Prosecutor. In his cross-examination by the Public Prosecutor, he admitted it to be correct that one bag was searched in his presence and a polythene envelope was found inside the same and from it sticks of black substance were taken out and on smelling and tasting, were found to be charas. He has also admitted the case of the prosecution to the effect that the recovered charas weighed 1.100 grams and from it two samples were taken. In his cross-examination by the defence he has stated that the accused were taking tea outside the road and he did not know whether the bag was slung on the shoulder or lying on the table. As per this witness, he saw the bag first time with the police while it was checked. He admitted it to be correct that police asked from the accused whether the bag belonged to them and in answer to said query, the response of the accused was in negative. He has admitted it to be correct that there were reports in daily news that he was allegedly dealing with in trade of contraband.

6. HC Kunwar Singh entered into the witness box as PW3 and stated that on 18.12.2009 at around 11:30 p.m., a contraband parcel pertaining to this case was deposited by ASI Agya Ram and he made entries qua the above parcels in the Malkhana Register. He further deposed that on 21.12.2009 said parcels along with sample seals and NCB Forms were sent to FSL, Junga through LHC Surender Pal and the RC was brought back by LHC Surender Pal and handed over to him.

7. PW4 Jagdish Chand has deposed to the effect that he was associated by the police at the Dhaba of Dilshad at Sainwala. Memo Ext. PW4/A was prepared by the police which bears his signatures.

8. PW5 Kamal Kumar has deposed that on 18.12.2009 he was associated by the police while he was present at the Dhaba of Dilshad Khan. According to him, there were 8-10 persons inside the Dhaba and two persons were standing outside the Dhaba near the road. They revealed their names to the police as Mukesh and Jagat Singh. He further stated that there was a bag with accused Mukesh which was searched by the police from which charas was recovered. In his cross-examination he has stated that he cannot say the bag was lying on a table outside the Dhaba. He further deposed that he had not seen the bag on the person of accused or lying on the table outside the Dhaba. He further stated that police enquired from all persons present in the Dhaba as to whether bag belonged to them and all persons denied that the bag belonged to them. He has further stated that he was called by the police when they started searching the bag outside the Dhaba.

9. Constable Sushil Kumar entered into the witness box as PW6 and stated that he remained posted as MC, CIA, Nahan and Rapat No. 7 was entered by Inspector Om Parkash on 18.12.2009.

10. PW7 Inspector Gurbax Singh deposed that after completion of investigation of this case, the case file was handed over to him by ASI Narayan Singh and he prepared the challan of the case.

11. PW8 Gurmeet Singh has deposed that on 18.12.2009 Constable Kailash brought reasons of belief of this case having been sent by Inspector SIU to his office which were received by him.

12. PW9 HC Surinder Pal deposed that on 21.12.2009 he took the case property along with sample seals and NCB forms and deposited the same at FSL, Junga and on his return he handed over the RC to the MHC.

13. PW10 Constable Kailash Panwar deposed to the effect that on 18.12.2009 he was part of the police party and was accompanying Inspector Om Parkash at Bus stand Sainwala at around 4:30 p.m. where Inspector Om Parkash received secret information about carrying of charas in a bag by accused Mukesh and Jagat Singh. He has further deposed that the reasons of belief were recorded by Inspector Om Parkash and handed over to him to take the same to the office of Addl. SP Nahan which he did.

14. PW11 ASI Agya Ram deposed that on 18.12.2009 on the basis of rukka mark A, FIR Ext. PW11/A was registered at Police Station, Nahan which bears his signatures. He has further deposed that at around 11:00 p.m., Inspector Om Parkash brought the parcel to Police Station, Nahan which was resealed by him and he thereafter deposited the case property, sample seals with MHC Kanwar Singh.

15. PW12 SI Narayan Singh has deposed that accused Mukesh had absconded during the investigation and was re-arrested and produced by Constables Sushil Kumar and Rajinder Singh before him.

16. PW13 Constable Mohd. Khalid has also supported the case of the prosecution. He has also deposed that the investigating officer reduced into writing Rukka Mark A, now Ext. PW13/A which was taken by him to Police Station, Nahan and got the FIR registered. He has further deposed that the case file was taken by him to the spot and handed over to the investigating officer on the spot.

17. PW14 Inspector Om Parkash has also supported the case of prosecution and has narrated the mode and manner in which he received the information and thereafter the factum of

his carrying out search and seizure by associating independent witnesses and thereafter arresting the accused.

18. On the basis of material produced on record by the prosecution, the learned Trial Court concluded that the prosecution had failed to prove its case against the accused beyond all reasonable doubt and on these bases, the learned Trial Court acquitted the accused of the charge framed against him.

19. Learned Addl. Advocate General argued that the judgment passed by the learned Trial Court was perverse and the findings returned by the learned Trial Court were not borne out from the records. He submitted that the learned Trial Court erred in not appreciating that it stood established from the testimony of PW5 read with testimony of PW13 and PW14 that the contraband in fact was recovered from the bag which was being carried by accused Mukesh. He further argued that the learned Trial Court had erred in not appreciating the testimony of PW13 and PW14 in the right perspective. He also argued that the learned Trial Court had given undue importance to minor discrepancies in the statements of PW5 as well as PW13 and PW14 without appreciating that on the basis of material on record, the prosecution had been able to establish beyond all reasonable doubt that the contraband in fact was recovered from the bag which was found on the shoulder of accused Mukesh. Accordingly, on these points, it was urged by the learned Addl. Advocate General that the judgment passed by the learned Trial Court was not sustainable in the eyes of law and was liable to be quashed and set aside.

20. On the other hand, learned Amicus Curiae submitted that a perusal of the records of the case demonstrate that the prosecution had not been able to link the accused with the recovery of the alleged charas from the bag. She submitted that the prosecution had miserably failed to prove on record that accused-Mukesh was carrying any bag from which charas was recovered by the police. According to her, there was neither any perversity nor any infirmity with the findings returned by the learned Trial Court and the judgment passed by the learned Trial Court needed no interference.

21. We have heard learned counsel for the parties as well as Ms. Kanta Thakur, learned Amicus Curiae. We have also perused the judgment passed by the learned Trial Court.

22. The case as has been put forth by the prosecution is that Inspector Om Parkash who was heading the police party on 18.12.2009 had received a secret information to the effect that the accused were standing near Punjabi Dhaba and if they were searched, some contraband can be recovered from their possession. On the basis of said information, he associated independent witnesses Dilshad Khan and Kamal Kumar and thereafter proceeded towards Punjabi Dhaba situated at Sainwala alongwith other police officials. The first fallacy which appears with the veracity in the story of the prosecution is this that as per prosecution, Insp. Om Parkash received the secret information at about 4:30 p.m., while the police party was at Bus stand Sainwala and on receipt of the same, it associated two independent witnesses, namely, Dilshad Khan and Kamal Kumar and thereafter proceeded towards Punjabi Dhaba situated at Sainwala and incidentally one of them who was present at bus stand Sainwala happened to be the owner of the said Punjabi Dhaba. We fail to understand whether this is coincidence or otherwise that out of the two independent witnesses who were associated by the police and that too not at Punjabi Dhaba but at bus stand Sainwala one happened to be the owner of the Punjabi Dhaba where the accused were to be found with contraband as per the secret information received by Insp. Om Parkash. Incidentally, Dilshand Khan has not supported the case of prosecution. According to him, the alleged bag from which charas was recovered was not found in the possession of accused Mukesh by the police. As per this witness, when he first time saw the bag the same was with the police and the same was being searched by the police. Similarly, the second independent witness PW5 (Kamal Kumar) in his cross-examination stated that he had not seen the bag on the person of the accused or lying outside the table outside the Dhaba. According to him, the police enquired from all persons present in the Dhaba whether the bag belonged to them or not. All persons present there denied the factum of owning the bag including

the accused. No other independent person has been associated by the police at the time of search and seizure except these two independent witnesses who have not supported the case of the prosecution, therefore, it is apparent and evident from the perusal of the testimony of said two witnesses that the prosecution has not been able to prove that the bag from which the charas was recovered belonged to accused Mukesh and that Mukesh was in possession of the said bag before the same was allegedly seized from him by the police.

23. Another important aspect of the matter is that it has come in the statement of PW5 that there were 8-10 persons outside the Dhaba. Therefore, it is not as if no other person was available who could have been associated at the time of search and seizure. Further it is not the case of the prosecution that these two independent witnesses were associated at the spot only. As per the prosecution Insp. Om Parkash had associated these persons at around 4:30 p.m., after he received the secret information at 4:30 p.m., at the bus stand and he reached Punjabi Dhaba along with these two independent witnesses and other police officials at around 5:00 p.m. This stand of the prosecution is also falsified by the statement of these two independent witnesses (PW2 and PW5) because it has categorically come in the statement of these two independent witnesses that they were not associated by the police near the bus stand but they were present at the Dhaba in issue i.e. at Punjabi Dhaba.

24. Further the case of the prosecution that the accused were in conscious possession of contraband which was allegedly recovered from a bag which was slung on his shoulder by accused Mukesh, the same is not supported by the statements of PW2 and PW5, as has been discussed by us hereinabove. Thus, it is evident from what we have discussed above that the prosecution has not been able to prove from the material placed on record that accused Mukesh was present outside the Dhaba with a bag slung on his shoulder which was seized by the prosecution in the presence of independent witnesses and search of which revealed that the accused were carrying 1.100 grams charas in the same.

25. Incidentally, a perusal of the statements of PW13 and PW14 will demonstrate that according to them the independent witnesses were made to join the investigation about 200 meters from the Dhaba near the rain shelter. PW13 in fact has stated that both Dilshad and Kamal Kumar were joined at rain shelter where the secret information was received and from there they came to the Dhaba of Dilshad. He has further deposed that he does not remember that how many persons were sitting in the Dhaba. He further deposed that he does not remember whether there are sitting arrangement in the shape of tables and chairs nor he remembers whether there were any customers present inside the Dhaba. On the other hand, PW14 has stated that both Dilshad and Kamal were present at Sainwala where he was standing. He has further stated that there was no arrangement for sitting of customers outside the Dhaba, however, there was arrangement inside the Dhaba, but there was no customer either inside or outside the Dhaha.

26. If we carefully peruse the testimonies of these four witnesses i.e. PW2, PW5 on one hand and PW13 and P14 on the other hand there are major contradictions in their depositions with regard to the mode and manner in which PW2 and PW5 were associated by PW14 to be a part of the investigation. Not only this, there are major contradictions made by PW13 and PW14 when compared with the statements of PW2 and PW5 with regard to the sitting arrangement of Punjabi Dhaba as well as with regard to the number of customers who were present at the said Dhaba at the relevant time. All these facts raise serious doubt and suspicion on the mode and manner in which the alleged recovery of contraband has actually taken place and version of prosecution does not inspire confidence.

27. The testimony of PW13 and PW14 does not seem to be trustworthy and it does not inspire confidence so as to be made basis of conviction of the accused. Therefore, in the absence of the independent witnesses corroborating the case of the prosecution and further in view of their being major contradictions in the testimony of PW13 and PW14 with regard to the mode and manner in which the alleged recovery of the contraband was made from the accused,

we are afraid that it cannot be held that the prosecution was able to prove its case against the accused beyond reasonable doubt.

28. Further a perusal of the judgment passed by the learned Trial Court demonstrates that all these aspects of the matter have been considered by the learned Trial Court minutely and it is only thereafter that the learned Trial Court has come to the conclusion that on the basis of the material on record, the prosecution has not been able to bring home guilt of the accused. It is apparent and evident from the testimony of PW2 and PW5 that they were summoned from inside the Dhaba and were joined as witnesses while they were present at the Dhaba of PW2 which belies the version put forth by the prosecution about the said independent witnesses having been associated by Inspector Om Parkash at 4:30 p.m. after he received the secret information at the bus stand.

29. All the above factors when taken together create grave suspicion over the case of the prosecution, as has been put forth by it. In our considered view, it cannot be said that on the basis of material which have been produced on record by the prosecution that it has proved beyond all reasonable doubt that accused were guilt of the offence with which they were charged. Therefore, in our view there is no perversity or infirmity with the judgment passed by the learned Trial Court vide which it has acquitted the accused by holding that the prosecution has not been able to prove its case against the accused beyond all reasonable doubt. In our considered view also, the prosecution has not been able to prove its case against the accused beyond all reasonable doubt. Accordingly, we uphold the judgment passed by the learned Trial Court and dismiss the present appeal being devoid of merit. Bail bonds, if any, furnished by the accused are discharged.

This Court places on record it's appreciation for the assistance rendered by the learned Amicus Curiae in the adjudication of the present case.

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

Shri Surender Kumar ……Appellant
Versus
The State of Himachal Pradesh & others ….Respondents

LPA No. 59 of 2016
Decided on : 14.07.2016

Constitution of India, 1950- Article 226- Services of the petitioners were terminated- a reference was made to the Labour Court who dismissed the claim- held, that award passed by the Labour Court is based upon facts and evidence led by the parties- Writ Court cannot sit over factual findings returned by the Labour Court, unless these are trash and illegal- Labour Court had rightly made the award after examining the facts and appreciating the evidence, which was rightly upheld by the Writ Court- appeal dismissed. (Para-6 to 10)

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, ILR 2014 (V) HP 970

For the Appellant : Mr. V.D. Khidtta, 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:

Mansoor Ahmad Mir, Chief Justice *(oral)*

This Letters Patent Appeal is directed against the judgment and order dated 26.02.2016, passed by the learned Single Judge in CWP No. 10059 of 2012, titled as **Surender Kumar** versus **State of Himachal Pradesh & others,** whereby the writ petition came to be dismissed, for short 'the impugned judgment'.

2. We have gone through the impugned judgment. The Writ Court, after scanning the pleadings and the award made by the Labour Court, held that the writ petitioner-appellant had no case. The impugned judgment is legally correct for the following reasons.

3. Services of the writ petitioner-appellant were terminated, dispute was raised under the Industrial Disputes Act, 1947, (for short 'the Act), the matter was referred by the competent Authority to the Labour Court-cum-Industrial Tribunal, for short 'the Labour Court'.

4. The Labour Court entered into the reference and issues were framed. Parties led their evidence and the Labour Court after examining the pleadings and the evidence led by the parties, dismissed the claim of the petitioner.

5. The award passed by the Labour Court is based on the facts and the evidence led by the parties.

6. It is a beaten law of the land that the Writ Court and the Appellate Court cannot sit over the factual findings returned by Labour Court, unless the same are trash and illegal.

7. 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."*

8. 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. "*

9. 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.

10. Labour Court after examining the facts and appreciating the evidence made the award, came to be rightly upheld by the Writ Court.

11. The writ petitioner-appellant has not been able to carve out a case for interference.

12 Having said so, no interference is required. Accordingly, the impugned judgment is upheld and the appeal is dismissed.

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

The New India Assurance Company .....Appellant
Versus
Smt. Rafikan & others ..... Respondents

FAO No.70 of 2011
Date of decision: 15.07.2016

Motor Vehicles Act, 1988- Section 166- Income of the deceased was Rs. 3,600/- per month- deceased was a bachelor- half of the amount is to be deducted towards personal expenses- thus, claimants have lost source of dependency to the tune of Rs. 1,800/- per month- deceased was '18' years of age at the time of death- multiplier of '18' is applicable- thus, claimants are entitled to Rs. 1,800x12x18= Rs. 3,88,800/- towards loss of dependency. (Para-4 and 5)

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

For the appellant: Mr. B.M. Chauhan, Advocate.
For the respondents: Mr.Ajay Chandel, Advocate, for respondents No.1 and 2.
Ms.Sharmila Patial, Advocate, for respondent No.3.
Nemo for respondent No.4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 22nd November, 2010, passed by the Motor Accident Claims Tribunal, Fast Track Court, Chamba (HP), (for short, "the Tribunal") in M.A.C. No.32/09, titled Smt. Rafikan & another vs. Surjeet Singh & others, whereby a sum of Rs.5,78,400/- alongwith interest at the rate of 7.5% per annum came to be awarded as compensation in favour of the claimants 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 it relates to them.

3. During the course of hearing, the learned counsel for the appellant/insurer has laid challenge to the impugned award only on two grounds – i) the amount awarded by the Tribunal is excessive; and ii) the deceased was a bachelor, therefore, 1/2 was to be deducted towards the personal expenses of the deceased and the Tribunal has fallen into an error in deducting 1/3rd amount.

4. In view of ***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 argument of the learned counsel for the appellant is legally correct. The Tribunal has rightly assessed the income of the deceased to the tune of Rs.3,600/- per month and since the deceased was a bachelor at the time of death, after deducting 1/2 from the said income towards his personal expenses, it is held that the claimants have lost source of dependency to the tune of Rs.1,800/- per month.

5. The deceased was 18 years of age at the time of death. Therefore, the Tribunal has rightly applied the multiplier of '18' 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. Accordingly, it is held that the claimants have lost source of dependency to the tune of Rs.1,800x12x18= Rs.3,88,800/-.

6. The amount awarded under other heads is not in dispute.

7. In view of the above discussion, the claimants are held entitled to Rs.3,88,800/- + Rs.50,000/- + Rs.10,000/- = Rs.4,48,800/-, alongwith interest as awarded by the Tribunal

8. The Registry is directed to release the amount in favour of the claimants through their bank accounts, strictly as per the terms and conditions contained in the impugned award. The excess amount, if any, be released in favour of the appellant-insurer through payee's account cheque.

9. The impugned award is modified, as indicated above, and the appeal is disposed of alongwith all the pending applications.

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

Varun Kumar Malhotra and another …Appellants

Versus

State of Himachal Pradesh …Respondent

Cr. Appeal No. 89/2016
Reserved on: July 14, 2016
Decided on: July 15, 2016

N.D.P.S. Act, 1985- Section 20 and 29- A Maruti car was signaled to stop- accused sitting on the seat beside the driver threw an orange coloured bag on the rear seat and tried to run away- driver and accused were apprehended- vehicle was searched and 1.4 kg charas was recovered from the bag- accused were tried and convicted by the trial Court- held, in appeal that prosecution witnesses duly proved that accused were apprehended in Maruti car- vehicle was intercepted at 1.30 AM- there was no possibility of associating independent witnesses- minor contradictions in the statements are bound to come with the passage of time - recovery was effected from the Car and there was no requirement of complying with Section 50 of N.D.P.S. Act- minor variation in the weight of the contraband is not significant- prosecution had proved its case beyond reasonable doubt and the accused were rightly convicted by the trial Court- appeal dismissed.

(Para-15 to 21)

Cases referred:
Karamjit Singh vs. State (Delhi Administration), AIR 2003 SC 1311
Bharwada Bhoginbhai Hirjibhai vs State of Gujarat 1983 (3) SCC 217,
Dehal Singh & Ors V/S State of Himachal Pradesh AIR 2010 SC 3594

For the Appellants: Mr. Virender Singh Rathour, Advocate.
For the Respondent: Mr. P.M. Negi, Deputy Advocate General.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge

This appeal is instituted against Judgment dated 31.1.2015 rendered by the learned Special Judge, Ghumarwin, District Bilaspur, Himachal Pradesh (Camp at Bilaspur) in Sessions Trial No. 10/3 of 2014, whereby the appellant-accused (hereinafter referred to as 'accused' for convenience sake), who were charged with and tried for offences under Sections 20 and 29 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'Act' for convenience sake), have been sentenced to undergo rigorous imprisonment for a period of ten years each and to pay a fine of Rs.1.00 Lakh each for offence under Section 20(b)(ii)(C) of the Act. In default of payment of fine, to further undergo simple imprisonment for six months. Accused have further been sentenced to undergo rigorous imprisonment for a period of ten years each and to pay fine of Rs.1.00 lakh each for offence under Section 29 of the Act. In default of payment of fine, to further undergo simple imprisonment for six months each. Both the sentences were ordered to run concurrently.

2. Case of the prosecution, in a nutshell, is that PSI Tavender Thakur (PW-13) alongwith Constable Amit (PW-4), Constable Vijay Kumar (PW-1), Constable Sandeep Kumar and HHG Hans Raj had set up a *Naka* at Ghumai Chowk on the intervening night of 25/26.2.2014. At about 1.30 AM, one Maruti Car silver in colour, bearing registration No. HP-06-4403, came from Bilaspur side. It was signalled to stop. Accused sitting on the seat beside the driver threw on the rear seat, an orange coloured bag from inside his jacket. Accused tried to run away. They were nabbed. Accused disclosed their identities. Vehicle was searched. Orange coloured bag (Ext.P2) lying on rear seat of the Car was searched. A yellow coloured bag (Ext. P3) was found from inside the orange coloured bag. It contained *Charas* Ext P4. HHC Raj Kumar was sent to bring the weights and scale. *Charas* weighed 1.4 kg. *Charas* was put back in the same yellow coloured carry bag. This bag was put back in the orange coloured bag. It was sealed in a plain cloth parcel (Ext.P1) with six seal impressions of seal 'M'. Sample seal was taken on a piece of plain cloth (Ext. PW-1/A). NCB-1 form in triplicate was filled in. seal after use was handed over to Constable Vijay Kumar. Parcel containing *Charas* alongwith car was taken into possession. *Rukka* Ext. PW-9/A was prepared and sent through Constable Vijay Kumar to Police Station. Inspector/SHO Sita Ram Sandhu registered FIR Ext. PW-9/B. Case property consisting of parcel, NCB-I form in triplicate and sample of seal 'M' were handed over to Inspector SHO Sita Ram Sandhu for resealing. Inspector/SHO Sita Ram Sandhu resealed the same with six seal impressions of 'A'. Impression of seal was also put on NCB-1 form. Sample of seal 'A' was taken on a piece of cloth (Ext. PW-9/D). Case property was handed over to HC Mahinder Singh. MHC made entry in the register of Malkhana at Sr. No. 32. He sent the parcel, NCB-1 form in triplicate, copy of FIR, sample seals 'M' and 'A', docket and recovery memo to State Forensic Science Laboratory, Junga for analysis through Constable Sanjeev Kumar on 1.3.2014 vide RC No. 39/14, copy of which is Ext. PW-5/A. Constable Sanjeev Kumar carried the case property to SFSL Junga and deposited them in safe condition there. He handed over receipt to MHC on his return. Report of FSL Junga is Ext. PW-5/B. Investigation was completed and Challan was put up in the Court after completing all codal formalities.

3. Prosecution has examined as many as thirteen witnesses to prove its case against the accused. Accused were also examined under Section 313 CrPC. Their case was that of

denial simpliciter. Accused were convicted and sentenced as noticed herein above. Hence, this appeal.

4. Mr. Virender Singh Rathour, Advocate, argued that the prosecution has failed to prove its case against accused.

5. Mr. P.M. Negi, Deputy Advocate General, has supported the judgment of conviction dated 31.10.2015.

6. We have heard the learned counsel for the parties and also gone through the record carefully.

7. Constable Vijay Kumar (PW-1) testified that on the intervening night of 25/26.2.2014, he alongwith Constable Amit Kumar, Constable Sandeep Kumar, HHG Hans Raj and ASI Tavender Kumar was on patrolling duty in the official vehicle. They had set up a *Naka* at Ghumani Chowk. At about 1.30 AM, a Maruti car bearing No. HP-06-4403 came from Bilaspur side. ASI Tavender signalled the vehicle to stop. The driver stopped the car. Another person sitting on seat by the side of driver threw a bag from his jacket, on the rear seat of the car. Accused tried to run away. They were nabbed. Accused disclosed their identities. Vehicle was searched. The bag thrown on back seat was checked. It contained another yellow bag. Yellow bag contained *Charas*. HHC Raj Kumar was sent to bring weights and scale to the spot. *Charas* was weighed. It weighed 1.4 kg. It was put back in the yellow coloured bag. This bag was then put back in the orange coloured bag and thereafter, sealed in a cloth parcel with six seal impressions of seal 'M'. Specimen of seal 'M' was taken on a piece of plain cloth. NCB-I form in triplicate was filled in at the spot. Seal after use was handed over to him. PW-1 was further examined on 7.7.2015. In his examination-in-chief he deposed that on 26.2.2014 at about 3 AM, PSI Tavender Singh had handed over to him *Rukka* Ext. PW-9/A with a direction to take it to the Police Station, Ghumarwin, for registration of FIR. He handed over the same to the MHC. FIR Ext. PW-9/B was registered. In his cross-examination, he deposed that the vehicle had come at about 1.30AM. In between, they had checked 20-25 vehicles. No bus was checked. Only small vehicles and trucks were checked because of large number of thefts in the area. He admitted that Shimla-Dharamshala National Highway was a busy road. He denied the suggestion that even during night vehicles frequently ply on it.

8. Constable Sanjeev Kumar (PW-2) deposed that on 1.3.2014 MHC Mohinder Sigh handed over one parcel sealed with six seal impressions of ' M' and six seal impressions of 'A' stated to be containing 1.4 kg *Charas*, specimen of seals, 'A' and 'M', copy of FIR memo of recovery, NCB-I form in triplicate, vide RC No. 39/2014 for depositing the same with FSL Junga. He deposited the same with FSL Junga on the same day.

9. Constable Amit Kumar (PW-4) deposed the manner in which vehicle was intercepted at 1.30 AM, *Charas* was recovered. He was declared hostile and cross-examined by the learned Public Prosecutor. In his cross-examination, he has admitted that Ext. PW-4/A was signed by both the accused. He also admitted that after sealing, *Charas* in a cloth parcel, it alongwith vehicle bearing registration No. HP-06-4403 was seized vide seizure memo Ext. PW-1/B. He admitted that the NCB-I form was filled in at the spot by the IO. He also admitted that on the completion of proceedings, *Rukka* was sent to Police Station, by the IO. He admitted his signatures on sample seal Ext. PW-1/A. In his cross-examination, he has admitted that 20-25 vehicles were checked by them. He deposed that Shimla-Dharamshala road was a busy road. Volunteered that since it was night time a few vehicles were plying on the road.

10. HC Mohinder Singh (PW-5) deposed that on 26.2.2014, Inspector SR Sandhu had deposited with him a sealed parcel with six seal impressions of 'M' and six seal impressions of 'A', NCB-I form in triplicate and vehicle bearing registration No. HP-06-4403. He made entry at Sr. No. 32.

11. Shri Prithvi Singh (PW-7) deposed that on 27.2.2014, he had come to know from his brother that his vehicle had been impounded by the police at Ghumarwin.

12. District Inspector Sita Ram Sandhu (PW-9) deposed that on 26.2.2014, at about 3.45 AM, he had received *Rukka* Ext. PW-9/A through Constable Vijay Kumar, sent by PSI Tavender Singh. He registered FIR Ext. PW-9/B on the basis of *Rukka*. On the same day, at about 4.40 AM, PSI Tavender Singh had handed over to him one parcel duly sealed with six seal impressions of 'M', stated to be contained 1.4 kg *Charas*, sample seal, NCB-I form in triplicate. Seals were tallied. They were found intact. In the presence of MHC, he had resealed the parcel with six seal impressions of 'A'. Seal impression was also put on NCB-I form, Ext. PW-9/C and filled up columns No. 9 to 11 in the form. Specimen of seal 'A' was taken on cloth piece Ext. PW-9/D. He deposited the parcel alongwith samples of seals, NCB-I form in triplicate with MHC.

13. Constable Raj Kumar (PW-11) deposed that on 26.2.2014 at about 1.35 AM, SHO /Inspector Sita Ram Sandhu had directed him to take the scale and weights to Ghumani Chowk. He took them on official motor cycle. He handed over the weights and scale at the spot to PSI Tavender Singh. In his cross-examination, he deposed that in his presence, no efforts were made to call for independent witnesses.

14. PSI Tavender Singh (PW-13) testified the matter in which vehicle was intercepted. Contraband was recovered. All the codal formalities were completed. He filled in *Rukka*. It was sent through Constable Vijay Kumar to Police Station. FIR was registered. Site map was prepared. In his cross-examination, he has admitted that road where the accused were apprehended was a busy road. Volunteered that during night time, movement of vehicles is very less. He has also deposed that no public witness was associated as it was not possible.

15. What can be deduced from the discussion of evidence made herein above, is that the accused were apprehended while travelling in a Maruti car bearing registration No. HP-06-4403. Bag was recovered. It contained *Charas*. All the codal formalities were completed at the spot. *Rukka* was sent to the Police Station, on the basis of which FIR was registered. Case property was produced before SHO. He resealed the same and deposited it with the MHC. MHC sent the same to FSL Junga. According to the report of FSL, Junga, contraband was found to be *Charas*.

16. Mr. Virender Singh Rathour, Advocate has vehemently argued that the police have not associated independent witnesses at the time when accused were apprehended and search, seizure and sampling proceedings were completed on the spot. He has drawn the attention of the Court to the statement of PW-11 HHR Raj Kumar that he has deposed in his cross-examination that no efforts were made to call independent witnesses. However, fact of the matter is that PW-13 Tavender Singh, in his cross-examination has deposed that no public witness was associated as it was not possible. Fact of the matter is that the vehicle in question was intercepted at 1.30 AM in the morning. There was no possibility of associating independent witnesses at this time. Statements of official witnesses inspire confidence. PW-1 Constable Vijay Kumar has deposed that they had tried to call for independent witnesses, but none was available.

17. Their lordships of the Hon'ble Supreme Court in the case of ***Karamjit Singh vs. State (Delhi Administration),*** reported in ***AIR 2003 SC 1311,*** have held that there is no principle of law that without corroboration by independent witnesses their testimony cannot be relied upon. Presumption that person acts honestly applies as much in favour of police personnel as of other persons. It has been held as follows:

> " 8. Shri Sinha, learned senior counsel for the appellant, has vehemently urged that all the witnesses of recovery examined by the prosecution are police personnel and in absence of any public witness, their testimony alone should not be held sufficient for sustaining the conviction of the appellant. In our opinion the contention raised is too broadly stated and cannot be accepted. The testimony of police personnel should be treated in the same manner as testimony

of any other witness and there is no principle of law that without corroboration by independent witnesses their testimony cannot be relied upon. The presumption that a person acts honestly applies as much in favour of police personnel as of other persons and it is not a proper judicial approach to distrust and suspect them without good grounds. It will all depend upon the facts and circumstances of each case and no principle of general application can be laid down. PW11 Pratap Singh has clearly stated in the opening part of his examination-in-chief that ACP Shakti Singh asked some public witnesses to accompany them but they showed their unwillingness. PW10 Rajinder Prasad, SI has given similar statement and has deposed that despite their best efforts no one from public was willing to join the raiding party due to the fear of the terrorists. Exactly similar statement has been given by PW9 R.D. Pandey. We should not forget that the incident took place in November 1990, when terrorism was at its peak in Punjab and neighbouring areas. The ground realities cannot be lost sight of that even in normal circumstances members of public are very reluctant to accompany a police party which is going to arrest a criminal or is embarking upon search of some premises. At the time when the terrorism was at its peak, it is quite natural for members of public to have avoided getting involved in a police operation for search or arrest of a person having links with terrorists. It is noteworthy that during the course of the cross- examination of the witness the defence did not even give any suggestion as to why they were falsely deposing against the appellant. There is absolutely no material or evidence on record to show that the prosecution witnesses had any reason to falsely implicate the appellant who was none else but a colleague of theirs being a member of the same police force. Therefore, the contention raised by Shri Sinha that on account of non-examination of a public witness, the testimony of the prosecution witnesses who are police personnel, should not be relied upon has hardly any substance and cannot be accepted."

18. Their Lordships of the Hon'ble Supreme Court in **Bharwada Bhoginbhai Hirjibhai vs State of Gujarat** reported in 1983 (3) SCC 217, have held that by and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen. Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details. The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.

19. Minor discrepancies have not shaken the whole of the prosecution case. Thus, the statements of official witnesses in this case are believable and trustworthy.

20. Mr. Virender Singh Rathour, Advocate has faintly argued that Section 50 of the Act has not been complied with. Contraband was recovered from the Car, thus the provisions of Section 50 of the Act were not attracted. Parcel remained intact from the date of seizure till analysis in the Laboratory. Mr. Rathour further submits that the police have seized 1 kg 400 grams *Charas* but net weight of *Charas* was 1.416 kg. There is bound to be variation since PW-11 HHC Raj Kumar has brought traditional weights and scale. All the exhibits are weighed on modern scale at FSL Junga.

21. Their Lordships of the Hon'ble Supreme Court in **Dehal Singh & Ors V/S State of Himachal Pradesh** reported in AIR 2010 SC 3594 have held that small difference in weight loses its significance, when one finds no infirmity in other part of the prosecution story.

22. Prosecution has proved its case against the accused to the hilt. There is no occasion for this Court to interfere with the well reasoned judgment of the learned trial Court.

23. Accordingly, there is no merit in the present appeal and the same is dismissed, so also the pending applications, 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.

H.K.Sarwata .....Petitioner.

Versus

State of Himachal Pradesh and another .....Respondents.

CWP No.884 of 2016.
Judgment reserved on: 11.07.2016.
Date of decision: July 16, 2016.

Constitution of India, 1950- Article 226- The petitioner joined the service of the State as Assistant Conservator of Forest- he was transferred from DFO (T), Bilaspur as DFO (Flying Squad), North Bilaspur- an original application was filed against the order of the transfer which was dismissed- aggrieved from the order, present writ petition was filed- held, that transfer is an incidence of service and the authority has an unfettered power to transfer a person- the petitioner being a state government employee is liable to be transferred from one place to another- administrative guidelines can furnish a reason to approach the high authority for redressal but cannot have the consequence of depriving the power of transferring an Officer - Judicial review of the order of transfer is permissible when the order is made on irrelevant consideration – the approval of Civil service board had already been obtained by the respondent – the post to which the petitioner was transferred is an equal post- the order was rightly passed by administrative tribunal- petition dismissed. (Para 7 to 21)

Cases referred:

T.S.R. Subramanian and others versus Union of India and others (2013) 15 SCC 732
S.C.Saxena versus Union of India and others (2006) 9 SCC 583

For the Petitioner : Mr. Bimal Gupta, Senior Advocate with Ms.Kusum Chaudhary, Advocate.

For the Respondents: Mr.Anup Rattan, Mr.Romesh Verma, Additional Advocate Generals with Mr. J.K. Verma, Deputy Advocate General, for respondent No.1.

The following judgment of the Court was delivered:

<u>Tarlok Singh Chauhan, Judge.</u>

This writ petition has been preferred against the order passed by the learned Central Administrative Tribunal (for short 'Tribunal') on 29.03.2016 whereby the Original Application filed by the petitioner against his transfer orders came to be dismissed *in limine.*

2. Briefly stated the facts as are necessary for the determination of the instant petition are that the petitioner in the year 1992 joined the service of the respondent-State as Assistant Conservator of Forests and thereafter during the year 2005 was inducted in the cadre of Indian Forest Service (for short 'IFS'). Vide order dated 11.06.2014, the petitioner was transferred from the post of DFO, Mandi to the post of DFO (T), Bilaspur, however, thereafter vide impugned notification dated 16.03.2016 was ordered to be transferred from DFO (T), Bilaspur as DFO (Flying Squad),North Bilaspur.

3. The aforesaid notification was assailed by the petitioner by filing an Original Application before learned Tribunal wherein it was contended that this notification was issued in violation of the judgment rendered by the Hon'ble Supreme Court in ***T.S.R. Subramanian and others*** *versus* ***Union of India and others (2013) 15 SCC 732*** fixing therein a minimum tenure of two years to all the incumbents of the All India Service. It was also alleged that in compliance of the aforesaid judgment, the Civil Service Board has though been constituted vide notification dated 10.04.2015, but its recommendations have not been obtained before issuing the impugned notification. It was also averred that the post of DFO (Flying Squad) is not a cadre post and is meant for Junior Officers or the State Forest Service Officers and that the impugned notification had been issued at the instance of the forest mafia because the petitioner was tightening the noose on illegal felling of 'Khair' trees. Lastly, it was contended that no reasonable opportunity of being heard has been afforded to the petitioner before issuance of the impugned notification.

4. The Original Application came up for consideration before learned Tribunal on 29.03.2016 and without even calling for the reply and after recording detailed reasons was ordered to be dismissed *in limine.*

5. Aggrieved by the orders passed by learned Tribunal, the petitioner has approached this Court by raising the same contentions as were raised before learned Tribunal and has prayed for the following substantive reliefs:-

> *"(i) That the impugned order dated 29.3.2016, Annexure P-12, passed by the Ld. Central Administrative Tribunal, Chandigarh Bench, in OA No.063/00023/2016 may kindly be set-aside and quashed and the OA, filed by the petitioner, may kindly be allowed, as prayed for.*
>
> *(ii) Order of transfer dated 16.3.2016 Annexure P-9, may kindly be held wrong, illegal, arbitrary, malafide as well as in violation of transfer policy of the respondent-State and also as a result of colourable exercise of powers and the same may kindly be set aside and quashed."*

6. Respondent No.1 in its reply has justified its stand of transferring the petitioner on account of public interest and administrative exigencies. As regards the judgment of the Hon'ble Supreme Court in ***T.S.R. Subramanian's case*** (supra), it is stated that the Ministry of Personnel Public Grievances and Pension has already issued a notification dated 28.01.2014 and constituted a Civil Service Board for recommendations of transfer and postings of IAS/IPS/IFS Officers of the Himachal Pradesh cadre vide notification dated 10.04.2015. It is further averred that insofar as the case of the petitioner is concerned, ex-post-facto approval/recommendations of the said Board had specifically been obtained and minutes of such approval have also been annexed with the reply as Annexure R-1. With respect to the allegation of minimum tenure of service, respondents have justified their stand by relying upon the reasons as accorded by learned Tribunal and in addition thereto it has been averred that the question of completion of two years in the instant case does not arise as the petitioner has infact not been transferred and is rather posted at the same station though on a different post. As regards, the cadre of the posts, it has been clarified that the posts i.e. DFO (Flying Squad) and DFO (T) are both equivalent posts and, therefore, it is not correct on the part of the petitioner to suggest that IFS Probationers have been posted in the cadre posts by shifting two HPFS Officers. It has also been mentioned that it is only sometimes that due to non-availability of IFS cadre Officers that the posts are manned by the State Forest Officers. It also stands clarified that the petitioner alone is not the only IFS Officer to hold this post.

We have heard the learned counsel for the parties and also gone through the material placed on record.

7. At the outset, it may be observed that it is trite that transfer is an incidence of service and as long as the authority acts keeping in view the administrative exigency and taking into consideration the public interest as the paramount consideration, it has unfettered powers to effect transfer subject of course to certain disciplines. Once it is admitted that the petitioner is

State government employee and holds a transferable post then he is liable to be transferred from one place to the other within the District

in case it is a District cadre post and throughout the State in case he

holds a State cadre post. A government servant holding a transferable post has no vested right to remain posted at one place or the other and courts should not ordinarily interfere with the orders of transfer instead affected party should approach the higher authorities in the department. Who should be transferred where and in what manner is for the appropriate authority to decide. The courts and tribunals are not expected to interdict the working of the administrative system by transferring the officers to "proper place". It is for the administration to take appropriate decision.

8. Even the administrative guidelines for regulating transfers or containing transfer policies at best may afford an opportunity to the officer or servant concerned to approach their higher authorities for redress but cannot have the consequence of depriving or denying the competent authority to transfer a particular officer/ servant to any place in public interest and as is found necessitated by exigencies of service as long as the official status is

not affected adversely and there is no infraction of any career prospects such as seniority, scale of pay and secured emoluments. Even if the order of transfer is made in transgression of administrative guidelines, the same cannot be interfered with as it does not confer any legally enforceable rights unless the same is shown to have been vitiated by malafides or made in violation of any statutory provision. The government is the best judge to decide how to distribute and utilize the services of its employees.

9. However, this power must be exercised honestly, bona

fide and reasonably. It should be exercised in public interest. If the

exercise of power is based on extraneous considerations without any factual background foundation or for achieving an alien purpose or an oblique motive it would amount to mala fide and colourable exercise of power. A transfer is mala fide when it is made not for professed purpose, such as in normal course or in public or administrative interest or in the exigencies of service but for other purpose, such as on the basis of complaints. It is the basic principle of rule of law and good administration that even administrative action should be just and fair. An order of transfer is to satisfy the test of Articles 14 and 16 of the Constitution otherwise the same will be treated as arbitrary.

10. Judicial review of the order of transfer is permissible when the order is made on irrelevant consideration. Even when the order of transfer which otherwise appears to be innocuous on its face is passed on extraneous consideration then the court is competent to go into the matter to find out the real foundation of transfer. The court is competent to ascertain whether the order of transfer is passed bonafide or as a measure of punishment.

11. Reverting back to the case, it would be noticed that learned Tribunal has dealt with each of the grounds raised by the petitioner as would be evident from the relevant portion of the order which reads thus:-

> *"5. We have carefully considered the matter. We find ourselves unable to accept the contentions raised on behalf of the applicant. The applicant has already served as DFO, Bilaspur for more than one year nine months. In other words, he is only a little short of completing his tenure of two years as DFO, Bilaspur. Consequently, the impugned transfer order is not vitiated merely because the applicant has had a little short of two years tenure.*
>
> *6. The plea that the post of DFO (Flying Squad) is non-cadre post is also untenable. Counsel for the applicant referred to notification (Annexure A-3) in support of this contention. However, in this notification, even the post of DFO, Bilaspur is not mentioned as cadre post. Faced with this situation, it was pointed*

out that the post of DFO (Territorial) Bilaspur is equivalent to Deputy Conservator of Forests (DCF), (Territorial) Bilaspur which is a cadre post as per notification (Annexure A-3). However, if post of DFO, (Territorial) Bilaspur is equivalent to DCF, (Territorial) Bilaspur, then the post of DFO (Flying Squad) cannot be said to be a non-cadre post because the said post would also be equivalent to the post of Deputy Conservator of Forests. There is no material on record to depict that the post of DFO (Flying Squad) is non-cadre post or is meant for Junior Officers or for State Forest Service Officers.

7. Since the applicant had almost completed his tenure as DFO Bilaspur, the impugned transfer order is, therefore, not vitiated for not obtaining the recommendation of the Civil Services Board before issuing the impugned transfer order.

8. As regards action against Forest Mafia allegedly being taken by the applicant, reliance has been placed on letter dated 16.03.2016 (Annexure A-5) written by the applicant. However, the impugned transfer order is also of the same date. Consequently, it cannot be said that the applicant has been transferred in view of action initiated by the applicant vide letter dated 16.03.2016. On the other hand, as DFO (Flying Squad), the applicant would be in a much better position to check the illegal activities of the Forest Mafia.

9. No opportunity of hearing was required to be given to the applicant before issuing the routine transfer order.

10. We may add that Courts/Tribunals are reluctant to interfere with transfer order passed by the Administrative Authorities unless there are very special reasons for interfering with transfer order. In the instant case, however, there is no reason much less special reason for interfering with the impugned transfer order."

12. The learned counsel for the petitioner would, however, vehemently harp upon the plea that the orders of transfer of the petitioner are in violation to the judgment rendered by the Hon'ble Supreme Court in ***T.S.R. Subramanian's case*** (supra) as the same have been passed before permitting him to complete mandatory service of two years at one station i.e. DFO (T), Bilapsur.

13. In order to appreciate the contention of the petitioner, we may now refer to the case of ***T.S.R. Subramanian's case*** (supra) upon which heavy reliance has been placed by the learned counsel for the petitioner. The Hon'ble Supreme Court in the aforesaid case was dealing with batch of cases of civil servants, who were working in the Centre and the State Governments and were not having any stability of tenure, particularly, in the State Governments where transfers and postings were being made frequently at the whims and fancies of the executive head for political and other considerations and not in public interest. It was in this background that the Hon'ble Supreme Court considered the necessity of fixing a minimum tenure for civil services not only to enable them to achieve their professional targets but also help them to function as effective instruments of public policy, as would be evident from the following observations which read thus:-

"35. We notice, at present the civil servants are not having stability of tenure, particularly in the State Governments where transfers and postings are made frequently, at the whims and fancies of the executive head for political and other considerations and not in public interest. The necessity of minimum tenure has been endorsed and implemented by the Union Government. In fact, we notice, almost 13 States have accepted the necessity of a minimum tenure for civil servants. Fixed minimum tenure would not only enable the civil servants to achieve their professional targets, but also help them to function as effective instruments of public policy. Repeated shuffling/transfer of the officers is deleterious to good governance. Minimum assured service tenure ensures efficient service delivery and

also increased efficiency. They can also prioritize various social and economic measures intended to implement for the poor and marginalized sections of the society.

36. We, therefore, direct the Union State Governments and Union Territories to issue appropriate directions to secure providing of minimum tenure of service to various civil servants, within a period of three months."

14. While placing strong reliance on the aforesaid judgment, the petitioner appears to have completely lost sight of the fact that in his case approval of the Civil Service Board has already been obtained by the respondent by way of ex-post-facto approval/recommendations and this action on their part has neither been questioned nor assailed by the petitioner. Therefore, in such circumstance, the petitioner is estopped by his own act and conduct from challenging the orders of transfer on the ground of violation of the directions contained in ***T.S.R. Subramanian's case*** (supra).

15. As regards the contention that the petitioner has been transferred to a non-cadre post, even this contention is equally without merit as the respondent in their reply have categorically stated that the posts of DFO (Flying Squad) is equivalent to that of DFO (T), Bilaspur and have further clarified that the petitioner alone is not the single IFS Officer, who has held this post.

16. It would also be noticed that the petitioner has though averred that the order of transfer is the result of colourable exercise of powers, but we find that the element of malice or malafide is conspicuously absent in the petition filed before this Court as also in the Original Application filed before the learned Tribunal.

17. It is more than settled that unless the order of transfer is shown to be an outcome of malafide exercise of powers and stated to be in violation of the statutory provisions prohibiting any such transfer, the Courts or the Tribunal cannot interfere with such orders as a matter of routine, as though they are appellate authorities substituting their own decisions for that of the employer as against such orders passed in the interest of administrative exigencies of the service concerned.

18. On the basis of what has been observed above, we have no difficulty in concluding that the instant petition appears to have been filed by the petitioner to satiate his ego more than anything else as it is really appalling to note that despite the petitioner having been transferred as far as back on 16.03.2016, he has not cared to even join his place of posting despite it being not only at the same station but in the same Office Complex.

19. It only needs to be reiterated that whenever a public servant is transferred, in the first place, he cannot disobey the order by not reporting at the place of posting and then go to the Court to ventilate his grievances. It was the duty of the petitioner to first report to work where he has been transferred and then make a representation regarding his personal problems.

20. Such tendency of not reporting at the place of posting and indulging in litigation needs to be curbed as has been observed by the Hon'ble Supreme Court in ***S.C.Saxena*** *versus* ***Union of India and others (2006) 9 SCC 583*** wherein it was held as under:-

"6. We have perused the record with the help of the learned counsel and heard the learned counsel very patiently. We find that no case for our interference whatsoever has been made out. <u>In the first place, a government servant cannot disobey a transfer order by not reporting at the place of posting and then go to a court to ventilate his grievances. It is his duty to first report for work where he is transferred and make a representation as to what may be his personal problems. This tendency of not reporting at the place of posting and indulging in litigation needs to be curbed</u>.........." (Underlining supplied by us)

21. To say the least, such litigious and cantankerous litigation ill behoves the petitioner, who otherwise belongs to the higher echelons of service.

22. In view of the aforesaid discussion and for the reasons so stated, we find no merit in this petition and the same is accordingly dismissed, leaving the parties to bear their costs.

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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
Manoj Kumar ...Respondent.

Cr.A No. : 348 of 2010
Reserved on: 15.7.2016
Decided on: 16.7. 2016

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 750 grams charas- he was tried and acquitted by the trial court- held, in appeal that accused was wearing a black jacket and sweater beneath it- it was bulging out- police asked the accused to take out the same- accused took out a yellow coloured bag, which was containing charas – contraband was recovered from the accused but the mandatory provisions of Section 50 of the Act were not complied with as the accused was not asked whether he wanted to give search either before a Magistrate or a Gazetted Officer - the accused was rightly acquitted by the trial Court- appeal dismissed.
(Para-14)

For the appellant: Mr. M.A. Khan, Addl. A.G.
For the Respondent: Mr. Vijay Chaudhary, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This appeal is instituted against the judgment dated 17.2.2010 rendered by the Special Judge, Chamba in sessions trial No. 9 of 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 (hereinafter referred to as the 'Act' for brevity sake), has been acquitted.

2. Case of the prosecution, in a nutshell, is that on 13.12.2008, PW-11 ASI Yudhbir Singh alongwith PW-1 HC Roop Singh and others left Police Post, Banikhet on patrolling duty after getting entered Rapat in the Daily Diary. The police officials were present at Zero Point, Goli alongwith PW-10 Parkash Chand and one Prem Chand. Accused came from Chauhra side. He tried to run away. He was nabbed. He was wearing a black jacket and sweater and something was bulging out from inside the sweater. ASI Yudhbir Singh became suspicious and asked the accused to take out article. Accused took out the article, which was found to be a small bag of yellow colour. On checking of the same, it was found to be containing polythene envelope. Polythene envelope was found to be containing charas. It was weighed. It was found to be 750 grams. Two samples of 25 grams each were separated from the charas. These were put into separate parcels. The same were sealed with seal impression 'K' at three places. The bulk charas was sealed in the same polythene packet and small bag with seal impression 'K' at three places. Rukka Ex.PW-11/B was prepared. It was sent to Police Station, Dalhousie through Constable

Sanjay Kumar. FIR Ex.PW-8/A was registered. Case property was produced by ASI Yudhbir Singh before SI Bhuvneshwar Singh. He resealed the sample parcels and the parcel containing bulk charas with seal impression 'B'. SI Bhuvneshwar also filled in the relevant columns of NCB form. The case property alongwith NCB form etc. was deposited with HC Gurdhian Singh, the-then MHC, Police Station, Dalhousie. The sample parcel was sent to FSL, Junga through HHC Kamal Kumar vide RC No. 127/08. The report of Chemical Examiner is Ex.PW-7/A. 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 eleven witnesses in all to prove its case against the accused. Statement of accused under Section 313 Cr.P.C. was recorded. The defence of the accused is of simplicitor denial. Trial court acquitted the accused. Hence, the present appeal.

4. Mr. M.A. Khan, learned Additional Advocate General, has vehemently argued that the prosecution has proved its case against the accused.

5. Mr. Vijay Chaudhary, learned counsel for the accused, has supported the judgment dated 17.2.2010.

6. We have heard the learned counsel for the parties and have gone through the judgment and record meticulously.

7. PW-1 HC Roop Singh has testified that on 13.12.2008, he alongwith ASI Yudhbir Singh and other police officials was on patrolling duty. Witnesses Prem Singh and Parkash Chand were also waiting for the bus at Rain Shelter, Goli. In the meantime, one person came on foot from Chauhra side. He tried to run away. He was apprehended. He was bearing a black jacket and a sweater. It was bulging out. Police asked the accused to take out the article. Accused took out a yellow colour bag. It was found to be containing one polythene envelope. Polythene envelope was carrying charas in the shape of sticks. It weighed 750 grams. The proceedings were completed on the spot. In his cross-examination, he has deposed that they arrived at the spot at about 6.46 – 7.00 P.M. ASI had arrived before them. He did not remember that ASI gave his personal search to the accused. He did not remember if statement of consent of accused was recorded or not. Dhaba and shops were at a distance of 100 meters from the Rain Shelter, Goli.

8. PW-2 Constable Rajesh Kumar has deposed that ASI Yudhbir Singh produced the case property before SI Bhuvneshwar Singh. SI Bhuvnehswar Singh resealed all the parcels with seal impression 'B' by putting three seals on each of the parcels.

9. PW-6 HC Gurdhian Singh has deposed that on 13.12.2008, SI/SHO Bhuvneshwar Pathania handed over to him three parcels, NCB form, specimen seal impressions K and B, which were entered by him in the Malkhana register. On 14.12.2008, one sample parcel was handed over to HHC Kamal Kumar for being taken to FSL, Junga alongwith NCB form and specimen seal impressions B and K for chemical examination. HHC Kamal Kumar after depositing the same with FSL, Junga, returned the receipt to him.

10. PW-8 SI Bhuvneshwar Singh Pathania has also deposed that the Rukka was brought to him. He recorded FIR Ex.PW-8/A. He resealed the parcels with seal impression 'B' and filled in the relevant columns of NCB form. Case property was deposited with MHC Gurdhyan Singh.

11. PW-9 HHC Kamal Kumar has deposed that on 14.12.2008, HC Gurdhyan Singh handed over to him, one sample parcel duly sealed with seals K and B having sealed at three places each and NCB form vide RC No. 127/2008. He deposited the same at FSL, Junga, on 15.12.2008.

12. PW-10 Parkash Chand has not supported the prosecution case. He was declared hostile and was cross examined by the learned Public Prosecutor. In his cross-examination by the learned Public Prosecutor, he has deposed that he could not say that accused was the same

person, who was arrested on that day. He has admitted his signatures on parcel Ex.P-1, sample parcels Ex.P-2 and P-3 and specimen seal impression Ex.PW-10/B.

13. PW-11 ASI Yudhbir Singh has testified the manner in which accused was apprehended and charas was recovered and all the codal formalities were completed. He prepared Rukka Ex.PW-11/A, on the basis of which FIR was registered. In his cross-examination, he has categorically admitted that he has not asked the accused if he wanted to give his search before a Magistrate. When he noticed the belly of the accused bulging out, he got suspicious that he might be carrying something and he asked him to take out the same which was concealed by him.

14. Learned trial court has acquitted the accused. Mr. M.A. Khan, learned Additional Advocate General has argued that section 50 of the Act was not applicable in the present case. Thus, the trial court has wrongly acquitted the accused. However, fact of the matter is that it has come in the statement of PW-1 Roop Singh that accused was wearing a black jacket and a sweater beneath it. It was bulging out. Police asked the accused to take out the same. Accused took out a yellow colour bag. It was found to be containing one polythene envelope. Polythene envelope was carrying charas. Similarly, PW-11 ASI Yudhbir Singh has also admitted that accused was wearing a jacket and a sweater. His belly was protuberating and he got suspected that accused might be carrying some contraband. Thereafter, accused was asked to take out the same from his person and it was found to be containing charas. The contraband has been recovered from the person of accused, but provisions of section 50 of the Act have not been complied with. PW-11 ASI Yudhbir Singh has admitted in his cross-examination that he has not sought option of the accused to be searched before a Magistrate. The accused was required to be asked whether he wanted to give search either before a Magistrate or a Gazetted Officer. Since the contraband has been recovered from the person of accused, compliance of provisions of section 50 of the Act was mandatory. Thus, there is no occasion for us to interfere with the well reasoned judgment of the trial court.

15. Consequently, in view of analysis and discussion made hereinabove, there is no merit in the appeal and the same is dismissed. Bail bonds are cancelled.

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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
Ramesh Chand ...Respondent.

Cr. Appeal No. 319 of 2012
Judgment reserved on: 21.6.2016
Date of Decision: July 16, 2016

Indian Penal Code, 1860- Section 498-A and 302- Deceased was married to the accused- accused subjected her to cruelty due to which she committed suicide by setting herself on fire- accused was tried and acquitted by the trial Court- held, in appeal that marriage was not in dispute- it was duly proved by PW-1 and PW-2 that accused used to physically assault the deceased- a complaint was also filed before Panchayat and police but the same was compromised- deceased was taken in burnt condition to the hospital, where she made a dying declaration before PW-5, a nurse- there is no law that dying declaration has to be made in a particular manner before a particular person- deceased had stated that she was burnt with kerosene oil, which fact was also confirmed by the accused, who brought her to the hospital- she had asked that her parents be informed – nurse advised the accused to take deceased to

Ayurvedic Hospital but accused brought her to home- incident had taken place within 7 years of marriage and there is a presumption under Indian Evidence Act- daughter of the deceased had also deposed that accused had put the deceased on fire- her testimony is reliable – there was no sign of bursting of a stove at the spot- prosecution version was proved beyond reasonable doubt and the trial court had wrongly acquitted the accused- appeal allowed and accused convicted of the commission of offences punishable under Sections 498-A and 302 of I.P.C. (Para- 8 to 58)

Cases referred:

M.G. Agarwal v. State of Maharashtra, AIR 1963 SC 200
Madan Gopal Makkad v. Naval Dubey and another, (1992) 3 SCC 204
Ramawati Devi v. State of Bihar, (1983) 1 SCC 211
Jaishree Anant Khandekar vs. State of Maharashtra, (2009) 11 SCC 647
Tapinder Singh vs. State of Punjab & another, AIR 1970 S.C. 1566
Khushal Rao vs. State of Bombay, AIR 1958 SC 22
Harbans Singh and another vs. The State of Punjab, AIR 1962 SC 439
Ram Nath vs. State of Madhya Pradesh, AIR 1953 SC 420
Paniben (Smt.) vs. State of Gujarat, (1992) 2 SCC 474
Jayabalan vs. Union Territory of Pondicherry, (2010) 1 SCC 199
Krishan vs. State of Haryana, (2013) 3 SCC 280
Mohanlal Gangaram Gehani vs. State of Maharashtra, (1982) 1 SCC 700
Puran Chand vs. State of Haryana, (2010) 6 SCC 566
Dandu Lakshmi Reddy vs. State of A.P. (1999) 7 SCC 69
Sanjay vs. State of Maharashtra, (2007) 9 SCC 148]
State of Rajasthan v. Shravan Ram and another, (2013) 12 SCC 255
Jai Karan vs. State of Delhi (MCT), (1999) 8 SCC 161
Sham Shankar Kankaria vs. State of Maharashtra, (2006) 13 SCC 165
Mohammed Asif vs. State of Uttaranchal, (2009) 11 SCC 497
Laxman vs. State of Maharashtra, (2002) 6 SCC 710,
Paparambaka Rosamma vs. State of A.P. (1999) 7 SCC 695
Koli Chunilal Savji vs. State of Gujarat, (1999) 9 SCC 562
Ravi and another vs. State of T.N. (2004) 10 SCC 776
Kamalavva and another vs. State of Karnataka, (2009) 13 SCC 614
Shaik Nagoor vs. State of Andhra Pradesh represented by its Public Prosecutor, High Court of Andhra Pradesh, Hyderabad, (2008) 15 SCC 471
Sukanti Moharana vs. State of Orissa, (2009) 9 SCC 163
Nallapati Sivaiah vs. SDO, (2007) 15 SCC 465
Ongole Ravikanth vs. State of Andhra Pradesh, (2009) 13 SCC 647
Sohan Lal alias Sohan Singh and others vs. State of Punjab, (2003) 11 SCC 534
Dayal Singh vs. State of Maharashtra, (2007) 12 SCC 452
Kanti Lal vs. State of Rajasthan, (2009) 12 SCC 498,
Gulam Hussain and another vs. State of Delhi, (2000) 7 SCC 254
Lakhan vs. State of Madhya Pradesh, (2010) 8 SCC 514
Munnu Raja and another v. The State of Madhya Pradesh, (1976) 3 SCC 104
Ram Bihari Yadav Vs. State of Bihar and others, (1998) 4 SCC 517
State of Karnataka vs. Shariff (2003) 2 SCC 473
K.Ramachandra Reddy and another vs. The Public prosecutor, (1976) 3 SCC 618
Mohan Lal and others vs. State of Haryana (2007) 9 SCC 151
Maiben D/o Danabhai Tulshibai Maheria vs. State of Gujarat, (2007) 10 SCC 362
Ramakant Mishra @ Lalu & others vs. State of Uttar Pradesh, (2015) 8 SCC 299

For the Appellant: Mr. V.S. Chauhan, Addl. AG., and Mr. Vikram Thakur, Dy. AG.
For the Respondent: Mr. Pawan Gautam, Advocate.
Mr. Yudhbir Singh Thakur, Amicus Curiae.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

State has appealed against the judgment dated 18.1.2012, passed by learned Additional Sessions Judge (I), Kangra at Dharamshala, Himachal Pradesh, in Sessions Case No.25-B/2009, titled as *State of Himachal Pradesh v. Ramesh Chand,* challenging the acquittal of respondent Ramesh Chand (hereinafter referred to as the accused), who stands charged for having committed offences punishable under the provisions of Sections 498-A and 302 of the Indian Penal Code.

2. On the basis of complaint (Ex.PW-1/A) so made by Smt. Sarla Devi (PW-1), FIR No.92, dated 22.7.2009 (Ex.PW-12/A), for commission of offence under the provisions of Section 498A/306 of the Indian Penal Code, was registered at Police Station, Baijnath. Investigation so conducted by SI Ghanshyam Chand (PW-16), revealed that accused subjected his wife, i.e deceased Veena Devi to cruelty, which prompted her to take away her life by setting herself on fire on 21.7.2009. Resultantly challan was presented in the Court and the accused was charged for having committed offences, punishable under the provisions of Sections 498A and 306 of the Indian Penal Code.

3. During trial, it was so observed that in fact it was the accused, who had set his wife, i.e. deceased Veena Devi, on fire, as a result of which the charge was altered in relation to offence, punishable under the provisions of Sections 498A and 302 of the Indian Penal Code.

4. Statement of the accused, under the provisions of Section 313 of the Code of Criminal Procedure, was also recorded, in which he took the following defence:

> "It was my second marriage with Veena Devi, therefore my in-laws insisted that land adjoining near to Ayurvedic Medical College, Paprola be mutated in the name of Veena Devi. But the land was not so mutated. Therefore, Sarla Devi etc. used to quarrel with me at my home. Therefore, Veena Devi was under depression and she committed suicide."
>
> "I had tried to save Veena Devi and my hands also got burnt and I am innocent."

5. Record reveals that with the alteration of charge, based on the statements made by the learned Public Prosecutor and the accused, the trial Court considered the evidence originally led by the parties.

6. In relation to the altered charges, based on the evidence already led by the parties, trial Court acquitted the accused on all counts, finding the testimonies of Smt. Sarla Devi (PW-1) and Simran alias Seema (PW-15) not to be inspiring in confidence. Hence, the present appeal by the State.

7. Having heard learned counsel for the parties as also perused the record, we are of the considered view that the trial Court seriously erred in correctly and completely appreciating the testimonies of the prosecution witnesses.

8. A Constitution Bench of the Hon'ble Supreme Court of India in *M.G. Agarwal v. State of Maharashtra,* AIR 1963 SC 200, has held that in dealing with an appeal against the judgment of acquittal, the appellate Court should normally be slow in disturbing the findings of fact recorded by the trial Court. However, there is a caveat. Such findings have to be based on proper and complete appreciation of evidence. Jurisdiction and the power of the appellate Court

is also to reappreciate the evidence but with caution. The Court is not to substitute its own opinion with that of the trial Court.

9. In *Madan Gopal Makkad v. Naval Dubey and another,* (1992) 3 SCC 204, the Apex Court held the scope of the Court in an appeal against acquittal in the following manner:

> "26. In *Wilayat Khan v. State of U.P.,* AIR 1953 SC 122; this court while examining the scope of S. 417 and 423 of the old Code pointed out that even in appeals against acquittal, the powers of the High court are as wide as in appeals from convictions. See also (1) *Surajpal Singh v. State,* AIR 1952 SC 52, (2) *Tulsiram Kanu v. State,* AIR 1954 SC 1, *(3) Aher Raja Khima v. State of Saurashtra,* AIR 1956 SC 217, (*4) Radha Kishan v. State of U.P.*, AIR 1963 SC 822, holding that an appeal from acquittal need not be treated different from an appeal from conviction; (5) *Jadunath Singh v. State of U.P.*, (1971) 3 SCC 577, (6) *Dharam Das v. State of U.P.,* (1973) 2 SCC 216, (7) *Barati v. State of U.P.*, (1974) 4 SCC 258, and (8) *Sethu Madhavan Nair v. State of Kerala,* (1975) 3 SCC 150."

10. The fact that accused was married to deceased Veena Devi is not in dispute. Such marriage came to be solemnized sometime in the year 2006, is evident from the testimony of Smt. Sarla Devi (PW-1) and Dalip Kumar (PW-2). From the conjoint reading of the testimonies of these witnesses, it is evident that under the influence of alcohol, accused used to physically assault the deceased. Such version goes unrebutted. In relation to such acts, matter came to be reported to the Panchayat and Ramesh Chand (PW-8), under whose mediation the marriage came to be solemnized. Smt. Sarla Devi has categorically deposed that the matter pertaining to the beatings and maltreatment came to be reported to the police and the Panchayat. Some action was taken and the matter came to be compromised, with the accused agreeing not to repeat the crime, which version also stands corroborated not only by Dalip Kumar but also by Smt. Kavita Devi (PW-6). Even though, the Investigating Officer admits the factum of maltreatment, under the influence of liquor not having come to his notice during the course of investigation, but then it is not the case of the close relatives of the deceased that any formal complaint came to be lodged. And, above all, this fact is also evidently clear from the statement of Simran (PW-15), whose statement is reproduced in toto in the later part of the judgment. Thus, the factum of the deceased being subjected to cruelty stands conclusively established, beyond reasonable doubt.

11. It is an admitted case of the parties that on 22.7.2009, the deceased was taken to a private hospital at Paprola, for treatment of burn injuries.

12. From the testimony of SI Ghanshyam Chand, it is evidently clear that a telephonic message was received from the Medical Officer, SDH, Baijanth that one lady in a burnt condition came to be admitted and accordingly Rapt (Ex.PW-13/A) registered. This witness alongwith L/C Suman Devi (PW-4) rushed to the Hospital, where Smt. Sarla Devi got recorded her statement (Ex.PW-1/A). The said statement does not record that the accused had set the deceased on fire, but then, the Investigating Officer himself has explained that in the supplementary statement, such fact came to be recorded. We may only observe that the complainant is a rustic villager. She hails from a rural background. She is illiterate and the Investigating Officer has explained the discrepancy, which had crept in the two statements, only on account of his fault. Crucially, even the Investigating Officer states that in the hospital, Smt. Sunita Thakur (PW-5), a Nurse, who had attended to the deceased had informed that the deceased was burnt as kerosene oil caught fire and that such information also came to be furnished to the parents of the deceased.

13. It is not the law, as is so urged by the learned counsel for the accused, that dying declaration has to be before the Doctor, Magistrate or a Government Officer.

14. Dying declaration can be made any time, in the presence of anyone. It need not to be a Doctor, a Government Officer or an Executive Magistrate. So long as the victim is aware and fully conscious of what is being done and said, any statement made by her can be treated as

a piece of evidence, it being a different matter, as to whether it requires corroboration or not. (See: *Munnu Raja and another v. The State of Madhya Pradesh,* (1976) 3 SCC 104; *Ramawati Devi v. State of Bihar,* (1983) 1 SCC 211).

15. In *Jaishree Anant Khandekar vs. State of Maharashtra,* (2009) 11 SCC 647, a comparative study of laws of various countries on the point of dying declaration was done by the Apex Court. It was held that:

> "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.
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> 19. Among the judicial fraternity this has been best expressed, possibly by Lord Chief Justice Baron Eyre (See. R. Vs. Woodcock, (1789) 1 Lea.502, and which I quote (ER p.353): -
>
> "...That such declarations are made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by the law as creating an obligation, equal to that which is imposed by a positive oath in a court of justice."
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> 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:
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> "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.

25. On certainty of death, the same strict test of English Law has been applied in American Jurisprudence. The test has been variously expressed as 'no hope of recovery', 'a settled expectation of death'. The core concept is that the expectation of death must be absolute and not susceptible to doubts and there should be no chance of operation of worldly motives. (See Wigmore on Evidence page 233-234).

26. This Court in Kishan Lal Vs. State of Rajasthan, AIR 1999 SC 3062, held that under English Law the credence and the relevance of the dying declaration is admissible only when the person making such statement is in hopeless condition and expecting imminent death. Justice Willes coined it as a "settled hopeless expectation of death" (R Vs. Peel, (1860) 2 F. & F. 21, which was approved by the Court of Criminal Appeal in R Vs. Perry, (1909) 2 KB 697). Under our Law, the declaration is relevant even if it is made by a person, who may or may not be under expectation of death, at the time of declaration. (See para 18,page 3066). However, the declaration must relate to any of the circumstances of the transaction which resulted in his death."

16. The apex Court in *Tapinder Singh vs. State of Punjab & another,* AIR 1970 S.C. 1566 has held 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.

17. In *Khushal Rao vs. State of Bombay,* AIR 1958 SC 22, the Apex Court has further held that:-

"Sometimes, attempts have been made to equate a dying declaration with the evidence of an accomplice or the evidence furnished by a confession as against the maker, if it is retracted, and as against others, even though not retracted. But in our opinion, it is not right in principle to do so. Though under S. 133 of the Evidence Act, it is not illegal to convict a person on the uncorroborated testimony of an accomplice, illustration (b) to S. 114 of the Act, lays down as a rule of produce based on experience, that an accomplice is unworthy of credit unless his evidence is corroborated in material particulars and this has now been accepted as a rule of law. The same cannot be said of a dying declaration because a dying declaration may not, unlike a confession, or the testimony of an approver, come from a tainted source. If a dying declaration has *been made by a person whose antecedents are as doubtful as in the other cases that may be a ground for looking upon it with suspicion, but generally speaking, the maker of a dying declaration cannot be tarnished with the same brush as the maker of a confession or an approver.*"

"*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; each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made*; it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence that other pieces of evidence; a dying declaration stands on the same footing 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; 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 for 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 in order to test the reliability of a dying declaration, the Court has to keep in view, the circumstances like the opportunity of the lying 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."

"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 a given case, has come to the conclusion that particular dying declaration was not free from the infirmities."(Emphasis supplied)

18. The aforesaid decision came up for consideration before the Constitution Bench of the Apex Court in *Harbans Singh and another vs. The State of Punjab,* AIR 1962 SC 439 and after taking into account its earlier decision in *Ram Nath vs. State of Madhya Pradesh,* AIR 1953 SC 420**,** affirmed the aforesaid view.

19. In *Paniben (Smt.) vs. State of Gujarat,* (1992) 2 SCC 474, the Court has further reiterated and laid down the following principles:-

"A dying declaration is entitled to great weight. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring-corroboration is merely a rule of prudence."

"However, since the accused has no power of cross-examination, which is essential for eliciting the truth, the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of either tutoring, prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailants. Normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye witness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail".

"Merely because a dying declaration does not contain the details as to occurrence, it is not to be rejected. Equally, merely because it is a brief statement, it is not be discarded. On the contrary, the shortness of the statement itself guarantees truth. But a dying declaration which suffers from infirmity cannot form the basis of conviction. Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon."

> "(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (Mannu Raja v. State of U.P. (1976) 2 SCR 764) (AIR 1976 SC 2199).
>
> (ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration (State of U.P. v. Ram Sagar Yadav, AIR 1985 SC 416; Ramavati Devi v. State of Bihar, AIR 1983 SC 164).
>
> (iii) This Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration. (Rama Chandra Reddy v. Public Prosecutor, AIR 1976 SC 1994).
>
> (iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence. (Rasheed Beg v. State of Madhya Pradesh, (1974) 4 SCC 264 : (AIR 1974 SC 332).
>
> (v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (Kake Singh v. State of M.P., AIR 1982 SC 1021).
>
> (vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (Ram Manorath v. State of U.P., 1981 SCC (Crl) 581).
>
> (vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (State of Maharashtra v. Krishnamurthi Laxmipati Naidu, AIR 1981 SC 617).
>
> (viii) Equally, merely because it is a brief statement it is not be discarded. On the contrary, the shortness of the statement itself guarantees truth. (Surajdeo Oza v. State of Bihar, AIR 1979 SC 1505).
>
> (ix) Normally the Court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail. (Nanahau Ram v. State, AIR 1988 SC 912).
>
> (x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (State of U.P. v. Madan Mohan, AIR 1989 SC 1519).
>
> 19. In the light of the above principles, we will consider the three dying declarations in the instant case and we will ascertain the truth with reference to all dying declarations made by the deceased Bai Kanta. This Court in Mohan Lal v. State of Maharashtra, AIR 1982 SC 839 held:
>
> "where there are more than one statement in the nature of dying declaration, one first in point of time must be preferred."
>
> Of course, if the plurality of dying declarations could be held to be trust-worthy and reliable, they have to be accepted."

20. In *Jayabalan vs. Union Territory of Pondicherry,* (2010) 1 SCC 199, the Apex Court was dealing with the case of an accused who after pouring kerosene oil had set his wife on fire. The husband was held guilty of having committed an offence punishable under Section 302, IPC. The accused assailed the findings of conviction on the ground that prosecution had examined only interested witnesses and also dying declaration was tutored, promoted and product of the imagination of deceased. In the proven facts of that case repelling the contention, it was held as under:-

> "We are of the considered view that in case where the court is called upon to deal with the evidence of the interested witnesses, the approach of the court, while appreciating the evidence of such witnesses must not be pedantic. The court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the court must not be suspicious of such evidence. The primary endeavour of the court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim."(Emphasis supplied)

21. In *Krishan vs. State of Haryana,* (2013) 3 SCC 280, even where the witnesses had turned hostile, solely on the basis of dying declaration, the Court convicted the accused.

22. 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. [*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].

23. This view further stands reiterated *in Jaishree Anant Khandekar vs. State of Maharashtra*, (2009) 11 SCC 647, where the Apex Court was dealing with five dying declarations, which were found not to be in variance with each other.

24. Further in *Puran Chand vs. State of Haryana,* (2010) 6 SCC 566, Apex Court has again summarized its view in the following terms:-

> "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. A mechanical approach in replying 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. 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. 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. The courts must bear in mind that each criminal trial is an individual aspect. If after careful scrutiny the court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it a basis of conviction, even if there is no corroboration. (Emphasis supplied)"

25. However, where there is variation in the dying declaration (two in question), the Apex Court has held any conviction to be bad in law. [*Dandu Lakshmi Reddy vs. State of A.P.* (1999) 7 SCC 69 and *Sanjay vs. State of Maharashtra*, (2007) 9 SCC 148].

26. Further, where the prosecution version differs from the statement of deceased, dying declaration cannot be used for convicting the accused [*Paniben (supra)* and *State of Rajasthan v. Shravan Ram and another,* (2013) 12 SCC 255].

27. The aforesaid view has been reiterated in Jai *Karan vs. State of Delhi (MCT),* (1999) 8 SCC 161, *Sham Shankar Kankaria vs. State of Maharashtra,* (2006) 13 SCC 165 and *Mohammed Asif vs. State of Uttaranchal,* (2009) 11 SCC 497.

28. The Constitutional Bench of the Apex Court in *Laxman vs. State of Maharashtra,* (2002) 6 SCC 710, while considering the conflict in *Paparambaka Rosamma vs. State of A.P.* (1999) 7 SCC 695 and *Koli Chunilal Savji vs. State of Gujarat,* (1999) 9 SCC 562, came to the conclusion that law laid down in the latter was the correct law and simply because the Doctor has not recorded/made endorsement that the deceased was in a fit state of mind to make the statement in question, other material on record to indicate that the deceased was fully conscious and capable of making statement cannot be ignored. This view has been reiterated in *Ravi and another vs. State of T.N.* (2004) 10 SCC 776; and *Kamalavva and another vs. State of Karnataka,* (2009) 13 SCC 614.

29. In *Shaik Nagoor vs. State of Andhra Pradesh represented by its Public Prosecutor, High Court of Andhra Pradesh, Hyderabad,* (2008) 15 SCC 471, the Apex Court held that where the Judicial Magistrate and the Police officer had given detailed description and the witnesses were not cross-examined on the point of fitness of the deceased, plea taken by the accused that the deceased was not fit to make the statement in the given circumstances was untenable.

30. In *Sukanti Moharana vs. State of Orissa,* (2009) 9 SCC 163, the Court was dealing with a case where the dying declaration was challenged on the ground that it did not contain thumb impression or signatures of the deceased. The challenge was repelled on the ground that medical evidence proved that the deceased was having 90% burn injuries on the thumb and therefore was in no position to sign the dying declaration. The Apex Court further reiterated its decision in Nallapati Sivaiah vs. SDO, (2007) 15 SCC 465, in the following terms:-

> "18. ...This Court in more than one decision cautioned that the courts have always to be on guard to see that the dying declaration was not the result of either tutoring or prompting or a product of imagination. It is the duty of the courts to find that the deceased was in a fit state of mind to make the dying declaration. In order to satisfy itself that the deceased was in a fit mental condition to make the dying declaration, the courts have to look for the medical opinion."

31. This view stands reiterated in *Ongole Ravikanth vs. State of Andhra Pradesh,* (2009) 13 SCC 647.

32. Further in *Sohan Lal alias Sohan Singh and others vs. State of Punjab,* (2003) 11 SCC 534, *State of Karnataka vs. Shariff,* (2003) 2 SCC 473, *Dayal Singh vs. State of Maharashtra,* (2007) 12 SCC 452 and *Kanti Lal vs. State of Rajasthan,* (2009) 12 SCC 498, it has been held that it is not necessary that dying declaration is to be recorded before the Magistrate. The same can be recorded even before or by the police official. This view stands reiterated in *Gulam Hussain and another vs. State of Delhi,* (2000) 7 SCC 254.

33. The apex Court in *Lakhan vs. State of Madhya Pradesh,* (2010) 8 SCC 514 had an occasion to deal with two contradictory dying declarations made by the deceased. Finding the first one to have been recorded in presence of the close relatives of the accused, even though by an Executive Magistrate, the Court by ignoring the same, relied jupon the second dying declaration recorded by the police officer in holding the accused guilty of the crime charged for.

34. Dying declaration can be made any time, in the presence of anyone. It need not to be a Doctor, a Government Officer or an Executive Magistrate. So long as the victim is aware and fully conscious of what is being done and said, any statement made by her can be treated as an evidence, it being a different matter, as to whether it requires corroboration or not. (See: *Munnu Raja and another v. The State of Madhya Pradesh,* (1976) 3 SCC 104; *Ramawati Devi v. State of Bihar,* (1983) 1 SCC 211).

35. Dying declaration need not be in the form of question and answer. Principles required to be adopted for recording the statement of deceased stand reiterated in *Ram Bihari Yadav Vs. State of Bihar and others,* (1998) 4 SCC 517**,** *State of Karnataka vs. Shariff* (2003) 2 SCC 473 and *K.Ramachandra Reddy and another vs. The Public prosecutor,* (1976) 3 SCC 618.

36. 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.

37. In *Mohan Lal and others vs. State of Haryana* (2007) 9 SCC 151, the Court disbelieved the statement made by the wife of the accused on the ground that not only it was vague but also there was no contemporaneous documentary or other material to prove dowry demands prior to the incident.

38. In *Maiben D/o Danabhai Tulshibai Maheria vs. State of Gujarat,* (2007) 10 SCC 362, the Court was dealing with a case where death took place 25 days subsequent to the recording of the statement of the deceased, yet the same was taken to be a dying declaration.

39. In *Ramakant Mishra @ Lalu & others vs. State of Uttar Pradesh,* (2015) 8 SCC 299 the Court cautioned the prosecution to establish that every step for recording the dying declaration must be diligently complied with including alerting the Jurisdictional Magistrate of the occurrence of the incident.

40. Applying the aforesaid principles of law, we find the factum of dying declaration to have been proven on record.

41. Testimony of Smt. Sarla Devi records that upon receiving information of the incident, she immediately rushed to the hospital, but found none to be present there. Hence, she went to the house of the accused where she found the deceased lying on the bed. Accused was also present. At that time, deceased, who was alive, stated that her husband, i.e. the accused, had burnt her by pouring kerosene oil on her. Thereafter, the deceased was taken to the hospital, from where, the accused ran away. As advised, she took the deceased to the Civil Hospital, Baijnath, where she was declared dead.

42. Now significantly, this witness learnt about the incident at about 10 p.m. She immediately rushed to the spot, took charge and ensured that her daughter got adequate medical treatment. For some strange reason, the accused, as is evident from the testimony of this witness, never reported the matter to the police; family members of the deceased; neighbours; but instead, while his wife was alive, brought her back home. Not only that, when his mother-in-law took the victim, he ran away from the Ayurvedic Hospital, Paprola. No doubt, just two days prior to the incident, this witness had visited the house of her daughter, but then, such fact would make no difference, for she has explained that the accused used to maltreat the deceased. Such fact stands conclusively established by her.

43. Version of Smt. Sarla Devi is corroborated, on all counts, by Dalip Kumar (PW-2), brother of the deceased and Smt. Kavita Devi (PW-6), who further states that the Nurse, who attended to the deceased at the Private Hospital, Paprola, had asked the person attending the victim to take her to the Ayurvedic Hospital.

44. In fact such, version stands materially disclosed by Smt. Sunita Thakur herself, who initially attended to the victim at the Private Hospital. She does state that on 21.7.2009, at about 10-10.30 p.m., a person, carrying a lady, suffering from excessive burns, had come to the hospital and was advised to take the victim to the Ayurvedic Hospital, Paprola. She is categorical that the victim had narrated to her that she had been burnt with kerosene oil, which fact was also confirmed by the person (accused), who brought her to the hospital. On her asking, she telephonically informed the parents. It is true that the victim did not disclose to her that it was her husband who had set her on fire, but then, she does establish three facts: (i) the victim sustained burn injuries with kerosene oil, (ii) the victim had asked her parents to be informed,

and (iii) this witness had asked the accused to take the victim to the Ayurvedic Hospital, Paprola. All this is only reflective of the conduct of the accused. Why is it that he did not take the victim to the Ayurvedic Hospital, Paprola and bring her back home? Why is it that he did not inform the parents of the victim? Why is it that he ran away from the hospital, when the victim was carried by her mother? All this remains unexplained.

45. Dying declaration, oral in nature, stands clearly established on record through the testimony of this witness as also the mother of the victim. The accused has taken a defence of suicide but from the suggestion put to the witness, it appears that the defence of bursting of stove, resulting into the injuries to the victim stands taken. Now it is an admitted fact that the incident came to be occurred in the matrimonial house and the incident took place within 7 years of marriage. Presumption with regard to the commission of offence under the provisions of Indian Evidence Act would not lie against the accused but then the burden which the accused was required to discharge in view of Section 114 of the said Act never came to be established on record. Police did not find any such telltale signs on the spot.

46. We find the testimonies of the witnesses to be fully inspiring in confidence. Their version is clear, consistent and cogent. There are neither any exaggerations nor any embellishments, much less improvements. In natural course, they are disclosing the events which took place on the spot resulting into the occurrence of the incident and the death of the deceased.

47. In the instant case, the dying declaration cannot be said to be out of malice. It was immediately brought to the notice of police.

48. But then, these facts alone have not weighed with the Court in arriving at its conclusions, for there is an eye-witness to the incident and that is daughter of the deceased, namely Simran (PW-15) aged 8 years, a student of 4th class, who has deposed as under:

> "My mother name was Kamla, who was married to Ramesh. It was about two years ago my father had come in drunken condition and beaten up my mother. It was during night time when Ramesh poured kerosin oil on my mother and my mother gone inside the room and thereafter Ramesh put on fire my mother with match box. Thereafter Ramesh put a blanket on my mother to save her. Thereafter my mother was removed to hospital. Thereafter my mother died. Today I have seen Ramesh who is standing the court.
>
> Xx xx by Shri M.C. Thakur, Adv. Xx xx xx
>
> Ramesh had constructed one new shop. It is correct that on the day when lentil was put my grand mother (Naani) had come. When my father was watering the lintel I was with him. It is correct that when I alongwith my father went towards the house then my mother was coming out while burning It is correct that while putting off the fire the hands of my father were also burnt. The shop is near to my house and adjoins to the road. When my father was watering to lintel he was not drunk. It is incorrect that mother and father was not having any dispute regarding the shop. It is incorrect that before this incident my father had also tried to snatch cani of kerosin oil 3-4 times and my father snatched the cani. It is incorrect that my statement was shown by the ld. P.P. and to make me understand the same. It is correct that prior this date, 2-3 times earlier had come with my Maussi and Naani."

49. The witness was found competent to depose in Court. Now, if we carefully peruse her testimony, she is categorical that it was the accused who after pouring the kerosene oil, had set his wife on fire. No doubt, in the cross-examination part, she does state that when she went with her father towards the house, she saw her mother come out burning. Thus, in our considered view, there is no contradiction. She is categorical that her father had set her mother on fire. It is only when the deceased came out, the accused was with this witness. Her statement

is natural. It cannot be said that she was tutored to make such a statement. She has no reason to depose falsely. Yes, the accused did wrap a blanket to save the victim, but then this would not mean that he had not set her on fire.

50. It has come in the testimony of Ramesh Chand (PW-8) that kerosene oil came to be purchased by the victim from him.

51. Postmortem report (Ex.PW-7/A), so proved by Dr. Manoj (PW-7), records that the deceased, aged 33 years, had suffered severe burn injuries to the extent of 85% and died due to circulatory failure secondary to ante-mortem burns.

52. The witnesses have established (i) the factum of the accused having burnt the deceased, (ii) the deceased having disclosed such fact to her mother and brother, with slightly different version to the Nurse, (iii) and the conduct of the accused in not ensuring proper medical treatment to the deceased. Now, all this conclusively establishes the guilt of the accused.

53. Now, in the instant case, the Nurse is categorical that the victim was in a position to communicate and had in fact asked her to inform her relatives. The victim had disclosed to her that she had been burnt with kerosene oil. Such statement was made at a time when her husband was there. Significantly, she did not categorically state that it was an accident. Record does reveal that despite medical advice, the accused brought the victim home, rather than taking her to the hospital. Now, even at home, the victim, in the presence of the accused, had disclosed to her mother and brother that it was the accused who had set her on fire by pouring kerosene oil. Police came to reach the spot only when the victim had died, for such information was given from the Ayurvedic Hospital and not the Private Hospital, where the victim was taken by the accused.

54. The accused wants the Court to believe that it was a case of an accident, as the stove got burst, but then such defence cannot be said to have been probablized on record. No telltale signs of bursting of a stove were found on the spot. Had the accused not been guilty, he would not have run away from the spot, leaving his wife alone.

55. Defence of false implication, so taken by the accused, for not transferring the land in the name of the deceased, on the insistence of her mother, cannot be said to have been proven on record. There is nothing on record to establish that the accused owned any land adjoining to the hospital or that the deceased or her mother had desired the same to be transferred as such.

56. 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. 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.

57. Hence, 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.

58. Thus, the findings returned by the trial Court cannot be said to be based on correct and complete appreciation of material on record, which are reversed. The appeal is allowed and we hold the accused guilty and convict him for having committed offences, punishable under the provisions Sections 498-A & 302 of the Indian Penal Code, for causing cruelty to the deceased and committing her murder.

59. Bail bonds furnished by the accused-convict stand cancelled. For the purpose of hearing him on the quantum of sentence, the appeal be listed on 2.8.2016. He be produced in the Court on the said date. Copy of the judgment be supplied to the accused, free of cost.

60. Assistance rendered by Mr. Yudhbir Singh, learned Amicus Curiae, is highly appreciable.

Appeal stands disposed of, so also pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J

State of Himachal Pradesh ... Appellant
Versus
Satnam Singh @ Satta ... Respondent

Cr. Appeal No. 193 of 2012
Reserved on: 28.06.2016
Date of decision: 16.07.2016

N.D.P.S. Act, 1985- Section 15- Police received a secret information that accused was dealing in poppy straw/husk in his house and huge quantity of poppy straw/husk could be recovered on search- information was reduced into writing and was sent to police station for registration of FIR- search of the house of the accused was conducted in presence of independent witnesses during which 7 plastic bags containing poppy straw/husk were recovered- accused was tried and acquitted by the trial Court- held, in appeal that accused was also previously booked for the commission of offence punishable under Section 15 of N.D.P.S. Act in which SHO had appeared as PW-16- it was asserted in that case that house belonged to accused and his brother- it was not proved that partition had taken place between accused and his brother - accused is residing with his wife and children in the house- independent witnesses were not examined as having been won over – no neighbour was associated at the time of recovery- prosecution has failed to prove its case beyond reasonable doubt and accused was rightly acquitted by the trial Court.

(Para-19 to 27)

Cases referred:

Mohd. Alam Khan Vs. Narcotics Control Bureau and another, AIR 1996 Supreme Court
Madan Lal and another Vs. State of H.P., (2003) 7 Supreme Court Cases 465
Om Prakash alias Baba Vs. State of Rajasthan, (2009) 10 Supreme Court Cases 632,

For the appellant: Mr. Vikram Thakur, Deputy Advocate General with Mr. J.S. Guleria, Assistant Advocate General.
For the respondent: Mr. Vinod Chauhan, Advocate, Amicus Curiae.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.:

By way of present appeal, State has challenged the judgment passed by the Court of Special Judge, Una, in Sessions Case No. 7-VII/2011/Sessions Trial No. 10/2011, dated 26.12.2011, vide which, learned trial Court has acquitted the accused for commission of offence under Section 15 of the Narcotic Drugs & Psychotropic Substances Act, 1985, hereinafter referred to as the NDPS Act.

2. The case of the prosecution was that in the afternoon of 29.09.2010, a police party headed by S.I./S.H.O. Shakti Singh Pathania of Police Station, Haroli, was on routine patrol duty in the official vehicle bearing registration No. HP-20C-0507, which was being driven by driver/constable Vikas Kumar. The other members of the police party were ASI Prem Lal, HC Harish Chander, HC Subhash Chand, HC Kewal Krishan, HHC Ashwnai Kumar, C. Gurmail Singh, L.C. Chanchla Devi, HHC Sat Pal, HHG Rachpal, HHG Dilbag Singh, HHC Ranbir Singh and HHG Jeewan. At around 12.55 noon, when the said police party was present at Chandpur Chowk, HC Sanjay Kumar of Special Investigating Unit, Una, met SHO and HC Sanjay Kumar made a statement under Section 154 Cr.P.C. (Ext. PW4/A) before the SI/SHO Shakti Singh to the effect that he was posted as an Investigating Officer in Special Investigating Unit, Una and on 29.09.2010, he was on routine patrol and detection duty on his official motorcycle in the area. At around 12.45 noon, when he was present in Kungrat Bazar, he received secret information to the effect that accused Satnam Singh deals in the sale of poppy straw/husk in an illegal manner in his house in village Heeran Thara. If the said dwelling house of the accused is raided and searched, then poppy straw/husk can be recovered in huge quantity. The said information was reliable and authentic and needful be done.

3. Endorsement was made on the said statement of Sanjay Kumar by the SHO and the same was forwarded through C. Gurmail Singh to the Police Station for registration of the FIR. On the said basis, FIR No. 298/2010 (Ext. PW6/A) was lodged in Police Station, Haroli and endorsement to this effect was made on the Ruqua vide Ext. PW6/B. Reasons of belief were also prepared by the SHO as per the provisions of Section 42 of the NDPS Act vide Ext. PW5/A and was sent through HC Subhash Chand to the Superintendent of Police, Una, for his information.

4. Thereafter, SHO proceeded to the spot alongwith the staff and HC Sanjay Kumar. SHO sent HC Harish Chander in the official vehicle with driver/constable Vikas Kumar and HC Kewal Krishan to call the local persons after the police party reached the village of the accused. HC Kewal Krishan brought with him Smt. Amarjit Kaur, Ward Panch, Gram Panchayat Heeran Thara. HC Harish Chander came with Rakesh Pal Sharma, Up Pradhan, Gram Panchayat Heeran Thara and Mohinder Singh, Patwari, Circle Kungrat, to the spot. The house of the accused was encircled by the SHO with the help of his subordinates and on the arrival of the independent witnesses, they were informed about the details of the secret information received by the police. Thereafter, the gate of the house of the accused was got opened. The accused was present in his house and he was informed as to why the police was there. The police officials and the witnesses accompanying them gave their search to the accused. Ext. PW1/A to this effect was prepared. Thereafter, the house of the accused was raided and searched in the presence of the independent witnesses. During the search, seven plastic bags were recovered from the 'Parchhati' of the bath room of the house of the accused. These bags were brought down from the 'Parchhati', opened and checked and they contained poppy straw/husk. Thereafter, a weighing scale and weights were arranged by the police at the spot and all these bags were weighed one after the other. In all, they contained poppy straw/husk. Out of these, two samples of one Kg. each were drawn and these samples were numbered as 1/S-1, 1/S-2 to 7/S-1 and 7/S-2. 14 samples were separately wrapped and sealed by affixing seal impression 'T' and the bags were sealed with seal impression 'T'. NCB forms were filled in at the spot and the impression of the seal used was retained on the pieces of cloth including Ext. PW1/B and the NCB forms. The seal after its use was handed over to Mohinder Singh, Patwari. The proceedings were photographed. The bags and sample parcels etc. were taken into possession vide Memo Ext. PW22/C, which were signed by the accused and the witnesses. A copy of the seizure memo was supplied to the accused free of cost. Site plan showing the place of the alleged recovery was drawn and the statements of the witnesses under Selection 161 Cr.P.C. were recorded.

5. The accused was arrested and he was also informed about the grounds of his arrest. The information of his arrest was given to his wife. Thereafter, the police party

returned to Police Station, Haroli, alongwith the case property and the accused. The case property was produced by SI/SHI Shakti Singh Pathania before ASI Krishan Kumar, who re-sealed the same by affixing seal impression 'M'. The impression of the seal used was also retained on the NCB forms. The relevant columns of the NCB forms were filled in by ASI Krishan Kumar. He then deposited the case property with the MHC of the Police station.

6. A special report as per Section 57 of the NDPS Act was sent to the Superintendent of Police, Una, by the SHO. The sample parcels were sent for chemical test to FSL Junga. The report of the laboratory was obtained and all the seven bags were also produced before the Illaqua Magistrate by the police for the preparation of the inventory as per Section 52-A of the NDPS Act. The learned Magistrate too drew the samples of 500 grams each from all the seven bags and the bags and the samples were sealed with the seal of the Court. The samples drawn by the learned Magistrate were also forwarded to Junga for analysis and the report was collected. It was revealed during the course of the investigation that the accused was earlier also booked for the commission of such like offence both by the Himachal and Punjab Police.

7. After the completion of the investigation, challan was presented in the Court and as a prima facie case was found against the accused, he was charged for commission of offence punishable under Section 15 of the NDPS Act, to which he pleaded not guilty and claimed the trial.

8. On the basis of the material produced on record by the prosecution, the learned trial Court came to the conclusion that the prosecution had failed to prove the conscious and exclusive possession of the accused with regard to poppy straw/husk in question and it accordingly acquitted the accused of the offence alleged against him.

9. We have heard learned counsel for the appellant as well as learned Amicus Curiae. We have also gone through the records of the case and the judgment passed by the learned trial Court.

10. Before proceeding further, it is relevant to take note of the stand which has been taken by the accused in his statement recorded under Section 313 Cr.P.C. As per the accused, when the police came to his house, he was not there. He was telephonically called to his house. His brother was there at the relevant time who fled away. He has further stated that his elder brother Darbara Singh was forced to sit in the Police Station by the police and lady police came to arrest his wife. He was called and taken in the police vehicle to Police Station, Haroli, thereafter, his brother Darbara Singh was let off by the police. SI Shakti Singh had earlier also framed him in a case under the NDPS Act in the year 2003. The said ASI had asked him to call his brother who had fled away. The accused expressed his inability to do so. He further deposed that, the police official asked him to sign on various papers and procured his signatures and that he had been involved in a false case.

11. Out of the persons who were associated with the search and recovery, the prosecution examined HC Harish Chander, Rakesh Pal Sharma, HHC Ashwani Kumar, HC Sanjay Kumar and SI/SHO Shakti Singh Pathania. The two independent witnesses who were associated with the recovery, namely, Smt. Amarjit Kaur and Mohinder Singh, were given up by the learned Public Prosecutor on the ground that the said witnesses had been won over by the accused, as has been argued by the learned Deputy Advocate General.

12. Therefore, now we will closely scrutinize the statements made by the above mentioned witnesses in order to ascertain as to whether the prosecution was able to prove its case against the accused and whether the learned trial Court has erred in acquitting the accused.

13. HC Harish Chander has entered the witness box as PW-1 and he has deposed that on 29.09.2010, he alongwith ASI Prem Lal and the other police officials including the SHO

were on routine patrol duty in the official vehicle No. HP-20C-0507. At noon, they were present in Chandpur Chowk, where HC Sanjay Kumar met them, who made a statement under Section 154 Cr.P.C. before the S.H.O., on the basis of which, Ruqua was sent through constable Gurmail Singh and reasons of belief were prepared by the SHO under Section42 of the NDPS Act and handed over to HC Subhash Chand to deliver the same in the office of Superintendent of Police, Una. He has further stated that they proceeded to village Heeran Thara i.e. village of the accused. The SHO directed him and HC Kewal Krishan to call the independent witnesses and he called Mohidner Singh Patwari and Rakesh Pal and brought them to the spot. HC Kewal Krishan brought Smt. Amarjit Kaur. The area was cordoned by them and the witnesses were told regarding the details of the case. Accused Satnam Singh was called out of his house and conveyed the details of the case. Thereafter, as per the said witness they gave their search to the accused in the presence of witness Smt. Amarjit Kaur vide Memo Ext.PW1/A. The house of the accused was searched. During search, from the 'Parchhati' of the bath room of the accused, which has the entry from the 'Pooja Room', seven bags were recovered. Those bags were brought down from the 'Parchhati' and checked by the S.H.O. Six bags contained poppy husk and one bag was containing the poppy straw. The SHO directed him to bring the weights and scale to the spot. He went to Laluwal and brought the same to the spot from the shop of Lakhvinder Singh. All the bags were weighed. They contained 208 Kgs of poppy straw/husk. Out of all these bags, two samples of one Kg. each were drawn of the poppy straw/husk i.e. total 14 samples. All the samples and the bags were then wrapped and sealed by affixing seal impression 'T'. The bags were numbered from 1 to 7. The NCB forms were filled in at the spot. The seal after its use was handed over to Mohinder Singh, Patwari. The seizure memo was prepared at the spot, which was signed by the accused and the witnesses. In his cross-examination, he has stated that he had mentioned in his statement recorded under Section 161 Cr.P.C. that on the fateful day Amarjit Kaur was called by HC Kewal Krishan. He was confronted with his statement Ext. DA wherein it was not so recorded. He also stated that he had got recorded in his statement under Section 161 Cr.P.C. that the sample and the bags were marked separately and he was confronted with his statement Ext. DA, wherein this was not so recorded.

14. Rakesh Pal Sharma has entered the witness box as PW-2 and stated that he was working in his fields and was called by the police. He firstly went to his house from the fields. At around 12.30 noon, he reached the house of the accused and remained standing outside the gate of the house of the accused and noticed that some bags were lying inside the house of the accused. Smt. Amarjit Kaur, member of the Panchayat, was also there. He was declared as a hostile witness. In his cross-examination, he has stated that when he reached the spot, Mohidner Singh, Patwrai, was there. He has denied the suggestion that the he and police officials gave their search to the accused and Memo Ext. PW1/A was prepared in this regard. He denied the suggestion that the house of the accused was searched in his presence which led to the recovery of seven bags of poppy straw/husk. He has also denied the suggestion that two samples each from all the bags were drawn by the police in his presence. He has further stated that when the police prepared all the papers, he was called inside the house to sign the same.

15. HHC Ashwnai Kumar has entered the witness box as PW-3 and stated that he joined the investigation on 29.09.2010 and took photographs in village Heeran Thara relating to the recovery.

16. HC Sanjay Kumar has entered the witness box as PW-17 and stated that on 29.09.2010 while he was posted as SIU, Una, he received secret information to the effect that accused deals in the illegal sale and purchase of poppy straw/husk. He also received the information that the accused carried out said business from his house in village Heeran Thara. He further deposed that if the house of the accused is raided and searched, the recovery can be effected. As the information was reliable, he left Kungrath on the motorcycle for Police Station, Haroli. At around 12.55 noon, when he reached village Chandpur, SI/SHO Shakti Singh

Pathania met him alongwith the other police officials. They were in the official vehicle. He narrated the secret information to the SHO, who recorded his statement under Section 154 Cr.P.C. and thereafter, set the process into motion for search and seizure of the house of the accused. He further deposed that the SHO directed HC Kewal Krishan and HC Harish to call independent witnesses. HC Kewal Krishan came with Smt. Amarjit Kaur and HC Harish brought Patwari Mohinder Singh and Up Pradhan Rakesh Pal. Then they proceeded to the house of the accused. The accused who was present in the house, opened the gate. The details of the information were disclosed to the accused and thereafter, they gave their search to the accused in the presence of Smt. Amarjit Kaur and then they entered the house of the accused alongwith the witnesses. Seven plastic bags were recovered from the 'Parchhati' of the bath room of the accused and the six bags were containing poppy straw/husk. The accused was not having any permit to keep or sell the poppy straw/husk.

17. Similarly, PW-18 SHO Shakti Singh Pathania has also narrated the occurrence of events. He has deposed that he endorsed the statement made by HC Sanjay Kumar and sent it through C. Gurmail Singh to the Police Station for registration of the FIR. He also deposed that the reasons of belief Ext. PW5/A were prepared by him and sent through HC Subhash Chand to the office of S.P. Una. Then he proceeded to the village of the accused i.e. village Heeran Thara with the staff and HC Sanjay Kumar. He also stated that he directed HC Harish Chander and H.C. Kewal Krishan to bring the independent witnesses. HC Harish Chander returned with Patwari Mohinder Singh and Up Pradhan Rakesh Kumar. H.C. Kewal Krishan returned with Smt. Amarjit Kaur (Ward Panch). He further stated that they went to the house of the accused and gave their search to the accused in the presence of Smt. Amarjjit Kaur. Memo ext. PW11/A was prepared in this regard. After that, they went inside the house of the accused and checked the same, from the 'Parchhati' of the bath room, seven plastic bags were recovered. These bags were brought down from the 'Parchhati'. He further deposed that the same were opened and checked and six bags contained poppy husk and the seventh bag was found containing the poppy straw. He directed HC Harish Chand to bring the weights and scale to the spot. HC Harish Chander returned after sometime with weights, scale and Lakhvinder Singh. The bags were weighed one after the other. They contained 204 KGs of poppy husk and 04 Kgs of poppy husk. Out of each bag, two samples of 1 Kg. each were drawn. The bags and samples were then sealed by affixing seal impression 'T'. The seal impression was retained on NCB form and the seal after the use was handed over to Mohinder Singh. The case property was taken into possession vide Memo Ext. PW2/C. Copies of the Memos were supplied to the accused free of costs. The photographs of the spot were taken. He recorded the statements of the witnesses under Section 161 Cr.P.C. The accused was arrested and informed about the grounds of arrest. The case property was produced before him by ASI/SHO Krishan Lal. ASI Krishan Lal resealed the bags etc. with seal 'M' and deposited the same with MHC. On 30.09.2010, special report was delivered by him in the office of S.P. Una. The demarcation of the house of the accused was done from the Field Kanungo.

18. These are the material witnesses, which as per learned Deputy Advocate General fully corroborated the case of the prosecution and which aspect of the matter has been ignored as per him by the learned trial Court rendering the judgment passed by the learned trial Court to be bad.

19. Perusal of the record of the case reveals that the accused was previously also booked under Section 15 of the NDPS Act vide FIR No. 687/2003 registered at Police Station in Una on 22.10.2003. In the said case which was registered against the accused SHO Shakti Singh Pathania appeared as PW-16. At that time, he was posted as Incharge Police Post Santoshgarh. In that case, Memo of consent and recovery were prepared by the police which were signed by ASI Shakti Singh as a witness. These Memos have been exhibited as Ext. DG and Ext. DH. A perusal of the same demonstrate that in the earlier case the stand of the prosecution was that house in issue in village Heeran Thara belonged to Satnam Singh accused and his brother Gurbax Singh. A perusal of Ext. D1/D, which is a death certificate,

demonstrates that Gurbax Singh died on 23.01.2011 i.e. during the course of investigation of the present case. The prosecution has not produced any material on record that partition had taken place between the accused and his deceased brother Gurbax Singh before his death. The prosecution has also not produced any evidence on record to suggest or substantiate that the accused was residing alone in the house. On the contrary, a perusal of the statement made by PW-2 i.e. Rakesh Pal who happens to be an eye witness to the alleged recovery as well as PW-18 SHO Shakti Singh Pathania reveals that they have deposed that the accused, his wife and children were residing in the house. Ext. D1/C is the copy of judgment dated 30.11.2006 passed by the Court of learned Sessions Judge in Sessions Trial No. 2 of 2006 i.e. the case in which the accused was tried for commission of offence under Section 15 of the NDPS Act in FIR No. 687/2003. A perusal of the said judgment demonstrates that the accused was acquitted by the learned Court below inter alia on the ground that the prosecution could not prove its case beyond reasonable doubt against the accused and it could not establish that the accused was residing alone in the house.

20. Incidentally, in the present case, three persons were associated as independent witnesses. They are namely Mohinder Singh, Up Pradhan, Rakesh Pal Sharma and Ward Panch Amarjit Kaur. Out of these three witnesses only Rakesh Pal Sharma has been examined as PW-2, whereas the other two spot witnesses have not been examined by the prosecution. As per the records, learned Public Prosecutor gave up PWs Amarjit Kaur and Mohinder Singh on the ground that they were won over by the accused. H.C. Kewal Krishan who was part of the police party, who as per the case of the prosecution, was sent to call the independent witness and who had brought Amarjit Kaur. He was also given up by the prosecution. It is not the case of the prosecution that the house of the accused from where the alleged recovery was effected was situated at some secluded place and there was no habitation near that house. The copy of demarcation report is on record as Ext. PW8/A. This demarcation was conducted by Field Kanungo Subhash Chand (PW-8), who has deposed that he went to the spot with Halqua Patwari Mohinder Singh and the police and the demarcation was conducted by him at the spot and at the time of demarcation Smt. Bhupinder Kaur, wife of the accused, was present. In his cross-examination, he has stated that "**there are other houses near to the house of the accused**." Despite this, no neighbour of the accused has been either associated with the recovery or has been examined by the prosecution to substantiate its case with regard to the alleged recovery made from the house of the accused or with regard to the factum as to who were the persons living in the house.

21. Therefore, we are of the considered opinion that the prosecution has miserably failed to prove that the house was in the exclusive possession of the accused or that the poppy straw/husk which was allegedly recovered from the house was in the conscious and exclusive possession of the accused only.

22. Now, if we refer to the statement of the accused under Section 313 Cr.P.C., he has stated therein that when the police came to his house, he was not there and he was telephonically called to the house. He further stated that his brother was there who fled away. He has also stated that his elder brother Darbara Singh was forced to sit by the police in the Police Station and lady police came to arrest his wife. He has also stated that he was called and taken in the police vehicle to Police Station, Haroli and thereafter, his brother Darbara Singh was let off. The accused has also mentioned in his statement that SI Shakti Singh had earlier also framed him in a case under the NDPS Act in the year 2003. This fact stands proved from the record. Therefore, the element of previous animosity between SI Shakti Singh and the accused is apparent and evident from the record.

23. Incidentally, one of the three independent witnesses who actually entered the witness box i.e. PW-2 Rakesh Pal Sharma has not corroborated the story of the prosecution. He was cross-examined at length by learned Public Prosecutor but nothing material could be elucidated from him to substantiate the case of the prosecution. In his cross-examination, he has denied the suggestion that the house of the accused was searched in his presence which

led to the recovery of seven bags of poppy straw/husk. On the other hand, he has stated that when he reached the spot, the police officials were weighing the bags. No cogent explanation has been given by the prosecution as to why the other two spot witnesses in whose presence the alleged recovery was effected, namely, Amarjit Kaur and Mohinder Singh were given up on the ground having been won over by the accused. In our considered view, even if that was so, the prosecution had the opportunity of cross-examining the said witnesses to bring home the guilt of the accused and to prove the case of the prosecution. Therefore, except the police officials, there is no independent witness who has corroborated the case of the prosecution. We have already observed that from the material on record the prosecution has not been able to prove the conscious and exclusive possession of the accused with regard to the poppy straw/husk. The statement of police officials does not inspire confidence in the peculiar facts of the case.

24. It has been held by the Hon'ble Supreme Court in ***Mohd. Alam Khan Vs. Narcotics Control Bureau and another***, ***AIR 1996 Supreme Court***, that when the prosecution fails to establish the ownership and possession of the premises from where contraband articles were seized to be that of the accused, then the accused cannot be convicted.

25. The Hon'ble Supreme court has further held in ***Madan Lal and another Vs. State of H.P.***, ***(2003) 7 Supreme Court Cases 465***, that expression "possession" is a polymorphous term which assumes different colours in different contexts and it may carry different meanings in contextually different backgrounds. The Hon'ble Supreme Court further held that the word "conscious" means awareness about a particular fact and it is state of mind which is deliberate or intended. The relevant Paras of the said judgment are quoted herein below:-

> "20. Section 20(b) makes possession of contraband articles an offence. Section 20 appears in chapter IV of the Act which relates to offence for possession of such articles. It is submitted that in order to make the possession illicit, there must be a conscious possession.
>
> 21. It is highlighted that unless the possession was coupled with requisite mental element, i.e. conscious possession and not mere custody without awareness of the nature of such possession, Section 20 is not attracted.
>
> 22. The expression 'possession' is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible, as was observed in Supdt & Remembrancer of Legal Affairs, W. B. v. Anil Kumar Bhunja to work out a completely logical and precise definition of "possession" uniformally applicable to all situations in the context of all statutes.
>
> 23. The word 'conscious' means awareness about a particular fact. It is a state of mind which is deliberate or intended.
>
> 24. As noted in Gunwantlal v. The State of M.P. possession in a given case need not be physical possession but can be constructive, having power and control over the article in case in question, while the person whom physical possession is given holds it subject to that power or control.
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> 25. The word 'possession' means the legal right to possession (See Health v. Drown). In an interesting case it was observed that where a person keeps his fire arm in his mother's flat which is safer than his own home, he must be considered to be in possession of the same. (See Sullivan v. Earl of Caithness.)"

26. The Hon'ble Supreme Court has held in ***Om Prakash alias Baba Vs. State of Rajasthan***, ***(2009) 10 Supreme Court Cases 632***, that it is not sufficient to prove that the house from where the contraband was recovered belongs to the accused and was in his possession. The prosecution was further required to show that the accused had exclusive

possession of the contraband as a very large number of persons including the accused and five of his brothers, their children and their parents were living therein.

27. When we apply the ratio of the aforesaid judgments to the facts of the present case, the only conclusion which can be arrived at on the basis of the material produced on record by the prosecution is this that the prosecution has neither been able to prove that the house was in exclusive ownership and possession of the accused nor it has been established by the prosecution that the contraband which was allegedly recovered from the said house was in the exclusive and conscious possession of the accused.

28. A perusal of the judgment passed by the learned trial Court also demonstrates that all these aspects of the matter have been minutely gone into by the learned trial Court and after appreciating the evidence on record, it has returned the findings that the prosecution was not able to prove the case against the accused beyond reasonable doubt. In our considered view, there is neither any perversity nor any infirmity in the said findings returned by the learned trial Court. Accordingly, we uphold the judgment of acquittal passed by the learned trial Court and dismiss the present appeal being devoid of any merit. Bail bonds, if any, furnished by the accused are discharged.

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

Bishan Dass & others ……Appellants-Defendants.
Versus
Shri Sardari Lal …..Respondent/Plaintiff.

RSA No. 475 of 2003.
Reserved on : 05.07.2016.
Decided on : 18th July, 2016.

Indian Succession Act, 1925- Section 63- Plaintiff filed a suit pleading that mutation has been attested on the basis of Will- Will is wrong, illegal and result of fraud and undue influence- suit was decreed by the trial Court- an appeal was preferred, which was dismissed- held, in second appeal that plaintiff had not stepped into the witness box to prove the suspicious circumstances surrounding the execution of the Will- Will was registered on the date of attestation- mere fact that DW-2 did not belong the Village of testator is no ground to doubt the validity of the Will - execution of the Will was duly proved- trial Court and Appellate Court had not appreciated the evidence properly- appeal allowed and judgments of the courts below set aside- suit dismissed.
(Para-8 to 15)

For the Appellants: Mr. Neeraj Gupta, Advocate.
For the Respondent: Mr. Sanjeev Kuthiala, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant Regular Second Appeal stands directed by the defendants/appellants against the impugned rendition of the learned Additional District Judge, Una whereby he dismissed the appeal of the defendants/appellants herein and affirmed the findings rendered by the learned Sub Judge 1st Class (1), Amb, District Una, H.P., whereby the latter Court decreed the suit of the plaintiff. The defendants/appellants herein stand aggrieved by the judgment and decree of the learned Additional District Judge, Una. Theirs standing aggrieved, they have therefrom preferred the instant appeal before this Court for seeking from this Court a verdict for reversing the findings recorded therein.

2. It has been averred in the plaint by the plaintiff that the defendants have not right, title or interest qua the estate left by late Sh. Chhajju Ram husband of the original plaintiff Smt. Bhambo Devi and in particular with respect to the land as detailed in the plaint, hereinafter referred to as the suit land. It is also averred that the defendants got attested mutation No.66 of 14.8.1992 in their favour on the anvil of the alleged Will of Chhajju Ram of 6.11.1974 which is alleged to be illegal on the ground of its being result of fraud and undue influence hence prayed that it is liable to be set aside being inopertive qua the rights of the plaintiff. The plaintiff claims that she is owner in possession of the suit land and the estate left by her husband. Consequently, the plaintiff has prayed for declaring the alleged Will null and void and further to restrain the defendants from causing interference in the suit land in the manner or in case the defendants succeeds in taking forcible possession of the suit land or part thereof, a decree for possession be also passed.

3. The defendants contested the suit and filed written statement, wherein they have taken preliminary objections qua maintainability, cause of action, limitation and estoppel. On merits, it has been pleaded that Sh. Chhajju Ram during his life time had executed a valid Will in their favour and he died on 5.2.1992. The Will was stated to have been executed out of his free volition as the defendants have been taking care of Chhaju Ram during his life time. The Will which was stated to have been executed in the year 1975 thus is claimed by the defendants to have been executed by the testator in a sound disposing mind and thus after his death on the strength of the Will defendants have succeeded to the estate of said late Sh. Chhajju Ram. In respect of the attestation of the mutation, it is submitted that the said document was also attested in the presence of the general public and therefore, the plaintiff has no right whatsoever in the estate left behind by Chhajju Ram and prayed that the suit be dismissed.

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

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

1. Whether the plaintiff is owner in possession of the suit property including abadi denoted by the letters ABCDEF in site plan, as alleged? OPP
2. Whether the Will in favour of defendants qua the estate of Chhajju is a result of fraud and undue influence and whether the mutation sanctioned on its basis in favour of defendants qua estate of Chajju is wrong, illegal and void, as alleged? OPP
3. Whether the plaintiff is entitled to the relief of injunction, as prayed for? OPP
4. Whether the plaintiff is entitled to the relief of possession in alternative, as alleged? OPP
5. Whether suit is within time? OPP
6. Whether suit is not maintainable in the present form? OPD
7. Whether the act and conduct of plaintiff is bar to the suit? OPD
8. Whether deceased Chhajju Ram executed valid will in favour of defendants qua his estate on 16.11.1974 in sound state of mind and whether defendants are owners in possession of suit property on the basis of Will? OPD
9. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiff. In an appeal, preferred therefrom before the learned first Appellate Court by the appellants/defendants, the first Appellate Court dismissed their appeal and affirmed the findings recorded by the learned trial Court.

7. Now the defendants/appellants herein 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 13.11.2003, this Court, admitted the appeal instituted by the defendants/appellants against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

a) Whether the suspicious circumstances relied upon by the two Courts below in declaring the impugned will Ex.DW2/A as invalid are suspicious circumstances surrounding the execution of the said Will and, if so, whether the suspicious circumstances have been satisfactorily explained?

Substantial question of Law No.1:

8. On demise of Chhajju Ram his estate opened for succession. On the anvil of a testamentary disposition of deceased testator Chhajju Ram mutation of inheritance qua his estate stood attested on 14.8.1992 in favour of the defendants by the Revenue Officer concerned. The learned counsel appearing for the appellant has contended with vehemence before this Court of with the plaintiff not stepping into the witness box for proving the averments constituted therein embodying the factum of the testamentary disposition of deceased Chhajju Ram comprised in Ex.DW2/A standing shrouded with suspicious circumstances, it was unwarranted for both the learned Courts below to proceed to underscore in their respective decisions, the prevalence of suspicious circumstances surrounding the execution of Ex.DW2/A. He contends of hence the suspicious circumstances, if any, surrounding the execution of Ex.DW2/A as stood marshaled ipso facto at the mere *ipse dixit* of both the learned Courts below for theirs thereupon concomitantly concluding of with its propounders failing to dispel the aura of suspicion gathering around the execution of Ex.DW2/A, not holding any vigour. However, the aforesaid submission addressed before this Court by the learned counsel appearing for the appellants ought at the out set suffer the fate of its standing axed as even in the absence of the plaintiff not stepping into the witness box to prove the apposite averments encompassing the purported suspicious circumstances surrounding the execution of Ex.DW2/A, the judicial conscience of Courts of law when stood beset with, on available material adduced therebefore in purported display of falsity ingraining Ex.DW2/A, an obstacle, to pronounce upon its valid and due execution by the deceased testator, it was incumbent upon its propounders to dispel the aura of suspicion surrounding Ex.DW2/A.

9. Be that as it may, even if the plaintiff had not stepped into the witness box to prove the averments embodying the purported suspicious circumstances surrounding the execution of Ex.DW2/A, for hence belittling the factum of its valid and due execution by the deceased testator yet the apposite suspicious circumstances as stood constituted in the purported falsities ingraining the recitals occurring in Ex.DW2/A, falsities whereof upsurged on both the learned Courts below alluding to the evidence adduced therebefore, any allusion thereto by them, is a legally justifiable concert on their part to satisfy their judicial conscience qua the factum of its valid and due execution by the deceased testator yet apart therefrom this Court is compatibly enjoined with a solemn obligation to ascertain by gauging from the apt material, whether suspicious circumstances, if any, which stood culled out by both the learned Courts below from the evidence available therebefore, ingraining the execution of Ex.DW2/A for hence theirs nullifying the execution of Ex.DW2/A holding sway with this Court.

10. At the outset, it is imperative to allude to the factum of Ex.DW2/A standing executed on 6.11.1974 and on its on the very same day standing presented for besides its standing accepted for registration by the Registering Officer concerned. The apposite statutory para meter enjoining substantiation by adduction of cogent evidence for a “Will” being construable to be validly and duly executed is of the deceased testator standing proven by any of the attesting witnesses thereto to either thumb mark it or append his signatures thereon in the presence of marginal witnesses thereto, besides of emphatic evidence standing adduced in pronouncement of the marginal witnesses thereto after theirs seeing the deceased testator append

his thumb impressions or his signatures thereon, theirs proceeding to in his presence append thereon their respective signatures or their respective thumb impressions. It is not necessary for each of the attesting witnesses to a testamentary disposition, to step into the witness box, in proof of the deceased testator embossing his thumb impressions thereon in their respective presence or his appending his signatures on the relevant testamentary disposition in their respective presence nor also both the marginal witnesses to a testamentary disposition are enjoined to step into the witness box to lend further proof qua the factum of theirs respectively in the presence of the deceased testator embossing their respective thumb impression or theirs appending their respective signatures thereon. Contrarily, under law, the deposition of any of the marginal witnesses to a testamentary disposition commands legal sway in proof of the valid and due execution of a testamentary disposition preeminently when he in his deposition makes striking underscorings therein in satiation of the statutory ingredients referred to hereinabove. Even though, one of the marginal witnesses to Ex.DW2/A, namely, Hari Ram stepped into the witness box whereat he with unequivocal vigour bespoke of the deceased testator Chhajju Ram embossing in his presence his thumb impression thereon besides, in the presence of another marginal witness thereto, namely, Jagdish Ram whereafter both, he and Jagdish Ram in the presence of deceased Chhajju Ram appended their respective signatures thereon, whereafter he testifies of the deceased testator accompanied by both the marginal witnesses aforesaid to Ex.DW2/A, proceeded to the office of the Sub Registrar concerned whereat it stood presented for registration by the deceased testator before him, who on making the requisite inquiry from the deceased testator Chhajju Ram qua his voluntariness in executing Ex.DW2/A besides on his explaining to him the contents of Ex.DW2/A, contents whereof stood acquiesced by deceased testator Chhajju Ram, whereafter the latter in the presence of the Sub Registrar embossed his thumb impression on Ex.DW2/A, embossing thereon by deceased testator Chhajju Ram of the thumb impression stood succeeded by both Hari Ram and Jagdish Ram, marginal witnesses thereto appending their respective signatures thereon in the presence of the Sub Registrar concerned besides in the presence of deceased testator, testification whereof of DW-2 does constitute a formidable evidence for wresting an invincible conclusion of the apposite statutory para meter enshrined in Section 63 of the Succession Act, provisions whereof stand extracted hereinafter, standing proven for hence sequeling an inference of Ex.DW2/A standing proven to be duly and validly executed. Provisions of Section 63 of the Succession Act read as under:-

> **"63. Execution of unprivileged Wills** :- Every testator, not being a soldier employed in an expedition or engaged in actual warfare, 1 [or an airman so employed or engaged,] or a mariner at sea, shall execute his Will according to the following rules.(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction;
>
> (b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will;.
>
> (c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

Nonetheless, the learned first Appellate Court dispelled the efficacy of Ex.DW2/A on the score of (a) DW Hari Ram not belonging to the same Panchayat whereat the deceased testator held his residence; (b) Jagdish Ram despite surviving at the time contemporaneous to the recording of the deposition of DW Hari Ram, his not stepping into the witness box. Both the aforesaid reasons ascribed by the learned first Appellate Court to dis-impute sanctity to Ex.DW2/A hold no clout unless evidence stood adduced by the plaintiff connotative of DW Hari Ram not holding any intimacy or acquaintance with the deceased testator. However, the aforesaid evidence is amiss.

Contrarily, with DW Hari Ram in his deposition making ad nauseam echoings of his holding a close acquaintance with the deceased testator, echoings whereof acquire tenacity arousable from no evidence in rebuttal thereto standing adduced, whereupon hence an inference stand ignited of the deceased testator construing DW2 Hari Ram to be his confidante hence when the association of a marginal witnesses by the deceased testator qua his testamentary disposition hinges upon trust reposed by the deceased testator in them dehors the factum of theirs residing elsewhere than within the domain of the Panchayat wherein the deceased testator held his estate, as a corollary, when DW2 Hari Ram enjoyed the confidence and trust of the deceased testator, the mere factum of DW-2 Hari Ram not belonging to the same Panchayat whereat the deceased testator held his residence was a meritless ground for the Courts below for dispelling the efficacy of his testimony preeminently when he has with vividty underlined therein qua satiation of the statutory para meters enshrined in Section 63 of the Succession Act standing begotten whereupon hence a conclusion of Ex.DW2/A standing clinchingly proven to be validly and duly executed is drawable. Since, law does not enjoin upon a propounder of a testamentary disposition to lead in evidence both the marginal witnesses thereto, it was insagacious for the learned first Appellate Court to discount the legal efficacy of Ex.DW2/A upon a legally emaciated count of the other marginal witness thereto not stepping into the witness box to prove the factum of its valid and due execution.

11. Be that as it may, both the marginal witnesses to Ex.DW2/A provenly accompanied the deceased testator to the office of Sub Registrar concerned whereat deceased testator Chhajju Ram presented for registration before the Sub Registrar concerned his testamentary disposition comprised in Ex.DW2/A, prior whereto of the Registering Officer concerned accepting it for registration provenly made an inquiry from the deceased testator qua his comprehensibility of the recitals occurring in Ex.DW2/A besides qua its standing voluntarily executed by him, on successful completion whereof provenly deceased Chhajju Ram in the presence of the Registering Officer concerned embossed his thumb impression thereon whereafter both, Hari Ram and Jagdish Ram, the marginal witnesses to Ex.DW2/A in presence of both, the deceased testator and in the presence of the Registering Officer concerned appended their respective signatures thereon, proven facts aforesaid when magnifyingly articulate the factum of the deceased testator voluntarily making Ex.DW2/A besides, with each of the marginal witnesses thereto inconsonance with the apt statutory mode both succeeding its execution by the deceased testator also in the presence of the Registering Officer concerned appending their respective signatures thereon whereupon a firm capitalization to an inference of Ex.DW2/A standing proven to be validly and duly executed by deceased testator Chhajju Ram, is drawable, in sequel, when clinching proof qua its standing duly and validly executed by the deceased testator stands evinced, it was inapt for both the learned Courts below to overwhelm its efficacy on the score of cuttings existing on the reverse of Ex.DW2/A, cuttings whereof remaining uninitialed by the Registering Officer concerned, stood construed by them to render Ex. DW2/A to be not an instrument executed by deceased testator Chhhajju Ram rather by one Lachhmi Nand whereupon hence an aura of illegality stood fastened by them qua the valid and due execution of Ex.DW2/A, whereas, given the factum of the front of Ex.DW2/A provenly containing the thumb impression of the deceased testator besides of each of the marginal witnesses thereto, also when its reverse held likewise, any inference drawn by the learned Court below on the mere occurrence therein by inadvertence of the name of one Lachhmi Nand, of the latter hence being its executor, if also stands countenanced by this Court would render nugatory the proven recitals existing on the front of Ex.DW2/A besides,the proven signatures thereon of the deceased testator and of the marginal witnesses also would lead to a unwarranted sequel of this Court discounting the proven signatures of the aforesaid existing on its reverse. Apart therefrom, this Court derives an alike conclusion vis-a-vis the conclusion drawn by the learned courts below qua the facet aforesaid it would for reiteration blunt the effect of clinching evidence analysed hereinabove as exists hereat in proof of its valid and due execution.

12. Recitals occurs in Ex.DW 2/A of deceased testator Chhajju Ram standing goaded by services rendered to him by the legatees of Ex.DW2/A to hence bequeath his estate in their

favour. However, both the learned Courts below on the anvill of DW-1 Ram Singh being aged eight years at the time contemporaneous to the execution of Ex.DW2/A besides his brother Bishan Dass serving in the army also of DW-1 omitting to unravel with specificity in his testimony qua the nature of services rendered by him to deceased testator Chhajju Ram, concluded therefrom of the motivating factor aforesaid for the legator of Ex.DW2/A to execute it when remained unsubstantiated, it hence ingraining Ex.DW2/A with an element of falsity whereupon both the learned Courts below disimputed sanctity qua its standing proven to be validly and duly executed. However, the aforesaid ground as meted by both the learned Courts below to disimpute sanctity qua the aforesaid recitals occurring in Ex.DW2/A appears to stand engendered by theirs making short shrift of the latter part of his testimony wherein he unravels of the plaintiff and the deceased testator uptill the demise of the latter residing in his dwelling whereat also his father resides with him. Embodiments aforesaid in his testimony when remained unrepulsed during the course of his standing held to cross-examination by the learned counsel for the plaintiff, fillips an inference of from the date of execution of Ex.DW2/A till the demise of deceased testator Chhajju Ram, both the latter and his wife residing in the homestead of DW-1 whereat he along with his father reside also therupon a concomitant inference stands derived of the Courts below holding a stricto senso view of the incapacity of DW1 besides his brother arising from the respective minority of DW-1 besides of his brother serving in the army, to hence serve the deceased testator, rendering the aforesaid motivating factor to hence stand ingrained with a falsity whereas they undermined the effect of the evident fact of deceased testator Chhajju Ram living in the house of DW-1 whereat his father resided with him, factum whereof would awaken an inference of vicarious services standing rendered to the deceased testator by the respective legatees of Ex. DW2/A through their father. Even otherwise, the learned Courts below appear to overlook the proven factum of the deceased testator along with his wife residing in the house of DW1 upto his demise, prolonged stay whereof of the deceased testator thereat ipso facto is connotative of his standing pleased with the services rendered by the legatees even through their father, dehors the incapacity, if any, of the legatees of Ex. DW2/A at the time contemporaneous to its execution by deceased testator Chhajju Ram, to purvey him their personal services nor it was apt for both the learned Courts below to insist upon strict proof of rendition of personal services by the legatees of Ex.DW2/A upon the deceased testator at the time contemporaneous to its execution when otherwise Ex.DW2/A stands proven to be validly and duly executed by him, predominantly when any insistence thereof would erode the effect of the desire of the deceased testator to bequeath his estate in their respective favour also would curtail the aspiration of the deceased testator manifested in his proven testamentary disposition besides would overwhelm the fact of Ex.DW2/A standing unrevoked by the deceased testator since its execution in the year 1974 upto his demise, factum whereof disrobes the falsity, if any, of the recital embodied therein of rendition of services by the beneficiaries of Ex.DW2/A towards deceased testator Chhajju Ram motivating him to execute it in their favour. The conclusion drawn by both the learned Courts below qua with no clinching evidence/proof standing adduced qua the rendition of personal services by the legatees of Ex.DW2/A towards deceased testator Chhajju Ram hence rendering Ex.DW2/A to stand shrouded with suspicious circumstances rendering hence its not standing proven to be validly and duly executed, appears to germinate from theirs omitting to hold a wholesome analysis of the testimony of DW-1 besides theirs overlooking evidence aforesaid alluded to hereinabove wherefrom an inference contrary to the one as stand drawn by the learned courts below, stands drawn by this Court. Further both the learned Courts below palpably appear to draw an obviable pedantic interpretation qua the recitals in Ex.DW2/A qua rendition of personal services by the legatees towards the deceased testator ingratiating the latter, any interpretation whereof, would frustrate the workability of evidence as stand adduced in satiation of the apposite para meter enshrined in Section 63 of the Succession Act whereupon this Court has construed it to be proven to be duly and validly executed by the deceased testator. Consequently, the aforesaid ground does not constitute any suspicious circumstances nor also it stood enjoined upon its propounders to dispel it.

13. The learned counsel appearing for the respondent has contended with vigour of with DW-1 in his cross-examination making a communication therein of apart from the income rearable from the estate of the deceased testator, Bhambo Devi not holding any other source of income for maintaining herself, renders the recitals in Ex.DW2/A of the deceased testator disinheriting her on hers holding ornaments besides sufficient cash to maintain herself, to stand ingrained with falsity, whereupon no sanctity is imputable to Ex.DW2/A. However, the solitary acquiescence by DW-1 qua the facet aforesaid would not erode Ex.DW2/A of its solemnity,especially when there exists a manifestation in Ex. P-1 of the mortgaged estate of the deceased testator standing redeemed by the plaintiff on hers paying in the year 1992, mortgage money to the State of Himachal Pradesh. The factum of hers redeeming the mortgaged estate of deceased Chhajju Ram by hers defraying the mortgage money to the State of Himachal Pradesh is a sufficient personification of hers holding financial resources other than the income reared or rearable from the landed estate of the deceased testator. As a corollary recitals in Ex.DW2/A of hers holding ornaments besides sufficient cash for her survival, movable assets whereof constrained deceased testator Chhajju Ram to disinherit her, hold veracity. Consequently with veracity percolating the facet aforesaid constituted in Ex.DW2/A for the deceased testator hence standing goaded to disinherit the plaintiff obviously renders the bequest constituted in Ex.DW2/A to not acquiring any aura of suspicion.

14. Lastly, the learned counsel appearing for the respondent has contended of with the propounders/beneficiaries of Ex.DW2/A holding no direct lineage vis-a-vis the deceased testator as apparent from revelations occurring in the memo of parties of the apposite suit of the deceased testator standing fathered by Baisakhi whereas the defendants standing fathered by Natha Ram, ancestors whereof of both hence not holding any affinity in lineage, rendering hence the relevant bequest comprised in Ex.DW2/A to be unnatural. However, with DW-1 deposing of the deceased testator holding a relationship with him and his brother as their uncle (Taya), factum whereof remains uneroded, does fillip a conclusion of even if, there was no direct affinity in lineage of the propounders vis-a-vis the executor of Ex.DW2/A yet it appears of there being an indirect lineage vis-a-vis both the executor and the legatees of Ex.DW2/A. Also the proven factum of the deceased testator living in the house of DW-1 since the execution of Ex.DW2/A uptill his demise holds sway with this Court to conclude of the legatees of Ex.DW-2/A holding a family relationship with the deceased testator, dehors the factum of their respective ancestors not holding any direct affinity in lineage.

15. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court as also by the learned trial Court are not based upon a proper and mature appreciation of evidence on record. Accordingly, the substantial question of law stands answered in favour of the defendants/appellants and against the plaintiff/respondent. Consequently, the instant appeal is allowed and the judgments and decrees rendered by both the learned Courts below are set aside. In sequel, the suit of the plaintiff is dismissed. No order as to the costs. All pending applications also stand disposed of. Records be sent back forthwith.

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

Capt. H.C. Chandel …Appellant.
Versus
State of H.P. and others …Respondents.

LPA No. 145 of 2015
Decided on:18.07.2016

Constitution of India, 1950- Article 226- Respondent admitted in their reply that bye laws were made but the water was not supplied due to objections of the villagers - water supply scheme had

been constructed and water would be supplied to the petitioner - in view of this reply, petition allowed and respondent directed to supply water and to do the needful. (Para 3-5)

For the appellant: Appellant in person.

For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan, Mr. Romesh Verma & Mr. M.A. Khan, Additional Advocate Generals, and Mr. Kush Sharma, Deputy Advocate General, for respondents No. 1 and 2.
Mr. Vivek 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 judgment and order, dated 13th August, 2015, made by the Writ Court/learned Single Judge in CWP No. 532 of 2014, titled as Capt. H.C. Chandel s/o Late Anant Ram versus State of H.P. & others, whereby the writ petition filed by the appellant-writ petitioner came to be dismissed (for short "the impugned judgment").

2. Heard. Perused.

3. It appears that the appellant-writ petitioner has himself drafted the writ petition and must not be knowing the niceties of law.

4. Respondents No. 1 and 2 have filed the reply. It is apt to reproduce paras 3 & 4 of the reply on merits herein:

> *"3&4. That in reply to these paras it is stated that there is no residential house/Farm House of the petition at Jammu-ki-Galani except a temporary shed. The petitioner is residing in village Rauni as per his own statement therefore, the respondent is not bound to provide under the rule any water to a person who does not own residential house at a particular site or does not reside there. In fact, the department has already provided him water connection at Village Rauni where he residing. However, a provision for laying pipe nearby the cow shed of petitioner was provided in the scheme during February, 2008 and the pipes were also laid, yet the villagers of Daruban did not allow connecting the line with the existing water tank and the source by saying that the petitioner does not reside there and raised dispute. It is further stated that various representations/ recommendations has been received from the petitioner through Hon'ble IPH Minister and Gram Panchyat to provide water connection to the petitioner and various efforts were made by the officials of the department to sort out the dispute yet, due to the aforesaid reason the villagers are not allowing to connect the pipe line. It may further be stated that the department has commissioned a lift water supply scheme LWSS Mul Matiyana and a provision to connect the area of Jamu-ki-Galani from this water supply scheme. The copy of site plan of old and new proposed is annexed as Annexure R-I/A. The water supply scheme is nearly completion and is likely to be inaugurated in the near future. Therefore, the petitioner shall be provided water facility from this scheme. However, the water connection shall be released only under the Rules provided he fulfill the criteria and complete the codal formalities but the same shall not in any manner be provided free of costs as claimed by the petitioner provided he apply for the same under rules."*

5. In view of the above, the appellant-writ petitioner has made out a case for grant of writ of mandamus commanding the respondents-authorities to do the needful, though not prayed for. The Writ Court can grant appropriate relief.

6. Accordingly, the respondents-authorities are directed to do the needful within four weeks.

7. Having said so, the impugned judgment is modified, as indicated hereinabove, and the appeal is disposed of. Pending applications, if any, are also disposed of.

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

H.P. State Forest Corporation .....Appellant/Plaintiff.
Versus
Sh. Narain Singh ....Respondent/defendant.

RSA No. 423 of 2007.
Reserved on : 11th July, 2016.
Decided on : 18th July, 2016.

Indian Contract Act, 1872- Section 56- Plaintiff invited tenders from labour supply mates for extraction of resin and carriage of the same up to road side Depot- tender of the defendant was accepted and as per agreement 354 Qtls. of pure resin was to be extracted from 10,106 blazes at the rate of Rs. 580 per Qtls.- defendant extracted 249.710 Qtls. pure resin and there was shortage of 104.290 Qtls.- relaxation of 67.830 Qtls. of resin was granted – plaintiff is entitled to Rs. 2,44,447/- - defendant denied the claim and filed a counter claim for the recovery of Rs. 79,535/-- suit was dismissed by the trial Court and counter claim was decreed- an appeal was preferred, which was dismissed- held, in second appeal that it was admitted in Ex.PW-4/A that there was a heavy rain fall due to which target was not completed- heavy rain frustrated the defendant to achieve the contractual target- learned Trial Court had rightly dismissed the suit- appeal dismissed. (Para-8 to 12)

For the Appellant: Mr. Bhupender Pathania, Advocate.
For the Respondent: Mr. G.R. Palsra, Advocate.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge.

The instant Regular Second Appeal stands directed by the plaintiff/appellant against the impugned rendition of the learned Additional District Judge, Mandi whereby he dismissed the appeal of the plaintiff/appellant herein and affirmed the judgment and decree rendered by the learned Civil Judge (Senior Division), Mandi, District Mandi, H.P., whereby the latter Court dismissed the suit of the plaintiff for recovery of Rs.2,44,453, whereas, decreed the counterclaim of the defendant for recovery of a sum of Rs.99,704/- along with interest @ 6% per annum from the date of filing of the counter claim till the realization of the decretal amount. The plaintiff/appellant herein stands aggrieved by the judgment and decree of the learned Additional District Judge, Mandi. Its standing aggrieved, it has therefrom preferred the instant appeal before this Court for seeking from this Court an order reversing the findings recorded therein.

2. Briefly stated the facts of the case are that the plaintiff is independent wing of Forest Department of Himachal Pradesh, which deals in timber, charcoal, resin and fuel wood. The plaintiff invited tenders from labour supply mates for setting up crop extraction of resin and carriage of the same upto road side Depot, for forest lot No.33/97, Jogindernagar for the year 1997. The tender filled in by the defendant was accepted and the resin extraction work was allotted to the defendant vide agreement of 20.09.1997 which was signed by both the parties. As

per agreement a target of 354 Qtls, pure resin, was fixed to be extracted from 10,106 blazes at the rate of Rs.580 per Qtls. The defendant deposited earnest money of Rs.15,000/- by way of FDR of Himachal Gramin Bank and pledged the same in favour of the plaintiff. As per agreement all the necessary articles were provided to the defendant and trees were also handed over to him. Though the defendant started work on 29.3.1997, but his work was not satisfactory. He was also asked to speed up the work. The defendant during entire period extracted only 249.710 Qtls. pure resin as against the target of 354 Qtls. as agreed between the parties. Thus the defendant extracted 104.290 Qtls. less resin than the target and the defendant caused loss of Rs.3,44,157/- to the plaintiff. On the objection of the defendant the Higher Authority of the plaintiff gave relaxation of 67.830 Qtls. of resin on account of heavy rain and unfavourable circumstances. Thus, the plaintiff is entitled to recover the amount of Rs.2,44,447/- after deducting the amount of Rs.99,704/-, which is with the plaintiff. Hence the suit.

3. The defendant contested the suit and he also filed counter claim against the plaintiff for the recovery of Rs.99,704/-. In the written statement, the defendant has taken preliminary objections qua maintainability, limitation and estoppel. On merits, he averred that the agreement was in the form of Cyclostyled already prepared by the plaintiff and only signatures of the defendant were obtained on the same which was not readover and explained to him. Thus, the terms and conditions of the agreement are not binding upon him. He further averred that the target of extraction of resin could not be achieved due to heavy rain fall and the plaintiff has already recommended the case of the defendant for waving off the extraction. Even cost of the resin has been wrongly worked out at exorbitant rate of Rs.3300 per Qtls. The defendant refuted the case of the plaintiff and prayed for the dismissal of the suit.

4. In the counter claim the defendant alleged that balance of Rs.79,535/- is still out standing which is liable to be paid to the defendant by the plaintiff besides this he is also entitled to the refund of earnest money of Rs.20,169/-. Thus, the defendant is entitled to recovery of a sum of Rs. 99,704 with interest at the rate of 18% per annum thereon. The defendant prayed that the suit of the plaintiff be dismissed and his counter claim be decreed.

5. The plaintiff/appellant herein filed replication to the written statement of the defendant/respondent as well as written statement to the counter claim instituted by the defendant, wherein, he denied the contents of the written statement as well as of counter claim besides re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether the plaintiff is entitled to recover the suit amount with interest, if so to what extent? OPP
2. Whether the plaintiff has no locus standi to file the present suit? OPD
3. Whether the plaintiff has no cause of action? OPD
4. Whether the suit is barred by limitation? OPD
5. Whether the plaintiff is estopped by his own act and conduct from filing the suit? OPD
6. Whether the defendant is entitled to recover a sum of Rs.99,704/- with interest from the plaintiff, as claimed in the counter claim, as alleged? OPD
7. Relief.

7. On an appraisal of the evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiff whereas it decreed the counter claim instituted by the defendant against the plaintiff/appellant herein. In an appeal, preferred therefrom by the plaintiff/appellant herein, the learned first Appellate Court dismissed its appeal.

8. Now the plaintiff/appellant has 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 28.03.2008, this Court, admitted the appeal instituted by the plaintiff/appellant against the judgment and decree, rendered by the learned First Appellate Court, on the hereinafter extracted substantial question of law:-

a) Whether the Courts below have erred in law in concluding that the agreement Ex. PW4/A had become impossible and become void when it became impossible. Have not the Courts below wrongly construed the provisions of Section 56 of the Indian Contract Act and have thereby wrongly applied the same in favour of the respondent/defendant. Had the agreement Ex.PW4/A becoming impossible and whether there was sufficient evidence to prove that the agreement had become impossible?

Substantial question of Law No.1:

9. Uncontrovertedly, the defendant/respondent herein omitted to abide by the terms of allotment of the apposite work made in his favour by the plaintiff/appellant. The apposite breach occurred in the defendant/respondent herein not meteing the requisite target enjoined to be accomplished by the relevant contract by him, breach whereof is contended to stand occasioned by heavy rain fall occurring in the area whereat the relevant work stood allotted to him. The factum of occurrence of heavy rain fall in the area whereat the relevant work stood allotted to the defendant/respondent herein by the plaintiff/appellant herein stands displayed in Ex.DW4/A. Recitals qua the facet aforesaid occurring in Ex.DW4/A stand corroborated by PW-2 and PW-6. Given the occurrence of heavy rainfall in the area whereat the relevant work stood allotted for execution to the defendant by the plaintiff obviously deterred him to mete the relevant target imposed upon him in agreement Ex.PW4/A. Also with PW-6 admitting of on his visiting the relevant site his noticing of the defendant employing sufficient manpower in consonance with the terms and conditions of agreement Ex.PW4/A, does give leverage to an inference of the defendant not dereliciing in achieving the target imposed upon him under agreement Ex.PW4/A rather the evident fact of occurrence of heavy rainfall in the relevant area deterring him to achieve the target imposed upon him under Ex.PW4/A.

10. Be that as it may, even if, in Ex.PW4/A there occurs no recital of on occurrence of heavy rainfall whereupon the accomplishment by the defendant of the relevant contractual target is rendered impossible, mandatory pecuniary liability towards the plaintiff standing exculpated, nonetheless, the evident fact of occurrence of heavy rainfall in the relevant area, factum whereof is a *vis major,* occurrence whereof supervenes the execution of Ex.PW4/A imminently frustrated the accomplishment by the defendant of the relevant contractual target. Even if, the factum aforesaid remained unembodied in Ex.PW4/A nonetheless with Section 56 of the Indian Contract Act, 1872 (hereinafter referred to the "Act"), which stands extracted hereinafter, enshrining the doctrine of frustration of contracts, frustration whereof arises from occurrence of events supervening the recording of the relevant contract, enjoins or warrant its workability hereat:-

> "56. **Agreement to do impossible act**.- An agreement to do an act impossible in itself is void.
>
> Contract to do act afterwards becoming impossible or unlawful- A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.
>
> Compensation for loss through non-performance of act known to be impossible or unlawful- Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise."

Imperatively, when hereat the frustrating supervening event since the execution of Ex.PW 4/A is the aforereferred *vis major,* occurrence whereof frustrated the defendant to achieve the relevant

contractual target enjoined to be accomplished by him, renders its standing attractable hereat dehors the recitals inconsonance therewith standing un-enunciated in Ex.PW4/A, preeminently when statutory postulations even when remain unrecited in the relevant agreement, their workability when on evident material as exists hereat in display qua their awakening stands enlivened , renders their apposite invocation hereat to be not amenable to face the ill fortune of it being blunted and benumbed. Consequently, while galvanizing the provisions of Section 56 of the Act, the inevitable sequel is of with evident material in satiation thereof existing hereat obviously constrain this Court to conclude of the apposite supervening *vis major* frustrating the execution to the fullest by the defendant the obligations cast upon him under Ex.PW4/A.

11. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court as well as by the learned trial Court stand based upon a proper and mature appreciation of the evidence on record. While rendering the findings, both the learned Courts below have not excluded germane and apposite material from consideration. Accordingly, the substantial question of law stands answered in favour of the defendant/respondent and against the plaintiff/appellant.

12. Since, no appeal stands preferred hereat by the plaintiff/appellant against the concurrently recorded judgments and decrees of both the learned Courts below whereby they decreed the counterclaim instituted thereat by the defendant/respondent herein nor any substantial question of law in consonance therewith stands either framed nor obviously thereupon the appeal of the plaintiff/appellant herein stands admitted, hence renders the renditions of both the learned courts below, whereby they decreed the counterclaim instituted by the defendant/respondent herein against the plaintiff/appellant herein to not warrant any interference by this Court.

13. In view of above discussion, the present Regular Second Appeal is dismissed. In sequel, the judgements and decrees rendered by both the learned Courts below are maintained and affirmed. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.

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

IndusInd Bank Ltd. & another ......Petitioners.

Versus

Ramesh Kumar ....Respondent.

CMPMO No. 41 of 2016
Reserved on: 13.7.2016.
Decided on: 18.7.2016.

Arbitration and Conciliation Act, 1996- Section 8- Respondent entered into an agreement with the petitioner, whereby loan of Rs. 13,30,000/- was sanctioned along with the finance charges of Rs. 3,69,740/- - loan was repayable in 46 EMIs- respondent defaulted in the payment of the installments- respondent instituted a suit for restraining the petitioner from taking the forcible possession- petitioner filed an application for referring the dispute to Arbitrator - application was dismissed by the trial Court- held, that agreement specifically provided that all disputes, differences and/or claims arising out of or touching upon the Agreement are to be settled by arbitration – non-payment of the loan would be a dispute arising out of the agreement- once it was brought to the notice of the Court that its jurisdiction had been taken away by a special statue, the civil court should first see whether there is ouster of jurisdiction or not- petition allowed and the order of trial Court set aside. (Para-4 to 9)

Case referred:
M/S Sundram Finance Limited and another vs. T. Thankam, AIR 2015 SC 1303

For the petitioners: Mr. Ashwani Kaundal, Advocate.
For the respondent: Mr. Jagat Paul, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This petition is instituted against the impugned order dated 16.12.2015, rendered by the learned Civil Judge (Jr. Divn.) Court No. 4, Shimla, H.P., in CMA in Civil Suit No. 53-1 of 2015.

2. Key facts necessary for the adjudication of this petition are that the respondent has entered into loan agreement with the petitioners whereby a sum of Rs. 13,30,000/- was sanctioned as loan along with the finance charges of Rs. 3,69,740/- vide loan agreement dated 21.8.2013. The amount was repayable by the respondent in 46 EMIs. The respondent has made number of defaults in the payment of monthly installments and further failed to perform its part of the obligation towards loan agreement. The respondent instituted a suit against the petitioners for permanent prohibitory injunction for restraining the petitioners from taking the forcible possession of the vehicle in question. The petitioners have moved an application before the learned trial Court under Section 8 read with Section 5 of the Arbitration and Conciliation Act, 1996 to refer the dispute to Arbitral Tribunal in view of clause23 of the loan agreement. The learned Civil Judge (Jr. Divn.) Court No. 4, Shimla dismissed the application on 16.12.2015. Hence, this petition.

3. I have heard counsel for the parties and gone through the impugned order dated 16.12.2015, carefully.

4. The loan agreement was entered into between the parties, as noticed hereinabove, on 21.8.2013. The relevant portion of clause 23.1 reads as follows:

> "All disputes, differences and/or claim arising out of or touching upon this Agreement whether during its subsistence or thereafter shall be settled by arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996, or any statutory amendments thereof and shall be refereed to the sole Arbitration of an Arbitrator nominated by the lender. The award given by such an Arbitrator shall be final and binding on all the parties to this agreement."

5. The application filed by the petitioners was not contested by the respondent and despite that the application preferred under Section 8 read with Section 5 of the Arbitration and Conciliation Act, 1996 has been dismissed by the learned trial Court.

6. It is evident from the language of the agreement, as quoted hereinabove, that all disputes, differences and/or claims arising out of or touching upon the Agreement whether during its subsistence or thereafter are to be settled by arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996. The learned trial Court has erred in law by not considering the plain language of the arbitration clause. The non-payment of the loan amount, as agreed between the parties, would amount to disputes, differences and/or claim arising out of or touching upon this Agreement within the ambit of clause 23 of the agreement. The words "disputes, differences or claims" have wider meaning. The parties voluntarily have agreed upon to refer the dispute to the arbitration. The re-payment of the loan is the essence and soul of the loan agreement.

7. It has come on record that the respondent was not paying the installments regularly. The learned trial Court has further erred in law by making observation that the

petitioners could take legal recourse to recover the same in the event of default of such liability. The rights of the parties are to be determined as per the loan agreement, more particularly, clause 23(1) of the loan agreement.

8. The learned trial Court has also not taken into consideration the law laid down by the Hon'ble Supreme Court in the cases of P. Anand Gajapathi Raju and others vs. P.V.G. Raju (Dead) and others (2000) 4 SCC 539, Hindustan Petroleum Corp. Ltd. vs. Pinckcity Midway Petroleum (2003) 6 SCC 503, Manager Magma Leasing & Finance Ltd. & anr. vs. Potluri Madhavilata 2009 (10) SCC 103, Sukanya Holdings (P) Ltd. vs. Jayesh Pandya and another (2003) 5 SCC 531 and Orix Auto Finance (India) Ltd. vs. Jagmander Singh and another (2006) 2 SCC 598. These judgments have been considered by their lordships of the Hon'ble Supreme Court in the case of ***M/S Sundram Finance Limited and another vs. T. Thankam,*** reported in ***AIR 2015 SC 1303.*** Their lordships have held that once an application in due compliance of Section 8 of the Arbitration Act is filed, the approach of the civil court should be not to see whether the court has jurisdiction. Once it is brought to the notice of the court that its jurisdiction has been taken away in terms of the procedure prescribed under a special statue, the civil court should first see whether there is ouster of jurisdiction in terms or compliance of the procedure under the special statute. The general law should yield to the special law. In such a situation, the approach shall not be to see whether there is still jurisdiction in the civil court under the general law. In this case also, the suit for injunction was filed by the respondent with prayer to restrain the first and second defendant institutions and their men from illegally taking away from the possession of plaintiff or her employee, or interfering with the use or causing damage to the car in the ownership and possession of the plaintiff by way of decree of injunction. Their lordships have held as follows:

> "15. Once an application in due compliance of Section 8 of the Arbitration Act is filed, the approach of the civil court should be not to see whether the court has jurisdiction. It should be to see whether its jurisdiction has been ousted. There is a lot of difference between the two approaches. Once it is brought to the notice of the court that its jurisdiction has been taken away in terms of the procedure prescribed under a special statue, the civil court should first see whether there is ouster of jurisdiction in terms or compliance of the procedure under the special statute. The general law should yield to the special law – generalia specialibus non derogant. In such a situation, the approach shall not be to see whether there is still jurisdiction in the civil court under the general law. Such approaches would only delay the resolution of disputes and complicate the redressal of grievance and of course unnecessarily increase the pendency in the court."

9. Accordingly, the petition is allowed. Order dated 16.12.2015 rendered by the learned trial Court is set aside. The learned trial Court is directed to pass fresh orders on the application filed by the petitioners under Section 8 read with Section 5 of the Arbitration and Conciliation Act, 1996, within a period of one month after the receipt of the certified copy of this judgment. Pending application(s), if any, shall stand disposed of.

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

Cr. Appeal No. 241/2011 with
Cr. Appeals No. 248 and 249/2011
Reserved on: July 14, 2016
Decided on: July 18, 2016

1. Cr. Appeal No. 241/2011

Rajesh Gupta …… Appellant

Versus

Central Bureau of Investigation …… Respondent

2. Cr. Appeal No. 248/2011
Vinay Singh Mehta …… Appellant
Versus
Central Bureau of Investigation …… Respondent
3. Cr. Appeal No. 249/2011
Diwan Chand …… Appellant
Versus
Central Bureau of Investigation …… Respondent

Indian Penal Code, 1860- Section 420, 409 and 120-B- **Prevention of Corruption Act, 1988-** Section 13(2)- R and V were working as Divisional Manager and Administrative Officer in the United India Insurance Company Limited- Government of Himachal Pradesh had taken a group personnel insurance policy from the company after inviting the quotations- Accused No.1 was working as an agent of the company- accused No. 2 and 3 had paid 10% commission to accused No. 1- Government of Himachal Pradesh had not taken service of any agent for taking the policy- accused had defrauded the company- accused were tried and convicted by the trial Court- held, in appeal that there is no reference of any brokerage/ commission in Memorandum for consideration of the Council of Ministers- United India Insurance Company was requested to furnish cover note and stamped receipt - Government had directly dealt with the Divisional Managers of Insurance Companies- accused No. 1 was not instrumental in the procurement of the premium and the payment of commission to him was illegal and unjustified- accused R and V were aware that accused was not entitled to commission and had issued cheque in favour of D- sanction was properly given by a person who was competent to remove the accused- prosecution case was proved beyond reasonable doubt- appeal dismissed. (Para-40 to 49)

Cases referred:
Central Bureau of Investigation vs. V.K. Sehgal and another (1999) 8 SCC 501
State by Police Inspector v. T. Venkatesh Murthy (2004)7 SCC 763
Ashok Tshering Bhutia v. State of Sikkim (2011) 4 SCC 402

For the appellant(s) : Mr. Anoop Chitkara, Advocate, for the appellant in Cr. Appeal No. 249/2011.
Mr. K.S. Banyal, Senior Advocate with Mr. Bhupender Thakur, Advocate, for the appellant in Cr. Appeal No. 248/2011
Mr. N.K. Thakur, Senior Advocate with Ms. Jamuna, Advocate, for the Appellant in Cr. Appeal no. 241/2011.

For the respondent : Mr. Ashok Sharma, Assistant Solicitor General of India, in all the appeals.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge:

Since all the appeals arise from the same judgment and common questions of law and facts are involved, all the appeals were taken up together for hearing and are being disposed of by this common judgment.

2. The present appeals have been instituted against Judgment dated 30.6.2011 rendered by the learned Sessions Judge (Special Judge), Shimla in Sessions Trial CC No. 3-S/7 of 2006, whereby appellants-accused (hereinafter referred to as 'accused' for convenience sake), who were charged with and tried for offences punishable under Sections 420, 409 and 120-B IPC and Section 13(2) of the Prevention of Corruption Act, 1988, have been convicted and sentenced to undergo rigorous imprisonment for a period of one year each and to pay a fine of Rs.5,000/- each

under Sections 420, 120-B IPC and Section 13 (2) of the Prevention of Corruption Act, 1988, and, in default of payment of fine, to further undergo simple imprisonment for two months each. Substantive sentence of imprisonment were ordered to run concurrently.

3. Case of the prosecution, in a nutshell, is that Rajesh Gupta and V.S. Mehta were working as Divisional Manager and Administrative Officer in the United India Insurance Company Limited. Government of Himachal Pradesh had taken a group personnel insurance policy (Ext. PW-31/U) from United India Insurance Company Limited for its 1,50,000 employees at the rate of Rs.2,00,000 per employee from 1.1.2005 to 31.12.2005. Total premium paid to the insurance company was Rs.1,36,50,000/-. Government of Himachal Pradesh had not taken services of a broker/agent for arranging insurance cover. Notice inviting quotations was issued to the public/private sector insurance companies. Twelve insurance companies including four public sector insurance companies had submitted quotations. Though the quotation of private sector company was found to be lowest but at the instance of NGO Federation, government had decided to allot the work to the public sector insurance companies. United India Insurance Company had negotiated with other three public sector insurance companies (National Insurance Company, New India Assurance Company and Oriental Insurance Company) and was nominated leader. Premium was to be shared in the ratio of 40:20:20:20 between the United India Insurance Company and three other insurance Companies. Accused Diwan Chand was working as an agent of United India Insurance Company. He had not dealt with the Government at any stage. Accused No.2 and 3 namely Rajesh Gupta and V.S. Mehta had paid 10% commission amounting to Rs.12,38,657/- on the premium of Rs.1,23,86,570/- to Diwan chand. Cheque in the sum of Rs.10,50,935/- Ext. PW-4/F was prepared by PW-7 Sushil Bhardwaj. The cheque was submitted to Sh. T.B. Negi, Assistant Manager. Shri T.B. Negi had signed the cheque. Since the amount of the cheque exceeded the authority of Sh. T.B. Negi, he made reference Ext. PW-7/A-1 dated 6.1.2005 to the Regional Office for second signatory of competent jurisdiction. V.S. Mehta had taken the cheque as also the reference from Shri T.B. Negi. Later, V.S. Mehta had signed the cheque as second signatory and had handed over the same to Diwan Chand. Diwan Chand presented the cheque with Canara Bank Branch Shimla on 6.1.2005. Amount of Rs.10,50,935/- was credited to account No. 4688 of the accused Diwan Chand on 7.1.2005 after deducting Rs.1,87,722/- as tax deducted at source. Accused No.1, 2 and 3 had entered into a criminal conspiracy to cheat the Government of Himachal Pradesh and the United India Insurance Company of Rs.12,38,657/-. V.S. Mehta had obtained blank cheques of his account No. 4688 from Diwan Chand. Blank cheques were encashed. FIR was registered. Matter was investigated by PW-40. Accused Rajesh Gupta had defrauded three other Insurance Companies of an amount of Rs.2,47,731/-. Admitted specimen signatures and handwritings of the accused were obtained by PW-40. These were sent to PW-23, T. Joshi. Sanction was obtained. Investigation was completed. Challan was put up in the Court after completing all the codal formalities.

4. Prosecution has examined as many as forty one witnesses to prove its case against accused. Accused were also examined under Section 313 CrPC. Their case was denial simpliciter. Accused were convicted by the learned trial Court as noticed herein above. Hence, these appeals.

5. Mr. K.S. Banyal, Mr. N.K. Thakur, learned Senior Advocates and Mr. Anoop Chitkara, Advocate, have vehemently argued that the prosecution has failed to prove its case against the accused.

6. Mr. Ashok Sharma, Assistant Solicitor General of India has supported judgment dated 30.6.2011.

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

8. Nalin Mahajan (PW-1) testified that he was posted as Research Officer, Finance Department, HP Secretariat, Shimla since 1997. He worked as Statistical Assistant from 1983 and from 1995 till 1997 as Technical Assistant in the same department. He was associated by the

CBI in the investigation of the case. Group Personal Accident Insurance Scheme was floated by the Government of Himachal Pradesh initially in the year 1997. National insurance companies approached the government at that time for introducing the scheme. Scheme was applicable to all the government employees including daily wagers, contractual employees and employees of Boards and Corporations. Scheme was introduced in 1997 for one year. However, in the year 1998, the scheme could not be renewed. It was discontinued and renewed in the year 2000 and it continued for that year and was discontinued in the year 2002. Thereafter, in the year 2004, negotiations with the Insurance Companies, scheme was introduced in the year 2005. Quotations were called from all nationalized and private insurance companies by the Additional Chief Secretary (Finance) vide letter dated 8.9.2004 Ext. PW-1/A. In response to the quotations Ext. PW-1/A, six insurance companies offered to float the scheme namely National Insurance Co. New Delhi, New India Assurance Company Limited, United India Insurance Company, Oriental Insurance Company, ICICI Lombard, General Insurance Company and Kangra Central Co-operative Bank. The quotations offered by the companies are Ext. PW-1/B. The officials present in the meeting were Shri D.S. Thakur of New India Insurance Company, Shri Rajesh Gupta, Divisional Manager, United India Insurance Company, Shri Prem Nath Bodh, Oriental Insurance Company, Shri D.S. Kaith, Divisional Manager, New India Insurance Company, Shri Gupta, Area Manager, ICICI Insurance Company, Shri V.S. Mehta of United India Insurance Company. Document showing their presence is Ext. PW-1/C. Rates quoted by the insurance companies were intimated to the President NGO Federation vide letter dated 5.10.2004 Ext. PW-1/D. President, NGO Federation intimated to the government that the federation would accept and adopt the scheme only from Public Sector companies and accordingly, the ICICI Lombard which quoted lowest premium rate was dropped from consideration for floating the scheme. Intimation sent by the Federation is Ext. PW-1/E. Government invited the Divisional Managers of United India Insurance Company, Oriental Insurance Company, New India Assurance Company Limited and National Insurance Company for negotiations and to consider and reduce the quotations for the scheme. United India Insurance Company agreed to revise the premium from Rs.94 to 91 and communication to this extent was sent by the Divisional Manager, United India Insurance Company which is Ext. PW-1/F. Matter was finalised. It was placed before the Cabinet for consideration and approval. After due deliberation by the Cabinet, the approval was conveyed to the department through noting of the file vide Ext.PW-1/G. Scheme was duly notified on 30.12.2004 vide Ext. PW-1/H. A sum of Rs.1,36,50,000/- was paid to United India Insurance Company by the Finance Department on 31.12.2004 through covering letter Ext. PW-1/K. It was sent by the Secretary (Finance). Receipt of the payment by United India Insurance Company was duly acknowledged vide receipt No. 64059 dated 3.1.2005 vide Ext. PW-1/L. He has categorically admitted that during the entire process of consideration for floating the scheme, the government employees of HP, Divisional Manager, United India Insurance Company with the Finance Department, other than Divisional Manager, at no point of time, any other officer or any other official was consulted by the government for taking up the aforesaid scheme. At no point of time, the Finance Department sought any advice from any other person or institute in considering and accepting the aforesaid scheme.

9. For entire deliberations meetings, negotiations on behalf of government, Secretary Finance, Additional Secretary (Finance) on behalf of the companies their Divisional Managers or representatives i.e. Mr. Mehta and Mr. Gupta used to represent the Insurance Companies. CBI was duly informed by the Additional Chief Secretary that no services of agent named in Ext. PW-1/N were ever taken by the government and the government had directly dealt with the Divisional Manager of the Insurance Companies of four Public Sector Insurance Companies. In his cross-examination, he has admitted that policy floated by the United India Insurance Company, New India Assurance Company, Oriental Insurance Company and National Insurance Company remained inforce from 15.10.1997 to 15.10.1998. He has also deposed in his cross-examination that NGO Federation was not involved in the negotiations of Group Personal Accident Insurance Scheme.

10. Shri Kant Baldi (PW-2) deposed that he took over as Secretary (Finance) to the Government of Himachal Pradesh in the month of March-April, 2005. Premium of Rs.1,36,50,000/- was sent directly to the Divisional Manager, United India Insurance Company through covering letter Ext. PW-1/K vide Banker's Cheque No. BC/C 274469 dated 31.12.2004. He testified that as per record, he found that the Government had directly dealt with the Public Sector Insurance Companies without dealing with any middleman or agent.

11. Anil Sharma (PW-3) testified that he was posted as a director, Institutional Finance in the H.P. Secretariat during the year 2004. He testified that in response to Ext. PW-1/A, quotations were received from United India Insurance Company, Shimla and other Insurance Companies. Rates quoted by ICICI Lombard were the lowest. In his cross-examination, he has admitted that the Council of Ministers approved the proposal to revive the Indexed Group Personal Accident Insurance for regular, ad hoc, contractual, part time and daily wage employees of the State government including the Boards and Corporations and Universities. Thereafter, Notification was issued by the Finance Department vide Ext. PW-1/H which was signed by him at point 'A'. He has specifically deposed that during the entire process of finalisation of policy, Finance Department had at no point of time, called for services of a middleman, broker or agent as per record shown to him in the Court.

12. Ashok Negi (PW-4) testified that he was posted in United India Insurance Company, Timber House, Cart Road, Shimla as Assistant Divisional Manager. He was looking after the accounts department. At that time, Rajesh Gupta was posted as Divisional Manager and V.S. Mehta was posted as Assistant Divisional Manager (Marketing). Accused Diwan Chand was working as agent with the United India Insurance Company. He used to look after and maintain the accounts including collecting premium and payment to be made by the Company. Fax message dated 5.1.2005 was not sent by Rajesh Gupta, Divisional Manager. Volunteered that he was on tour. He was cross-examined by the learned Public Prosecutor. He could not explain that how Shri Rajesh Gupta could sign on 5.1.2005 when he stated that he was on tour on the relevant date. No money was requisitioned from Regional Office Chandigarh. Volunteered that sufficient amount was available with the Company. He admitted that Ext. PW-6/A dated 5.1.2015 was signed by Rajesh Gupta, Divisional Manager, Shimla. He admitted that Ext. PW-6/A pertained to requisitioning of Rs.27,00,000/- from the regional office Chandigarh. He admitted that as per Ext. PW-4/A and Ext. PW-4/B, cheque signing power of Assistant Manager with Administrative Officer was Rs.4.00 Lakh. He also admitted that an amount of Rs.10,50,935/- was paid to Diwan Chand vide cheque Ext. PW-4/F. He identified signatures of V.S. Mehta the then Assistant Manager at point Q-31 and signatures of T.B. Negi the then Assistant Manager. He identified their signatures as he was working with them. In his cross-examination, he deposed that 507 was the code of accused Diwan Chand. Letter dated 31.12.2004 through which premium was sent had the code of accused Diwan Chand.

13. Sanjay Sharma (PW-5A) deposed that he was working as a Assistant Manager in the Regional Office of United India Insurance Company, Chandigarh. He produced the requisitioned document i.e. fax message dated 5.1.2005 sent to Regional Office by the Divisional Office Shimla. Document i.e. fax message dated 5.1.200 forms the part of official record of the Regional Office vide Ext. PW-5/A.

14. N.K. Sidhu (PW-6) testified that he was posted as Assistant Manager in Accounts Branch of United India Insurance Company, Chandigarh. He handed over file Ext. D58, Ext. PW-6/A to the police vide seizure memo Ext. PW-6/B. As per instructions Ext. PW-6/C-1, the Assistant Manager of United India Insurance Company was competent and authorised to sign cheques of Rs.2.00 Lakh with Administrative Officer jointly. Without the consent, approval and signatures of Administrative Officer, the Assistant Manager was not authorised to issue cheque even for amounts less than Rs.2.00 Lakh.

15. Sushil Bhardwaj (PW-7) deposed that he was associated in the investigation by the CBI. He handed over the documents to the CBI. Administrative Officer, V.S. Mehta has

received Ext. PW-4/F. Cheque was received by Mr. Mehta to be sent to the Regional Office, Chandigarh for signature of the competent officer having power to sign the same. Cheque Ext. PW-4/F was filled up by him in favour of Diwan Chand, agent of United India Insurance Company. At that time Shri T.B. Negi was Assistant Manager. He identified his signatures on Ext. PW-7/B. Cheque was signed by Shri Mehta, the Administrative Officer. In his cross-examination, he has admitted that the cheque Ext. PW-4/F was prepared in routine after having been approved by Shri T.B. Negi.

16. Surinder Kumar (PW-8) deposed that he was posted as Supervisor Canara Bank Shimla Branch from August, 2004 to 16.7.2008. He joined the investigation with the CBI. Cheque Ext. PW-4/F i.e. account payee cheque in favour of Diwan Chand for an amount of Rs.10,50,935/- was presented to him.

17. Jagdish Narang (PW-9) deposed that he has handed over record to the CBI including two files i.e. rate approval file in respect of policy No. 111300-42-04-00046, the commission correspondence file in respect of the policy.

18. B.S. Negi (PW-10) was associated in the investigation of the case. In his cross-examination, he has admitted that the Additional Chief Secretary to the Government of Himachal Pradesh had called for quotations from all the Insurance Companies in Himachal Pradesh. Thereafter, all the companies submitted quotations to the said company. In scrutiny the quotation submitted by United India Insurance Company was found the lowest one. In view of said fact, United India Insurance Company was made the leader. He admitted that they did not approach the NGO Federation at any point of time. Government had called for the quotations when NGO Federation asked the Government to implement this policy. He has deposed in his further cross-examination that had the payment of commission been not payable, they would not have allowed payment of commission to the agent. He also deposed that in every meeting in which he remained present, it was unanimously decided that the commission should be paid to the agent because the same was permissible.

19. SC Sharma (PW-11) deposed that he has never handed over any document to CBI. He was declared hostile and cross-examined by the learned Public Prosecutor. In his cross-examination, he has admitted that on 11.2.2005, Rajesh Gupta has written a letter Ext. DA-11/1 to the Regional office for ratification of the rates of commission. He was one of the members of the committee which was constituted for the ratification of rates of commission. Committee was asked to reduce the commission from 15% o 10%. He has categorically admitted towards the end of his cross-examination that in case of brokerage, there has to be a written mandate from the insured to represent him with the insurer.

20. Arun Kumar Bhardwaj (PW-12) has handed over documents enlisted in Ext. PW-12/A from A to H. Ext. PW-12/A was signed by him at point 'A'. Letter Ext. PW-1/P was shown to him wherein in para 4, the Additional Chief Secretary conveyed that the State government is not involved in it in any manner and that the Government has directly dealt with the Divisional Managers of the Insurance Companies and Government of India undertaking and Public Sector Undertaking and Insurance Sector. He was not aware of office note dated 11.4.2005 in which the Divisional Managers of New India Assurance Company, Oriental Insurance Company and United India Insurance Company were present but the fact that United India Insurance Company officials told him that they have been allowed to pay 10% commission by their RO office was conveyed to him which he confirmed vide letter Ext. DA-12/1.

21. Sudhir Bhattacharya (PW-13) deposed that he remained posted as Manager, United India Insurance Company, Head Office, Chennai. CBI associated him in the investigation. He issued letter Ext. PW-13/A. He had issued quoting rate of premium vide Ext. PW-13/B. In his cross-examination, he deposed that in case business of insurance is done through broker, in that case, there has to be a mandate of insured in writing appointing that person as broker to negotiate with the concerned company. If some business of the company is routed through an

agent the agent is entitled for commission. In reference to Ext. PW-13/DA, he stated that the same was not signed by anybody thus, he could not say by whom said instructions were issued.

22. V.S. Chopra (PW-14) deposed that he was posted as General Manager-cum-Director United India Insurance Company Limited in 2005. He was declared hostile and cross-examined by the learned Public Prosecutor. He has deposed in his statement Ext. PW-14/A that the brokers are to be appointed by the insured party and insured party in such case issues mandate to route the business through that broker. He has stated that the government had directly approached the Insurance Companies for taking insurance. He stated that in view of letter of Government of Himachal Pradesh, there was no question of any broker involved in the business, thus, there was no question of payment of brokerage.

23. R.K. Sharma (PW-14A) testified that during the period when he was working as Regional Manager, United India Insurance Company, at Chandigarh, Shimla was Divisional Office of the Company. Rajesh Gupta was the Divisional Manager at Shimla. The then Divisional Manager, United India Insurance Company informed that the business of Group Personal Accident Insurance Policy of the employees of the State of Himachal Pradesh was pursued through an agent. He had not revealed the name of the agent. No broker was appointed by the Government of Himachal Pradesh. Subsequently, on their clarification, the Divisional Manager of Company disclosed that said business was being routed through Diwan Chand, agent of the Company. He did not know Diwan Chand. He was declared hostile and cross-examined by the learned Public Prosecutor. He deposed that during the tenure as Regional Manager, he did not receive any document from the divisional Office to specify the role of an agent. Volunteered that such document was not required by the Regional Manager. He had also told the CBI officials that if the government directly approached them for group insurance, no commission was payable to any agent. However, brokerage could be paid in such cases if the Government had appointed any broker for the same. In his cross-examination by the learned defence Counsel, he admitted that it was in the knowledge of all the companies that business in this case was procured through an agent and commission was payable to the agent in this case. He also admitted that there was agency code in the policy.

24. Munshi Ram (PW-15A) deposed that he had money transaction with V.S. Mehta in connection with purchase of plot at Maliana. He requested V.S. Mehta to give him loan of Rs.1.00 Lakh for the purpose of plot and Mr. Mehta gave him Rs.1.00 Lakh. He withdrew the money and transferred the amount given by cheque to him by Mr. Mehta into his saving bank account.

25. Rajeev Sood (PW-17) Chartered Accountant deposed that he had conducted audit some 10-12 years back. V.S. Mehta never came to him for rendering services of filling up income tax return in respect of Diwan Chand. V.S. Mehta never gave him cheque of Rs.15,000/- for rendering the services in favour of Diwan Chand. He was declared hostile and cross-examined by the learned Public Prosecutor.

26. Sangeeta Bali (PW-18) testified that she was associated by the CBI in the investigation of the case. There was a Code of Conduct for agents. The IRDA Regulations 2000 lay down the Code of Conduct for agents. Agents are required under the Code of Conduct to regulate their working and for doing so they bring business from the market and give the proposal to the Insurance Company. She also admitted that Diwan Chand was paid a commission to the tune of Rs.10,50,935. On 31.12.2004, V.S. Mehta came alongwith cheque amounting to Rs.1,36,50,000/-. Upon the leter which was given to her by V.S. Mehta she was told that the agency code must be entered against Code No. 507 of Diwan Chand. In her cross-examination she deposed that every rate quoted was inclusive of the commission unless specifically described.

27. S.K. Munjal (PW-24) deposed that he collected information from Divisional Manager, New India Assurance Company Limited, Shimla. After receipt of the documents, he examined them and communicated his opinion vide letter Ext. PW-24/A. In his cross-examination, he deposed that he had not asked for any documents even from United India

Insurance Company to confirm the fact as to whether any effort has been made by the agent for procurement of the policy. Towards the end of his cross-examination, he admitted that in his opinion, if government gives premium cheque, commission is not payable.

28. Virender Kumar (PW-26) in his examination-in-chief deposed that in order to get the commission, an agent has to approach a prospect, understand the requirement of prospect, explain the policy conditions and exclusions and in case he agrees to take a policy get the proposal form filled and collect the payment of premium. He did not know whether said duties were performed by Diwan Chand. He further deposed that in case the mandate of the client was available then it was the brokerage which was to be paid and in the absence of the mandate, agency commission is payable if the business is procured through agent. He also admitted that the Exts. PW-13/A, PW-26/B, PW-15/DA and PW-13/B were the letters of correspondence in the case when the matter had not been finally decided as to what rate is to be quoted and the matter was in the pipeline during this period.

29. Jai Parkash (PW-27) deposed that he joined the Municipal Corporation, Shimla in the year 1982 as a Clerk. He became a cashier in the year 2004. His wife Kalpna was working as a Female Health Worker in the Department of Health. He knew V.S. Mehta. He was his friend. In the year 2003, he constructed duplex house in village Agwahi, Post Office Shoghi, District Shimla, HP. He had constructed said house over 4 biswas of land. he had started the construction in 2003. He had withdrawn Rs.4,50,000/- and his wife had also withdrawn GPF advance. He also obtained loan from State Bank of Patiala. He was declared hostile and cross-examined by the learned Public Prosecutor. In his cross-examination, he has admitted that he had filled all the particulars of cheque Ext. PW-27/B and withdrawn the amount of Rs.5,50,000/- from saving bank account of Diwan Chand at Canara Bank, The Mall, Shimla. He also admitted that on the reverse of Ext. PW-27/B, his signatures were there as Q-28.

30. Laxmi Singh Machhan (PW-29) deposed that after receipt of letter the insurance agents were visiting him. At that time, he did not know anything about the scheme. Agents from private as well as public sector insurance companies visited him and made aware of the benefits of the scheme. Diwan Chand agent of United India Insurance Company came to him. He was declared hostile and cross-examined by the learned Public Prosecutor. He admitted that Ext. PW-1/E was issued by him. He admitted that there was no reference of the fact that the Federation or he being President of the Federation was visited by agents or private/public sector insurance companies. He admitted that he had not received any letter from the Divisional Manager or any other officer of the United India Insurance Company that agent Diwan Chand would apprise the Federation of the benefit of the policy. Volunteered that there was no such practice. He proved the copy of letter mark DZ, which was written by him to Diwan Chand.

31. C.P.R. Verma(PW-32) deposed that he was working as Deputy General Manager. He accorded prosecution sanction vide Ext. PW-32/A.

32. T. Joshi (PW-33) gave opinion vide No. CX-148/2005 dated 5.7.2005 vide Ext. PW-33/Z-107

33. Mathew Verghese (PW-34) deposed that the CBI sent a reference Ext. PW-34/A. He sent reply Ext. PW-34/B to the same.

34. Rahul Dev Goyal (PW-35) deposed that the CBI had taken into possession numerous documents from the house of accused person. The documents were taken into possession vide seizure memo Ext. PW-30/A.

35. Rajesh Kumar Khajuria (PW-36) deposed that various documents were recovered from the house of accused Diwan Chand.

36. Bhawani Chand Kapoor (PW-37) deposed that house of accused V.S. Mehta was searched. Search memo Ext. PW-37/A was prepared. He duly signed the same.

37. Abhi Ram (PW-38) deposed that the CBI has raided the office of the accused and recovered documents vide Ext. PW-38/A.

38. Ashok Kalra (PW-39) deposed that he had carried out search of the residential house of accused V.S. Mehta on 6.4.2005 in the presence of ID Sharma and Bhawani Chand Kapoor. He prepared search memo Ext. PW-37/A.

39. Anil Chandola (PW-40) is the Investigating Officer. He had seized the original cheques of account No. 4688 of Diwan Chand maintained at Canara Bank on 7.4.2005 It transpired during the investigation that account No. 4688 in the name of Diwan Chand was opened on 5.1.2005. Cheque of Rs.10,50,935/- towards payment of commission to Diwan Chand in the GPA policy was issued on 6.1.2005 and this amount was credited in the account of Diwan Chand on 7.1.2005. Specimen signatures of the accused were obtained.

40. It is clear from Ext. PW-1/A dated 8.9.2004 that the Research Officer has sent a communication to 12 insurance companies requesting them to quote premium per annum for two accidental insurance schemes latest by 16.9.2004 by 11.00 AM positively under sealed covers. Same were to be opened in the presence of the representatives of participant insurance companies at 3.00 PM on the same day in the Chamber of the Secretary (Finance) i.e. Room No. 101. Mr. Rajesh Gupta was present on behalf of the United India Insurance Company in the meeting held on 16.9.2004 at 3.00 PM as per Ext. PW-1/C. Research Officer PW-1, has sent a communication to Shri Lakshmi Singh Machhan vide Ext. PW-1/D seeking clarification whether the NGO wanted policy from a PSU or a Company, which has quoted the lowest rates. Shri Lakshmi Singh Machhan sent a communication to the Additional Chief Secretary (Finance) vide Ext. PW-1/E that they would like to have policies from the United India Insurance Company, Oriental Insurance Company, New India Assurance Company and National Insurance Company. The Divisional Manager of United India Insurance Company informed the Principal Secretary (Finance) on 10.12.2004 that its revised rates would be Rs.91/ including service tax per employee. There is no reference of any brokerage/ commission. There is also no reference of brokerage/ commission in the Ext. PW-1/G, i.e., Memorandum for consideration of the Council of Ministers. The Indexed Group Personal Accident Insurance was revived as per Notification dated 30.12.2004 (Ext. PW-1/H). Principal Secretary (Finance) has sent a cheque of Rs.1,36,00,000/- in favour of the United India Insurance Company payable at State Bank of Patiala being premium for the scheme which was made operative from 1.1.2005 to 31.12.2005 vide Ext. PW-1/K. United India Insurance Company was requested to furnish cover note and official stamped receipt for the same at the earliest. Cheque was received vide Ext. PW-1/L. Superintendent of Police, CBI SCB has sought clarification of the Principal Secretary (Finance) vide letter dated 10.5.2005 vide letter Ext. PW-1/N, whether the Government had appointed Diwan Chand, a private person, to broker the deal with the Government and United India Insurance Company, in the matter of issuing Group Personal Accident Policy No. 111300/42/04. In sequel to Ext. PW-1/N, Additional Secretary (Finance) sent a communication to the Superintendent of Police on 19.5.2005 (Ext. PW-1/P) informing him that the Government is unaware of any such commission since the company used to quote a premium which is further subjected to negotiations with employees' leaders/ Unions and there might be an arrangement of the company concerned and State Government is not involved in it, in any manner, Government has directly dealt with the Divisional Managers of Insurance Companies i.e. Government of India Public Sector Undertakings in Insurance sector. Thus, the Government was unaware of any such commission. Government had made negotiations with the employees' leaders/ Unions. According to Ext. PW-4/E, a sum of Rs.10,50,935/- was debited. The Divisional Manager has sent a communication as per Ext. DA/2 for the ratification of the commission. Communication was sent to R.K. Sharma, Regional Manager, Regional Office, Chandigarh from the office at Shimla to seek approval of rates for policy. Rates were approved as per Ext. DA/5 dated 22.12.2004 at the rate of Rs.91/- per head including Rs.10.2% service tax for Table II cover. There is no reference of any commission /brokerage in Ext. DA/5. Shri R.K. Sharma, vide Ext. DA/18 dated 3.5.2005 has sent a communication to Rajesh Gupta stating that since he had requested for getting the approval of

HO for rate editing facility to disburse the commission @ 10% and accordingly, they had written to HO. The approval for the same has not been received as yet, but he (Rajesh Gupta) had released the commission without waiting for the necessary approval from head office. Explanation was sought from Rajesh Gupta vide Ext. DA/18. Rajesh Gupta, justified payment of 10% commission by sending reply dated 14.7.2005 to the notice dated 3.5.2005 that Rs.91/- was inclusive of 10% commission. Shri R.K. Sharma, Regional Manager has sent a communication to the accused Rajesh Gupta stating that right from the day one, he had been telling them that the subject business was likely to be routed through a broker and the rates suggested by him were also inclusive of brokerage. It was under that bonafide belief that they recommended to HO for rate editing at 10% commission/brokerage but now, it had surfaced that neither the business was booked through a broker nor the agent Diwan Chand was in any way instrumental in the procurement of the premium and as such the payment of commission to Shri Diwan Chand was totally illegal and unjustified. The officers also expressed their surprise as to how the agency code had been changed in the subsequent policies issued to boards/ corporations at his own. Rajesh Gupta was advised to take immediate steps for recovery of the commission illegally paid to Shri Diwan Chand and other agents. A carbon copy was sent to V.S. Chopra, General Manager, Head Office, Chennai informing him that at the time of recommending for rate editing with 10% commission they were under the bonafide belief that the business had been routed through a broker/agent but now the new facts had emerged out and as per which payment of commission was illegal and therefore it was requested that their earlier recommendation of rate editing with 10% commission may be treated as cancelled. Mr. Rajesh Gupta has again tried to mislead the investigating agency on 30.5.2005 vide Ext. DA/28 by stating that the rate of Rs.91 per employee was inclusive of 10% commission. It is also evident from the letter dated 20.3.1997 Ext. PW-5/A that limit of Assistant Manager to sign the cheque was less than Rs.4.00 Lakh. Ext. DA12/2 is contrary to the records. Thus, no agent was involved in the negotiations with the State Government. Rajesh Gupta could not come to the conclusion that rates quoted by the United India Insurance Company would include 10% commission. Ext. PW-14/D is against the record. Copy of cheque amounting to Rs.1,36,50,000/- is Ext. PW-13/B. Copy of cheque Ext. PW-15/A whereby a sum of Rs.1,00,000/- was paid from Canara Bank. Copy of the cheque whereby a sum of Rs.1,05,000/- was released is Ext. PW-33 and a sum of Rs.50,000/- was released vide Ext. PW-33/C. Another cheque is Ext. PW-27/B of Rs. 5,50,000/-. Ext. PW-33/R is the copy of saving bank account of Canara Bank whereby a sum of Rs.10,50,935/- was deposited. On the basis of cheque Ext. PW-33/S was drawn at Canara Bank. These cheques were sent for examination. These were found to be signed by the accused. Copy of the cheque book which was recovered from the possession of the accused, of Canara Bank is Ext. PW-33/Z-2 and Ext. PW17/D/A. Divisional Manager has sent a cheque No. 388313 dated 6.1.2005 for Rs.10,50,935/- for the signatures of the Regional Office official as the amount exceeded the cheque signing power of Divisional Manager. As per Ext. PW-7/A/1. The signature and handwritings of the accused have been examined/verified by T.Joshi (PW-27).

41. State Government has mooted a proposal for floating Group Personal Accident Insurance Policy for its employees. Quotations were called from all the nationalized and private sector insurance companies by the Additional Chief Secretary (Finance) vide letter dated 8.9.2004. Six insurance companies offered to float the policy/scheme. Lowest rates were quoted by the ICICI Lombard General Insurance Company, Chandigarh, but preference was given to United India Insurance Company. The United India Insurance Company was made leader. Government purchased the Group Personal Accident Insurance Scheme No. 040046 (Ext. PW-33/U) from the United India Insurance Company. Total premium paid to the Insurance Companyw as Rs.1,36,50,000/-. Service tax was payable. After payment of service tax, Rs.1,23,86,570/- was left with the Insurance Company. Premium was to be shared in the ratio of 40:20:20:20 between United India Insurance Company and three other Insurance Companies. However, fact of the matter is that the accused Nos. 2 and 3 namely Rajesh Gupta and V.S. Mehta have paid 10% commission amounting to Rs.12,38,657/- on the total premium of Rs.1,23,86,570/- to the accused Diwan Chand vide Cheque Ext. PW-4/F. Accused presented the

cheque to Canara Bank and a sum of Rs.10,50,935/- was credited to his account. PW-1 Shri Nalin Mahajan deposed that six insurance companies offered to float the scheme i.e. United India Insurance Company, Oriental Insurance Company, ICICI Lombard General Insurance Company and Kangra Central Co-operative Bank. Quotations of these companies were opened in the presence of the officers of these companies i.e. Shri D.S. Thakur of New India Insurance Company, Shri Rajesh Gupta, Divisional Manager, United India Insurance Company, Shri Prem Nath Bodh, Oriental Insurance Company, Shri D.S. Kaith, Divisional Manager, New India Insurance Company, Shri Gupta, Area Manager, ICICI Insurance Company, Shri V.S. Mehta of United India Insurance Company. Document showing the presence of these officers of the companies is Ext. PW-1/C. Thereafter, Divisional Managers of United India Insurance Company, New India Assurance Company Limited, National Insurance Company and Oriental Insurance Company Limited, were called for negotiations. The United India Insurance Company agreed to revise their premium from Rs.94 to Rs.91 and a communication to this effect was sent by Divisional Manager, United India Insurance Company vide Ext. PW-1/F. Thereafter, the matter was placed before the Cabinet. The Cabinet approved the same. Thereafter, scheme was duly notified on 30.12.2004. PW-1 Nalin Mahajan has specifically deposed in his examination-in-chief that during the entire process of the consideration for floating the Scheme, the government employees of Himachal Pradesh, Divisional Manager, United India Insurance Company, with Finance Department, other than the Divisional Manager, at no point of time, any other officer or any other official was consulted by the Government for taking the Scheme. At no point of time, the Finance Department sought any advice from any other person or institute in considering and accepting the Scheme. It was intimated by the Additional Chief Secretary that no services of the agent named in Ext. PW-1/N were ever taken by the Government and the Government has directly dealt with the Divisional Managers of the Insurance Companies of four Public Sector Undertakings. In his cross-examination, he has categorically denied that the NGO Federation was involved at the time of negotiations. Letter Ext. PW-1/P was written to the Superintendent of Police, CBI in response to letter Ext. PW-1/N, whereby clarification was given that the Government had directly dealt with the Divisional Managers of the Insurance Companies. PW-2 Shri Kant Baldi also deposed that all the documents were sent or received in the ordinary course of official work and the originals of these had been retained in the office. As per record, he found that the Government had directly dealt with PSU insurance companies without dealing with any agent or middleman. PW-3 Anil Sharma deposed in his cross-examination that during the entire process of finalisation of the policy, the Finance Department of HP at no point of time called for the services of middleman, broker or any agent as per the record shown to him. Though, PW-4 Ashok Negi has resiled from his previous statement that the fax message dated 5.1.2005 was not sent by Rajesh Gupta since he was on tour, however, in his cross-examination by the learned Public Prosecutor, he could not explain that how Shri Rajesh Gupta could sign the same on 5.1.2005, when he was on tour at that time. He has admitted that a sum of Rs. 10,50,935/- was paid to Diwan Chand vide Cheque Ext. PW-4/F. He identified the signatures of V.S. Mehta, the then Administrative Officer and at point Q-31, the signatures of TV Negi the then Assistant Manger. PW-6 N.K. Sidhu deposed that as per Notification Ext. PW-6/C-1, the Assistant Manager, United India Insurance Company was competent and authorised to sign cheques of Rs.2.00 lakh with Administrative Officer jointly. Without the consent approval and signatures of Administrative Officer, the Assistant Manager was not authorised to issue cheque even for an amount less than Rs.2.00 Lakh. To his knowledge, no instructions had been issued by the Company enhancing the powers of Assistant Manager and Administrative Officer to sign and issue cheque or amount more than Rs.4.00 Lakh. PW-7 Sushil Bhardwaj deposed that the cheque was signed by Shri Mehta. It was sent to regional office at Chandigarh for signatures of the competent officer having power to sign the cheque Ext. PW-4/F. Cheque was filled in by him in favour of Diwan Chand, agent of United India Insurance Company. Cheque was signed by Administrative Officer, Shri Mehta. It was prepared in routine after having been approved by T.B. Negi. PW-8 Surinder Kumar deposed that Ext. PW-4/F issued in favour of Diwan Chand for a sum of Rs.10,50,935/- was presented to him. It was sent to the clerical staff for debiting the same to the account No. 252. BS Negi (PW-10) Senior Manager, Divisional officer, Oriental Insurance

Company, Mandi has admitted in his cross-examination that the Additional Chief Secretary (Finance) to the Government of Himachal Pradesh had called for quotations of all the insurance companies in the State. Thereafter, all the companies submitted that quotations. United India Insurance Company was made leader. They did not approach any NGO Federation. Government had called for quotations when NGO Federation asked the Government to implement the policy. He admitted that had the payment of commission been not payable they would not have allowed the payment of the commission to the agent. PW-11 SC Sharma has admitted that in case of brokerage, there has to be a written mandate from the insured to represent him with the insurer. PW-13 Sudhir Bhattacharya also deposed that if some business of the Government is routed through an agent, agent is entitled to commission. PW-14 VS Chopra in his cross-examination has deposed that he has stated that the brokerage / commission is normally paid as per IRDA, Commission differs from case to case. Letter Mark PW-14/P was shown to him by the Investigating Officer. He had stated that the said circular and its enclosures do not mention any thing about routing the business through any broker. He stated that the Government had directly approached the insurance company. RK Sharma, PW-14-A though declared hostile but in his cross-examination he admitted that he stated to the CBI that if the government directly approached them for any group insurance, no commission was payable to any agent. However, brokerage was payable if the government had appointed any broker for the same. He also deposed that the Division Office at Shimla was directly negotiating with the Government. In his examination-in-chief he has admitted that from the documents sent by DO, he came to the conclusion that agent's services were obtained merely that the agent code is reflected in the record. In his cross-examination, he has admitted that in the present case, except to furnish the details of the policy and to persuade the NGO Federation to purchase the policy there was no other work in writing done by the agent. He also admitted that in a government business the policy is taken by the Government, premium is paid by the government and it is not recovered from the employees like Matri Shakti Insurance Policy. SK Munjal PW-24 communicated that a loss amounting to Rs.2,47,731/- had been construed as loss to the company. Said loss was confirmed by the Divisional Manager, New India Assurance Company Limited vide page one of Ext. PW-24/C. Towards the end of his cross-examination, he admitted that if government gives premium cheque the commission is not payable. Virender Kumar PW-26 has deposed in his cross-examination that in order to get commission, agent has to approach a prospect, understand the requirement of prospect, explain the policy conditions and exclusions and in case he agrees to take a policy get the proposal form filled and collect the payment of premium. He did not know whether these duties were performed by Diwan Chand. In his cross-examination PW-26 Virender Kumar has reiterated that in case mandate of the client is available then it is brokerage which is payable and in the absence of the mandate, agency commission is payable if the business is procured through the agent. In case the business has been procured through an agent, he is entitled to commission. PW-27 Jai Parkash has admitted in his cross-examination by the learned Public Prosecutor that he filled in all the particulars of the cheque Ext. PW-27/B and withdrew the amount of Rs.5,50,000/- from saving bank account of Diwan Chand at Canara Bank. He also admitted that he has sold 1/3rd portion of plot owned by him at Shoghi and received a consideration amount of Rs.5,50,000/- from V.S. Mehta.

42. Thus, the prosecution has conclusively proved that no commission was payable at the time of floating of Scheme. There is sufficient evidence on record that no agent was involved in the transaction. Negotiations had taken place between the functionaries and employees of various corporations. Reference of these proceedings is also mentioned alongwith the names of the official who attended the negotiations. There is no iota of evidence even remotely to suggest that Diwan Chand has, in any manner, acted as an agent of United India Insurance Company to get the policy floated. He could get commission if he was authorised and had procured business for United India Insurance Company. Rajesh Gupta and V.S. Mehta (accused) were aware throughout that Diwan Chand was not entitled to commission and despite that they have issued cheques in favour of the accused Diwan Chand. In fact, Diwan Chand has also paid a sum of Rs.5,50,000/- to V.S. Mehta for purchasing land. No suggestion has been put to Jai

Parkash PW-27 where was the occasion for him to issue cheque in favour of V.S. Mehta to purchase land. Rajesh Gupta and V.S. Mehta were not authorised to sign the cheque. All the accused have conspired together to cause loss to the Corporations/insurance companies. Their signatures on the documents have been duly proved by the report of Shri T. Joshi, PW-33. It has also come on the record that the agent was only entitled to any commission if he had been asked to get business. No letter has been placed on record whereby the Corporation at any given time has asked Diwan Chand to procure business on behalf of the Company from the State Government. Even T.B. Negi has admitted that since cheque exceeded the jurisdiction therefore same was sent to Regional Officer for doing the needful. Accused was having bank accounts with ICICI and HDFC Banks. However, new account was opened on 5.1.2005 where the cheque amounting to Rs.10,50,935/- was deposited. In fact, accused V.S. Mehta has also obtained cheque book from Diwan Chand. He had signed blank cheques. Premises of accused were searched. Cheque book issued in favour of Diwan Chand was recovered. It was recovered on 6.4.2005. Blank Cheque was recovered alongwith cheque book. Money drawn by Diwan Chand was meager. Amount withdrawn by V.S. Mehta from the account of Diwan Chand was substantial. Cheque book from which Ext. PW-15/A was taken out was recovered from the house of V.S. Mehta. Jai Parkash, PW-27 has not deposed about any liability to be discharged by way of Rs.5,50,000/-. Property has been purchased by V.S. Mehta with the money paid to him by Diwan chand. Accused Rajesh Gupta has not sent fax message dated 5.1.2005. Rajesh Gupta and V.S. Mehta have, thus, paid Rs.10,50,935/- to Diwan Chand fraudulently. No question of payment of commission was involved in this case. Rajesh Gupta and V.S. Mehta have cheated the Insurance Company and the State Government of Rs.12,38,657/-.

43. Learned advocates appearing on behalf of the accused have argued that the insurance companies have agreed to pay the commission on the basis of correspondences exchanged between the offices at Shimla and Chandigarh. However, fact of the matter is that since Diwan Chand neither had any mandate of the Government nor had performed any duties of an agent in the purchase of policy. Rather, the State Government had directly held negotiations with the Insurance Companies. Thus, these submissions made by the learned Advocates appearing on behalf of the accused merit rejection.

44. Learned advocates appearing on behalf of the accused have vehemently argued that in the present case, sanction to launch prosecution is not in accordance with law. They have relied upon Karnataka High Court Judgment in case **K T Uthappa vs State Of Karnataka decided on 1.3.2012**. They also submit that this judgment has been upheld by the Hon'ble Apex Court. However, fact of the matter is that in the instance case, sanction to launch prosecution given by C.P.R. Verma (PW-32). He was competent authority to remove the accused as per General Insurance (Conduct, Discipline and Appeal) Rules, 1975. This plea has been taken for the first time at the appellate stage. According to Section 19 (1)(c), sanction is to be obtained from an authority competent to remove the person from his office.

45. Their lordships of the Hon'ble Apex Court in **Central Bureau of Investigation vs. V.K. Sehgal and another** reported in (1999) 8 SCC 501 have held that where prosecution under Section 161 IPC and S. 5(2) of Prevention of Corruption Act ends in conviction, in such circumstances, reversal of conviction and sentence by appellate or revisional court merely on the ground of want of a valid sanction for prosecution was held impermissible. More so when the pleas of want of valid sanction was raised for the first time before the appellate court. Their lordships have further held that effort to save the public servant from frivolous or vindictive or mala fide prosecution becomes meaningless if on trial he is in fact found guilty. Their lordships have held as under:

> 10. A court of appeal or revision is debarred from reversing a finding (or even an order of conviction and sentence) on account of any error or irregularity in the sanction for the prosecution, unless failure of justice had been occasioned on account of such error or irregularity. For determining whether want of valid sanction had in fact occasioned failure of justice the aforesaid sub-section (2)

enjoins on the court a duty to consider whether the accused had raised any objection on that score at the trial stage. Even if he had raised any such objection at the early stage it is hardly sufficient to conclude that there was failure of justice. It has to be determined on the facts of each case. But an accused who did not raise it at the trial stage cannot possibly sustain such a plea made for the first time in the appellate court. In Kalpnath Rai v. State through CBI, [1997] 8 SCC 732 this Court has observed in paragraph 29 thus :

> "Sub-section (2) of Section 465 of the Code is not a carte blanche for rendering all trials vitiated on the ground of the irregularity of sanction if objection thereto was raised at the first instance itself. The sub- section only says that `the court shall have regard to the fact' that objection has been raised at the earlier stage in the proceedings. It is only one of the considerations to be weighed but it does not mean that if objection was raised at the earlier stage, for that very reason the irregularity in the sanction would spoil the prosecution and transmute the proceedings into a void trial."

11. In a case where the accused failed to raise the question of valid sanction the trial would normally proceed to its logical end by making judicial scrutiny of the entire materials. If that case ends in conviction there is no question of failure of justice on the mere premise that no valid sanction was accorded for prosecuting the public servant, because the very purpose of providing such a filtering check is to safeguard public servants from frivolous or mala fide or vindictive prosecution on the allegation that they have committed offence in the discharge of their official duties. But once the judicial filtering process is over on completion of the trial the purpose of providing for the initial sanction would bog down to a surplusage. This could be the reason for providing a bridle upon the appellate and revisional forums as envisaged in Section 465 of the Code of Criminal Procedure.

46. Their lordships of the Hon'ble Apex Court in **State by Police Inspector v. T. Venkatesh Murthy** reported in (2004)7 SCC 763 have reiterated that merely because there is any omission, error or irregularity in the matter of according sanction that does not affect the validity of the proceeding unless the court records the satisfaction that such error, omission or irregularity has resulted in failure of justice. The same logic also applies to the appellate or revisional court. The requirement of sub- section (4) about raising the issue, at the earliest stage has not been also considered.. Their lordships have held as under:

> 9. Sub-section (4) postulates that in determining under sub-section (3) whether the absence of, or any error, omission or irregularity in the sanction has occasioned or resulted in a failure of justice the Court shall have regard to the fact whether the objection could and should have been raised at any earlier stage in the proceedings.
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> 14. In the instant case neither the Trial Court nor the High Court appear to have kept in view the requirements of sub-section (3) relating to question regarding "failure of justice". Merely because there is any omission, error or irregularity in the matter of according sanction that does not affect the validity of the proceeding unless the court records the satisfaction that such error, omission or irregularity has resulted in failure of justice. The same logic also applies to the appellate or revisional court. The requirement of sub- section (4) about raising the issue, at the earliest stage has not been also considered. Unfortunately the High Court by a practically non- reasoned order, confirmed the order passed by the learned trial judge. The orders are, therefore, indefensible. We set aside the

> said orders. It would be appropriate to require the trial Court to record findings in terms of clause (b) of sub-section (3) and sub-section (4) of Section 19.

47. Their lordships of the Hon'ble Apex Court in **Ashok Tshering Bhutia v. State of Sikkim** reported in (2011) 4 SCC 402 have held that . Section 19 (1) of the PC Act 1988 is a matter of procedure and does not go to the root of the jurisdiction and once the cognizance has been taken by the Court under Cr.P.C., it cannot be said that an invalid police report is the foundation of jurisdiction of the court to take cognizance.. Their lordships have held as under:

> 19. It has further been submitted that an invalid sanction cannot be the foundation for the prosecution and thus, the entire investigation and trial stood vitiated as the investigation without proper authorisation and invalid sanction goes to the root of the jurisdiction of the court and so the conviction cannot stand.
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> 20. The issues raised hereinabove are no more res integra. The matter of investigation by an officer not authorised by law has been considered by this Court time and again and it has consistently been held that a defect or irregularity in investigation however serious, has no direct bearing on the competence or procedure relating to cognizance or trial and, therefore, where the cognizance of the case has in fact been taken and the case has proceeded to termination, the invalidity of the precedent investigation does not vitiate the result, unless a miscarriage of justice has been caused thereby. The defect or irregularity in investigation has no bearing on the competence of the Court or procedure relating to cognizance or trial. (Vide H.N.Rishbud & Anr. v. State of Delhi, AIR 1955 SC 196; Munnalal v.State of U.P., AIR 1964 SC 28, Khandu Sonu Dhobi & Anr. v. The State of Maharashtra, AIR 1972 SC 958; State of M.P. v. Bhooraji & Ors., AIR 2001 SC 3372; State of M.P. v. Ramesh Chand Sharma, (2005) 12 SCC 628; and State of M.P. v. Virender Kumar Tripathi, (2009) 15 SCC 533).
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> 21. In Kalpnath Rai v. State (Through CBI), AIR 1998 SC 201, a case under the provisions of Section 20 of Terrorist and Disruptive Activities (Prevention) Act, 1987, this Court considered the issue as to whether an oral direction to an officer to conduct investigation could meet the requirement of law. After considering the statutory provisions, the Court came to the conclusion that as oral approval was obtained from the competent officer concerned, it was sufficient to legalise the further action.
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> 22. In State Inspector of Police, Vishakhapatnam v. Surya Sankaram Karri, (2006) 7 SCC 172, a two-Judge Bench of this Court had taken a contrary view without taking note of the earlier two-Judge Bench judgment in Kalpnath Rai (supra) and held as under:
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>> "When a statutory functionary passes an order, that too authorizing a person to carry out a public function like investigation into an offence, an order in writing was required to be passed. A statutory functionary must act in a manner laid down in the statute. Issuance of an oral direction is not contemplated under the Act. Such a concept is unknown in administrative law. The statutory functionaries are enjoyed with a duty to pass written orders.
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> However, the Court taking note of subsequent proceedings recorded its conclusions as under:
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>> `It is true that only on the basis of illegal investigation a proceeding may not be quashed unless miscarriage of justice is shown, but in this case as we have noticed hereinbefore, the respondent had suffered miscarriage of justice as the investigation made by PW 41 was not fair'."

23. In the instant case, the officer has mentioned in the FIR itself that he had orally been directed by the Superintendent of Police to investigate the case. It is evident from the above that the judgments in Kalpnath Rai (supra) and Surya Sankaram Karri (supra) have been decided by two Judge Benches of this Court and in the latter judgment, the earlier judgment of this Court in Kalpnath Rai (supra) has not been taken note of. Technically speaking it can be held to be per incuriam. There is nothing on record to show that the officer's statement is not factually correct.

24. We have no occasion to decide as which of the earlier judgments is binding. It is evident that there was a direction by the Superintendent of Police to the officer concerned to investigate the case. Thus, in the facts and circumstances of the case, the issue as to whether the oral order could meet the requirement of law remains merely a technical issue. Further, as there is nothing on record to show that the investigation had been conducted unfairly, we are not inclined to examine the issue further.

25. Same remained the position regarding sanction. In the absence of anything to show that any defect or irregularity therein caused a failure of justice, the plea is without substance. A failure of justice is relatable to error, omission or irregularity in the sanction. Therefore, a mere error, omission or irregularity in sanction is not considered to be fatal unless it has resulted in a failure of justice or has been occasioned thereby. Section 19 (1) of the PC Act 1988 is a matter of procedure and does not go to the root of the jurisdiction and once the cognizance has been taken by the Court under Cr.P.C., it cannot be said that an invalid police report is the foundation of jurisdiction of the court to take cognizance. (Vide Kalpnath Rai (supra); State of Orissa v. Mrutunjaya Panda, AIR 1998 SC 715; State by Police Inspector v. Sri T. Venkatesh Murthy, (2004) 7 SCC 763;Shankerbhai Laljibhai Rot v. State of Gujarat, (2004) 13 SCC 487; Parkash Singh Badal & Anr. v. State of Punjab & Ors., AIR 2007 SC 1274; and M.C. Mehta v. Union of India & Ors. (Taj Corridor Scam), AIR 2007 SC 1087).

26. In State of Haryana & Ors. v. Ch. Bhajan Lal & Ors., AIR 1992 SC 604, this Court dealing with the same provisions held that a conjoint reading of the main provision, Section 5-A(1) (new Section 17) and the two provisos thereto, shows that the investigation by the designated police officer was the rule and the investigation by an officer of a lower rank was an exception. It has been ruled by the Court in several decisions that Section 6-A (new Section 23) of the Act was mandatory and not directory and the investigation conducted in violation thereof bears the stamp of illegality, but that illegality committed in the course of an investigation, does not affect the competence and the jurisdiction of the Court for trial and where the cognizance of the case has in fact been taken and the case has proceeded to termination, the validity of the proceedings is not vitiated unless a miscarriage of justice has been caused as a result of the illegality in the investigation.

48. A plain reading of clause (c) of Sub-section (1) of Section 19 of the Prevention of Corruption Act, 1988, shows that the authority competent to accord sanction to launch prosecution is the authority which is competent to remove him from his office. In the case in hand, sanction to launch prosecution has been accorded by C.P.R. Verma, (PW-32), who was the competent authority to grant sanction to launch prosecution against the accused in this case.

49. In view of the discussion made herein above, the prosecution has duly proved its case against the accused. Accused have been rightly convicted under Sections 420 and 120B IPC and Section 13 (2) of the Prevention of Corruption Act.

50. Accordingly, there is no merit in all the appeals and the same are dismissed. Pending applications, if any, are also disposed of. Bail bonds of all the accused are cancelled.

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

Karam Chand …..Revisionist.

Versus

State of Himachal Pradesh …..Respondent.

Cr. Revision No. 169 of 2009

Decided on : 18/07/2016

Indian Penal Code, 1860- Section 279- Accused was driving a truck with high speed under the state of intoxication- he was tried and convicted by the trial Court- an appeal was preferred, which was dismissed- held, in revision that 162.2 milligram and 270.3 milligram alcohol was found in the blood and urine samples of the accused, which shows that he was unable to drive the vehicle according to norms with due care and caution – quantity of liquor was more than permissible limit- testimony of eye-witness established that accused had swerved the vehicle to wrong side of the road, which shows his negligence- prosecution case was proved beyond reasonable – accused was rightly convicted by the trial Court- appeal dismissed. (Para-10)

For the petitioner: Mr. S.K.Banyal, Advocate.

For the Respondent: Mr.Vivek Singh Attri, Deputy Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

The instant revision petition stands preferred hereat by the accused his standing aggrieved by the concurrently recorded renditions of both the Courts below whereby he stands convicted and consequently sentenced in the manner as encapsulated therein for his committing an offence punishable under Sections 279 of the Indian Penal Code.

2. The brief facts of the case are that on 3.8.2001 a telephonic message was received at Police Station Kumarsain from a bus conductor at Khekhar at about 5.45 p.m about the collision between a bus and truck. Thereafter the I.O. Madan Singh accompanied by another police official proceeded to the spot where the complainant Devki Nandan lodged statement under Section 154 Cr.P.C alleging therein that he was driver of bus bearing No. HP-51-4774 and on that day he started from Shimla to Rampur at 1 p.m and when reached near Khekhar at 5.15 p.m a truck bearing No. HP-22-4444 coming from Rampur side with a fast speed hit the bus driven by him. The truck driver appeared under intoxication and committed accident due to rash and negligent driving. On the basis of this statement F.I.R was recorded. The Investigating Officer prepared site plan and during investigation blood and urine samples of the petitioner were also collected and after completing all codal formalities and on conclusion of the investigation into the offences, allegedly committed by the accused challan was prepared and filed in the Court.

3. Notice of accusation stood put to the accused by the learned trial Court for his committing offences punishable under Sections 279 IPC, and Sections 181 and 185 of the Motor Vehicles Act to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 9 witnesses. On closure of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure, was recorded in which he pleaded innocence and claimed false implication. However, he chose to lead Ext.DX, copy of driving license, in defence.

5. On an appraisal of evidence on record, the learned trial Court returned findings of conviction against the accused for his committing offences punishable under Section 279 IPC besides convicted him for his committing offences punishable under Sections 181 and 185 of the Motor Vehicles Act. However, the learned appellate Court acquitted the accused for his committing offences under Section 181 and 185 of the Motor Vehicles Act whereas it sustained his conviction under Section 279 IPC.

6. The accused stands aggrieved by the findings of conviction recorded by both the Courts below for his committing an offence punishable under Section 279 of the Indian Penal Code.

7. The learned counsel appearing for the accused has concerted to vigorously contend qua the findings of conviction recorded by both the Courts below 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 revisional jurisdiction and theirs being replaced by findings of acquittal.

8. On the other hand, the learned Deputy Advocate General appearing for the State has with considerable force and vigour, contended qua the findings of conviction recorded by the Courts below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating any interference rather meriting vindication.

9. 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.

10. Truck bearing No. HP-22-4444 driven at the relevant time by the accused collided at the site of occurrence with the bus driven by the complainant/ victim. The accident which occurred inter se the vehicles aforesaid stands canvassed by the prosecution to be a sequel to the accused negligently driving the truck aforesaid. It is apparent from a perusal of the report of the FSL concerned qua 162.2 milligram and 270.3 milligram per-centum of alcohol standing detected in the respective blood and urine samples of the accused/revisionist. The presence of heavy quantum of alcohol in the blood and urine samples of the accused per se rendered him to stand deprived of his cognitive faculties also hence he stood disabled to manoeuvre his vehicle bereft of his plying it in adherence to the norms of due care and caution. The inference aforesaid stands garnered by the provisions of Section 185 of the Motor Vehicles Act, which stands extracted hereinafter:-

> 185. Driving by a drunken person or by a person under the influence of drugs.– Whoever, while driving, or attempting to drive, a motor vehicle - [(a) has, in his blood, alcohol exceeding 30 mg. Per 100 ml. of blood detected in a test by a breath analyser, or] (b) is under the influence of a drug to such an extent as to be incapable of exercising proper control over the vehicle.
>
> shall be punishable for the first offence with imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both; and for a second or subsequent offence, if committed within three years of the commission of the previous similar offence, with imprisonment for a term which may extend to two year, or with fine which may extend to three thousand rupees, or with both.

wherein there is a marked display qua percentum of alcohol beyond 30 mg. per 100 ml. in the relevant blood sample of the accused being a grossly impermissible limit, rendering the presence of 162.2 ml.gram percentum of alcohol, as displayed by FSL report, in the blood samples of the accused to be excessively beyond the statutory permissible limit. Apparently, the legislature while prescribing therein the permissible limit of presence of alcohol in the blood samples of the accused had in mind the salutary purpose of only minimality of presence of alcohol in the blood sample of the accused not depriving him of his cognitive faculties nor rendering him handicapped to safely ply his vehicle on the road. Contrarily, when the presence of percentum of alcohol in the

blood sample of the accused is beyond the statutory limit prescribed in the apt provisions concomitantly statutorily rendered him to be incapable of exercising proper control of his vehicle. As a corollary with a grossly statutorily impermissible percentum of alcohol standing detected in the relevant blood sample of the accused coaxes this Court to conclude of the accused per se standing statutorily mandated to stand deprived of his cognitive faculties also weans a conclusion of his not safely plying his vehicle at the relevant site of occurrence rather his departing from adhering to the standards of due care and caution. In aftermath with the statute underpinning un-rebuttable presumption of the accused on his blood sample holding alcohol beyond the statutorily prescribed limit, statutory limit whereof as held in the relevant blood sample of the accused stands palpably breached, in sequel with the unrebuttable statutory presumption of his hence being incapable of exercising proper control over his vehicle warranting its standing drawn negates the submissions of the learned counsel for the petitioner of yet his not being negligent in driving his vehicle. With the conclusion formed hereinabove of the accused standing deprived of his cognitive faculties given the factum of excessive presence of alcohol in his blood sample, he is to be also concluded to wander astray from the appropriate portion of the road to its inappropriate portion whereat the vehicle driven by the accused was alone enjoined to occupy. In sequel, the collision which occurred inter se the vehicle driven by the accused with the vehicle driven by the complainant is to be concluded to stand aroused by the negligent manner of driving of the apposite vehicle by the accused. Furthermore, the eye witnesses to the occurrence in their respective depositions on oath ascribe therein with harmony an inculpatory role to the accused constituted by his swerving his vehicle to the inappropriate side of the road whereat the vehicle driven by the complainant was located hence begetting a collision inter se both the vehicles. The depositions of the eye witnesses to the occurrence qua the ill fated occurrence standing begotten by the negligent manner of driving of the accused, deposition whereof as stand comprised in their respective examinations in chief remain unstained by theirs making any communications in contradiction thereto in their respective cross-examination. Consequently, the depositions rendered qua the ill fated occurrence by the eye witnesses thereto acquire credibility. Lastly, the counsel for the accused/revisionist has submitted of with PW-8 deposing qua his at the time his examining the accused his observing him to be inebriated yet his voicing therein of the accused not displaying any visible signs of his being under its influence renders the apposite findings recorded by the FSL concerned to stand rebutted. However, when the opinion aforesaid voiced by PW-8 in his deposition emanated on his visually discerning the demeanor of the accused whereas it did not obviously spur from his subjecting the blood and urine samples of the accused to analyses, samples whereof on theirs standing analyzed by the FSL, Junga unraveled qua presence respectively in the blood and urine samples of the accused of 162.2 mg.gram and 270.3 mg.gram percentum of alcohol renders it to acquire prominence its constituting the best evidence in portrayal of the accused/revisionist labouring under the influence of alcohol. Imperatively when the report of the FSL holds evidentiary leverage contrarily the testimony of PW-8 in rebuttal thereof will not, it, remaining unanvilled on the relevant tests, be construed to be holding any sinew to repel the personifications existing in the report of the FSL. Also with the fastening of statutory presumption of negligence upon the accused arising from the statutorily impermissible limit of alcohol held in his relevant blood sample, gross impermissibility whereof stands displayed in the report of the FSL, renders the statutory presumption of negligence imputed hence to the accused to stand galvanized with full might vis.a.vis the accused. In sequel the concurrently recorded findings of conviction and sentence against him by both the Courts below under Section 279 IPC stand affirmed.

11. In view of the above discussion, I find no merit in this petition, which is accordingly dismissed. The judgement of conviction and sentence recorded against the accused by the learned Additional Sessions Judge, Kinnaur at Rampur District Shimla is maintained and affirmed. As the accused/revisionist is on bail, his bail bonds are cancelled. He be taken into custody forthwith to suffer the sentence. Necessary follow up action be taken by the Registry forthwith.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Ajay Dhiman ....Petitioner.
Versus
State of Himachal Pradesh. ...Respondent.

Cr. MP (M) No.851 of 2016.
Decided on: 19th July, 2016.

Code of Criminal Procedure, 1973- Section 439- The accused was found in possession of 30 bottles of Rexcof and 60 strips of Tramadol Hydrochloride Paracetamol tablets- 2 bottles were recovered during the course of investigation – he filed bail application pleading that he is innocent and has been falsely implicated – held, that the accused is involved in a crime which is affecting the society-many cases have been registered against one of the co-accused- there is every possibility that offence will be repeated- bail application dismissed, (Para 4-8)

Case referred:
Bhadresh Bipinbhai Sheth vs. State of Gujarat and another, (2016) 1 Supreme Court Cases 152

For the petitioner : Mr. Onkar Jairath, Advocate.
For the respondent : Mr. Virender Kumar Verma, Addl. Advocate General with Mr. Pushpinder Singh Jaswal, Dy. Advocate General.
ASI Kewal Singh, P.S. Ghumarwin, District Bilaspur, present in person.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge (oral).

The present bail application is maintained by the petitioner under Section 439 of the Code of Criminal Procedure for releasing him on bail in case FIR No.43 of 2016, dated 9.3.2016, registered under Sections 21 and 29 of the ND & PS Act, Police Station, Ghumarwin, District Bilaspur, H.P. As per the petitioner, he is innocent and is falsely implicated in this case and nothing has been recovered from him.

2. As per the prosecution story, 30 bottles of Relaxcof were recovered from the conscious and exclusive possession of accused Ayush Ratwan son of Shri Jitender Ratwan 100 ml. each having codeine phosphate. Accused Ayush Ratwan was also found in possession of 60 strips of Tramadol Hydrochloride Paracetamol tablets containing 10 tables in each strip i.e. 600 tables. The said bottles and tablets were purchased by accused Ayush Tatwan from accused Subhash Chand and Ajay Dhiman. During the course of investigation, two bottles of Relaxcof were also recovered at the instance of accused Subhash Chand son of Ram Parkash without any valid licence or permit. Total 32 bottles of Relaxcof containing 100 ml. each recovered alongwith 600 tablets.

3. Learned counsel for the petitioner has argued that the petitioner is innocent, falsely implicated in this case and may be released on bail.

4. To support his arguments learned counsel for the petitioner has relied upon the judgment in **(2016) 1 Supreme Court Cases 152** titled **Bhadresh Bipinbhai Sheth** vs. **State of Gujarat and another.**

5. Learned Additional Advocate General has argued that the petitioner has committed serious crime and in fact is spoiling the atmosphere of new generation by supplying narcotics to the small children and otherwise also the quantity is commercial in nature.

6. The Hon'ble **Supreme Court of India in (2016) 1 Supreme Court Cases 152** titled **Bhadresh Bipinbhai Sheth vs. State of Gujarat and another**, has held as under :

> **"(x) The following factors and parameters need to be taken into consideration while dealing with anticipatory bail :**
>
> **(a) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;**
>
> **(b) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a court in respect of any cognizable offence;**
>
> **(c) The possibility of the applicant to flee from justice;**
>
> **(d) The possibility of the accused's likelihood to repeat similar or other offences;**
>
> **(e) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her;**
>
> **(f) Impact or grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people;**
>
> **(g) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which the accused is implicated with the help of Sections 34 and 149 of the Penal Code, 1860 the court should consider with even greater care and caution, because over implication in the cases is a matter of common knowledge and concern;**
>
> **(h) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors, namely, no prejudice should be caused to free, fair and full investigation, and there should be prevention of harassment, humiliation and unjustified detention of the accused;**
>
> **(i) The court should consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;**
>
> **(j) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in** the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail."

7. After going through the record of this case, this Court finds that the petitioner is involved in the crime which is affecting the society. It has also come on record that so many cases were registered against one of the co-accused by the police for the similar offences.

8. Taking into consideration the above facts, it is clear that the offence is affecting a very large number of people and there is every possibility that accused shall repeat such offence. This Court finds that the present is a fit case where the judicial discretion to admit the petitioner on bail is not required to be exercised in favour of the petitioner. Accordingly, the petition, being devoid of merits, is dismissed.

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

Asha Chauhan ….Petitioner.

Versus

Himachal Pradesh Bus Stand Management and Development Authority and others .Respondents.

CWPIL No.17 of 2015
Date of order: July 19, 2016.

Constitution of India, 1950- Article 226- Respondents, particularly, respondent no. 13 has not complied with the directions passed by the Court to construct a multi-storeyed parking- notice ordered to be issued to show cause as to why contempt proceedings may not be issued against the respondent. (Para 2-6)

For the petitioner:	Mr.J.L. Bhardwaj, Advocate, as Amicus Curiae.
For the Respondents:	Mr.D.N. Sharma, Advocate, for respondents No.1 and 2.
	Mr.Shrawan Dogra, Advocate General, with Mr.Anup Rattan and Mr.Romesh Verma, Addl.A.Gs., and Mr.J.K. Verma, Dy.A.G., for respondents No.3 to 6, 8 and 9.
	Mr.Hamender Chandel, Advocate, for respondent No.7.
	Mr.Ashok Sharma, ASGI, with Mr.Ajay Chauhan, Advocate, for respondents No.10 and 11.
	Mr.Vivek Sharma, Advocate, for respondent No.12.
	Mr.Rahul Mahajan, Advocate, for respondent No.13.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

Respondents have not filed the status report, as directed by this Court in terms of previous orders. A perusal of the file does disclose that the respondents, particularly, respondent No.13, have not complied with the directions contained in the order, dated 15th March, 2016, passed by this Court and, prima facie, it appears that respondent No.13 is in breach.

2. At this stage, the learned Advocate General submitted that despite this Court having already decided two Public Interest Litigation Petitions i.e. CWPIL Nos. 4 of 2009 and 5 of 2010, by a common order, dated 20th November, 2014, wherein, after noticing the averments contained in the affidavit filed by the Northern Railways, directions were given to the Northern Railways to construct a multi-storeyed parking; the Northern Railways after removing Railway Godown existing at the spot, is utilizing the vacant space for parking, has failed to construct the multi-storeyed parking.

3. It is apt to reproduce the order, dated 20th November, 2014, passed in CWPIL Nos.4 of 2009 and 5 of 2010 hereunder:

> *"Respondent No.8 has filed the affidavit in terms of order dated 16th November, 2014. It is stated in the affidavit that the Northern Railways has decided to construct multi-storied parking at Railway Godown below Winter Field, Shimla and proposal has already been sent for earmarking the land measuring 546.77 sqms. It is apt to reproduce the relevant portion of the affidavit herein:-*
>
> > *"That the Department of Railways have constituted Rail Land Development Authority (hereinafter referred to as RLDA) and it is the statutory authority constituted under the Ministry of Railways for development of vacant Railway land*

for commercial use for the purpose of generating revenue by non-tariff measures. Northern Railways has already sent proposal to give the Railway land measuring 546.77 sqm. at Railways Godown Below Winter field Shimla H.P. to Rail Land Development Authority (RLDA) for the construction of multi-storeyed parking at Railway Godown below Winter field, Shimla. Copy of letter dated 29.10.2014 is annexed herewith as Annexure A-1.

2. Discussion has been held with vice Chairman RLDA who has agreed in principal to develop the above. A joint team is being nominated to make the plan for the above work which will sent to the Department of Town & Country Planning, Municipal Corporation and other statutory authorities for approval. Multi-storied parking at Railway Godown below Winter Field Shimla will be got constructed by RLDA thereafter."

2. State has also filed the affidavit in terms of order dated 17th July, 2014 and order dated 16th November, 2014, wherein it is stated that nine months period is required to do the needful. It is profitable to reproduce para-2 of the affidavit herein:-

"2. That as per the directions of Hon'ble High Court of Himachal Pradesh dated 17-07-2014, the design wing of HPPWD was to check and verify the design evolved by the Superintending Engineer, 4th Circle, HP PWD Shimla. The Chief Engineer (SZ) vide his office letter No. PW-SE (D-III) Misc. 4th Circle/2014-174-175 dated 15-10-2014 has intimated that the drawings submitted by the office of deponent is in order and has further advised deponent to take necessary action accordingly. The copy of this sanction letter of structural drawings is annexed herewith as Annexure R-I. Now e-tendering of this work i.e. construction of Foot Over Bridge near Vidhan Sabha as per earlier undertaking so made in para 7 of compliance affidavit dated 21.05.2014 and in para 9 of compliance affidavit dated 16.07.2014 shall also be completed within next three months and shall further be constructed and completed within next six months i.e. in total nine months."

3. Learned Advocate General sought and granted nine months to do the needful.

4. In the given circumstances, respondent No.8 is granted nine months period from today for taking all requisite steps, enabling it to obtain permissions/sanctions for raising construction of the said parking and thereafter one year period is granted for completing the construction.

5. All State Authorities are directed to grant requisite permissions to respondent No.8, as per the rules occupying the field, if request is made.

6. The parties are at liberty to seek extension of time on plausible grounds and also for laying motion for seeking appropriate directions, which may be required in order to complete the construction of Foot Over Bridge near Vidhan Sabha and the said multi-storied parking.

7. Having said so, both the petitions are disposed of alongwith all pending applications."

4. In view of the above stated position, respondent No.13 is asked to show cause within two weeks from today as to why contempt proceedings be not drawn against the said respondent.

5. Learned Amicus Curiae stated that the Tree-Committee has made some report. The learned Advocate General to seek instructions about the consequential action drawn in terms of the said report.

6. All the respondents are directed to file the compliance reports/status reports in terms of order, dated 15th March, 2016, passed by this Court within three weeks from today. Except respondents No.10 and 11, all other respondents also to remain present in person before this Court on the next date of hearing.

List on 16th August, 2016. Copy dasti.

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

Dhian Singh …Appellant.

Versus

State of Himachal Pradesh and others …Respondents.

LPA No. 134 of 2016
Decided on: 19.07.2016

Constitution of India, 1950- Article 226- The impugned judgment is not in accordance with the judgment of Hon'ble Supreme Court in ***Raghubir Singh versus General Manager, Haryana Roadways, Hissar, reported in 2014 AIR SCW 5515*** hence, the judgment set-aside - Labour Commissioner directed to make a reference to Industrial Tribunal- cum-Labour Court within six weeks. (Para 5-7)

Case referred:
Raghubir Singh versus General Manager, Haryana Roadways, Hissar, 2014 AIR SCW 5515

For the appellant: Mr. Virender Thakur, 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:

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

CMP (M) No. 742 of 2016

By the medium of this limitation petition, the appellant-applicant has sought condonation of delay of two years, six months and sixteen days, which has crept-in in filing the present Letters Patent Appeal.

2. Issue notice. Mr. J.K. Verma, learned Deputy Advocate General, waives notice on behalf of the respondents.

3. Keeping in view the judgment made by the Apex Court in the case titled as **Raghubir Singh versus General Manager, Haryana Roadways, Hissar,** reported in **2014 AIR SCW 5515,** we deem it proper to condone the delay. Accordingly, the delay is condoned. The application is disposed of.

LPA No. 134 of 2016

4. Appeal is taken on Board.

5. Issue notice. Mr. J.K. Verma, learned Deputy Advocate General, waives notice on behalf of the respondents.

6. We have gone through the impugned judgment and are of the considered view that the impugned judgment is not in tune with the judgment made by the Apex Court in **Raghubir Singh's case (supra)** and relied upon by this Court in a batch of writ petitions, **CWP**

No. 9467 of 2014, titled as **Pratap Chand versus Himachal Pradesh State Electricity Board and others,** being the lead case, decided on 30th December, 2014.

7. Viewed thus, the impugned judgment is set aside, the appeal is allowed and the Labour Commissioner is directed to make reference to the Industrial Tribunal-cum-Labour Court within six weeks from today.

8. The appeal is disposed of accordingly alongwith all pending applications.

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

State of HP. ....Appellant.

Vs.

Kamal Kumar son of Sh Rasil Singh ...Respondent.

Cr. Appeal No.72 of 2007
Judgment reserved on: 20.5.2016
Date of judgment: July 19, 2016

Indian Penal Code, 1860- Section 279, 337, 338 and 304-A- Accused was driving a truck with a high speed - he could not control the vehicle and it went off the road – one person received grievous injuries and died - other persons sustained multiple injuries – the accused was tried and acquitted by the Trial Court- aggrieved from the judgment an appeal was preferred- held, that eye witnesses had specifically stated that accident had not taken place due to the negligence of the accused - the Trial Court had rightly acquitted the accused- appeal dismissed. (Page 11-16)

Cases referred:

Parhlad and another Vs. State of Haryana, JT 2015 (7) SCC 192
Dayal Singh Vs. Uttranchal, AIR 2012 SC 3046
Krishan Chander Vs. State of Delhi, 2016 (2) Him.L.R (SC) 1148
Balu Sonba Shinde Vs. State of Maharashtra, 2002 (7) SCC 543
Koli Lakshmanbhai Vs. State of Gujarat, 1999 (8) SCC 624
Prithi Vs. State of Haryana 2010 (8) SCC 536
Ram Krishna Vs. State of Maharashtra 2007 (13) SCC 525
Khujji alias Surendra Tiwari Vs. State of M.P. AIR 1991 SC 1853
Bhajju alias Karam Singh Vs. State of M.P. 2012 (4) SCC 327
Bhagwan Singh Vs. State of Haryana AIR 1976 SC 2002
Ravindra Kumar Dey Vs. State of Orrissa AIR 1979 SC 170
Syad Akbar Vs. State of Karnatka AIR 1979 SC 1848
Vikram Jit Vs. State of Punjab, 2006 (12) SCC 306
Mulak Raj Vs State of Haryana, SLJ 1996 (2) 890 Apex Court
State of UP Vs. Gambhir Singh and others, 2005 (5) JT 553

For appellant: Mr. M.L.Chauhan Additional Advocate General.
For respondent: Mr. C.N.Singh, Advocate.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present appeal is filed against judgment of acquittal passed by learned Judicial Magistrate Ist Class Rajgarh District Sirmour HP in criminal case No. 32/2 of 2005 title State of HP Vs. Kamal Kumar.

Brief facts of prosecution case:

2. Brief facts of the case as alleged by prosecution are that on dated 3.4.2005 at about 7.45 AM at place Jhalti curve on Nauradhar Rajgarh accused was driving truck No. HP-64-4045 in rash and negligent manner. It is further alleged by prosecution that accused could not control the speed of vehicle and truck No. HP-64-4045 went off the road and fell down below road. It is further alleged by prosecution that in accident occupant Ranbir Singh received simple injury and accused also received simple and grievous injuries and Ram Rattan occupant of truck also received grievous injuries who died due to injuries. It is further alleged by prosecution that Hitender also received injuries. It is further alleged by prosecution that matter was reported in police station vide rapat Ext PW8/A and statement under section 154 Cr.PC recorded. It is further alleged by prosecution that FIR Ext PW8/A was registered. It is further alleged by prosecution that spot map Ext PW15/A was prepared at spot and truck No. HP-64-4045 along with documents took into possession. It is further alleged by prosecution that injured Ranbir Singh was also medically examined and MLC Ext PW9/A was obtained. It is further alleged by prosecution that accused was medically examined and MLC Ext PW9/B was also obtained. It is further alleged by prosecution that MLC of Hitender Kumar was also obtained. It is further alleged by prosecution that truck No. HP-64-4045 was mechanically examined and mechanical report Ext PW13/A was obtained.

3. Notice of accusation was given to accused under sections 279, 337, 338 and 304A IPC by learned Additional Chief Judicial Magistrate Rajgarh District Sirmour HP on dated 3.11.2005. Accused did not plead guilty and claimed trial.

4. Prosecution examined fifteen oral witnesses and tendered documentaries evidence. Statement of accused was recorded under Section 313 Cr.PC. Accused has stated that accident occurred due to failure of brake of vehicle. Accused did not lead any defence evidence. Learned Trial Court acquitted accused.

5. Feeling aggrieved against judgment passed by learned Trial Court State of HP filed present appeal.

6. Court heard learned Additional Advocate General appearing on behalf of appellant and learned Advocate appearing on behalf of respondent and also gone through entire record carefully.

7. Following points arise for determination in present appeal:

1. Whether appeal filed by State of HP against judgment of acquittal is liable to be accepted as mentioned in memorandum of grounds of appeal?

2. Final order.

8.Findings upon point No.1 with reasons:

8.1 PW1 Prem Dutt has stated that deceased Ram Rattan was his younger brother and deceased was travelling in truck at the time of accident. He has stated that truck rolled down from road and he visited the spot after occurrence of accident. He has stated that Ram Rattan died in accident. He has stated that police officials visited the spot and truck No. HP-64-4045 took into possession vide seizure memo Ext PW1/A. He has stated that after conducting post mortem of deceased body of deceased was handed over to him. He has stated that he has signed document Ext PW1/A as marginal witness. He has stated that he was informed by people that truck was rolled down from road when driver of truck had given pass to van. He has stated that he does not know that steering of vehicle was locked at the curve of road.

8.2 PW2 Asha Parkash has stated that accident took place on 3.4.2005. He has stated that he visited the spot after occurrence of accident. He has stated that truck involved in accident took into possession vide seizure memo Ext PW1/A and he signed documents as marginal witness. He has stated that documents of truck were took into possession vide seizure memo Ext PW2/A and he signed documents as marginal witness. He has stated that he heard

from people that accident took place when driver of truck had given pass to van. He has stated that steering of truck was locked. He has stated that truck was moving in a normal speed. He has stated that van was driven in a very fast speed. He has stated that accident took place when pass was given to van and when steering of the truck was locked.

8.3 PW3 Smt. Priksha Chauan has stated that on dated 21.4.2005 Asha Parkash handed over documents of truck to investigating agency and same were took into possession vide seizure memo Ext PW8/A and she signed documents as marginal witness. She has stated that she was informed by people that accident took place when driver of truck had given pass to van and when steering of truck was locked. She has stated that truck was driven in normal speed by accused.

8.4 PW4 Ranbir Singh has stated that he was travelling in truck No. HP-64-4045 at the time of accident. He has stated that truck was driven by accused. He has stated that van came from opposite side in a very fast speed. He has stated that in order to give pass to van truck rolled down from road. He has stated that accused was driving truck in a slow speed. He has stated that accident did not take place due to negligence of accused. He has admitted that Ram Rattan died in accident. He has stated that Ram Rattan was brought to civil hospital and his statement Ext PW4/A was recorded. Witness was declared hostile by prosecution. He has stated that he has not given statement of portion 'A to A' and 'B to B' of Ext PW4/A to investigating agency. He has denied suggestion that he has resiled from his earlier statement in order to save accused. He has denied suggestion that accident was caused due to rash and negligent driving by truck driver. In cross examination he has admitted that truck was driven by accused in slow speed. He has stated that truck driver had given pass just to save the van which was coming in very fast speed. He has stated that accident took place due to fault in steering of truck. He has stated that he was travelling in truck at the time of accident. He has stated that accident did not take place due to rash and negligent driving of truck driver.

8.5 PW5 Hitender Singh has stated that he was travelling in vehicle No. HP-64-4045 at the time of accident. He has stated that van came in very fast speed and in order to give pass to van truck rolled down from road. He has stated that truck rolled down from road due to lock of steering. He has stated that accused was driving truck in proper manner. He has stated that accused was not driving truck in rash and negligent manner at the time of accident. Witness was declared hostile by prosecution. He has stated that he did not give statement portion 'A to A and 'B to B' of mark 'B' to investigating agency. He has stated that he also sustained injury in accident. He has stated that he was medically examined in civil hospital Rajgarh. He has denied suggestion that he has resiled from his earlier statement in order to save accused. He has denied suggestion that accident took place due to rash and negligent driving of truck. He has admitted in cross-examination that accused was driving truck in slow speed. He has admitted in cross-examination that in order to save van which came in fast speed the truck was rolled down from road due to fault in steering.

8.6 PW6 Bhagat Ram has stated that on dated 3.4.2004 he visited at the place of accident. He has stated that injured persons were brought to civil hospital Rajgarh. He has admitted in cross-examination that road is in higher level in slope at the place of accident.

8.7 PW7 Dr. D.D.Sharma has stated that he is posted as Radiologist in Regional Hospital Nahan since April 2001. He has stated that on dated 1.7.2005 he examined x-ray film of injured Hitender Singh son of Daya Ram referred to him. He has stated that he submitted report Ext PW7/A which bears his signature. He has stated that on the same day he examined x-ray film No. 28 pertaining to Kamal Kumar accused and he submitted report Ext PW7/B.

8.8 PW8 HC Kuldip Kumar has stated that he was posted as investigating officer police station Rajgarh since March 2004. He has stated that FIR Ext PW8/A was registered which is written and signed by him. He has stated that endorsement Ext PW8/B is also signed by him.

8.9 PW9 Madan Dutt has stated that he was posted as constable police station Rajgarh since 2001. He has stated that on dated 3.4.2005 at about 8.30 morning Asha Parkash pradhan of gram panchayat has given information by way of telephone about accident. He has stated that police officials namely ASI Chaman Lal, Ram Kumar and Sunil Kumar visited the spot and rapat No. 4 Ext PW8/A was recorded. He has denied suggestion that rapat Ext PW8/A is not written and signed by him.

8.10 PW10 Dr.Y.P.Sharma has stated that he was posted as medical officer in civil hospital Rajgarh since June 2002. He has stated that on dated 3.4.2005 he examined Ranbir Singh, Kamal Kumar accused and Hitender Kumar who were brought to him by police officials relating to alleged history of road accident. He has stated that after examination of injured persons he issued MLC Ext PW9/A, Ext PW9/B and Ext PW9/C which bears his signatures. He has stated that injuries shown in MLC relating to injured persons are possible in road side accident. He has stated that he also given opinion on the back side of MLC after perusal of x-ray report.

8.11 PW11 Dr.Vikas Fotedar has stated that he was posted as medical officer in civil hospital Rajgarh since January 2005. He has stated that he conducted post mortem of deceased Ram Rattan and issued post mortem report Ext PW11/A which bears his signature. He has stated that deceased died due to head injuries leading to brain damage and death.

8.12. PW12 Chain Ram has stated that he was posted as SHO police station Rajgarh since 2004. He has stated that on dated 7.7.2005 investigation report was handed over to him by ASI Chaman Lal and he prepared challan. He has stated that challan was signed by him.

8.13. PW13 Jagpal Singh has stated that in the year 1991 he obtained motor mechanic diploma from ITI Nahan and remained posted as motor mechanic in police line Nahan since 1998 to 2005. He has stated that he mechanically examined many vehicles. He has stated that he mechanically examined vehicle involved in accident and submitted his report Ext PW13/A. He has stated that tie rod of steering system of vehicle was pulled out. In cross examination he has denied suggestion that steering system of vehicle would not operate if tie rod would pull out. He has denied suggestion that accident took place due to pulling out of tie rod from steering system of vehicle. He has admitted that there was curve at the place of accident.

8.14 PW14 Chain Ram SHO has stated that he was posted as SHO in police station Rajgarh since 2004. He has stated that on dated 3.4.2005 at 8.30 AM Asha Parkash pradhan gram panchayat has given information about accident and thereafter rapat Ext PW8/A was recorded. He has stated that information was also given to District Magistrate. He has stated that thereafter police officials visited the spot and investigation was conducted. He has stated that after preparation of challan same was presented in Court. In cross-examination he has admitted that information was received through telephone. He has denied suggestion that no information was received by way of telephone.

8.15 PW15 ASI Chaman Lal has stated that he was posted as ASI in police station Rajgarh w.e.f. 28.8.2004 to 14.7.2005. He has stated that on dated 3.4.2005 Asha Parkash pradhan gram panchayat has given information in police station that truck No. HP-64-4045 rolled down from road and one person died at the spot. He has stated that injured persons were brought to hospital. He has stated that rapat No. 4 Ext PW8/A was registered in police station Rajgarh. He has stated that thereafter police officials visited the spot. He has stated that statement of Ranbir Singh Ext PW4/A was recorded under section 154 Cr.PC. He has stated that FIR Ext PW8/A was registered and site plan Ext PW 15/A was prepared as per factual location of site. He has stated that vehicle involved in accident took into possession vide seizure memo Ext PW1/A. He has stated that medical examination of Ranbir Singh, Kamal Kumar accused and Hitender Kumar was conducted and MLC Ext PW9/A to Ext PW9/C were obtained. He has stated that statements of witnesses recorded as per their versions. He has stated that photographs Ext P1 to Ext P9 also obtained. He has stated that mechanical examination of vehicle was conducted

and mechanical report Ext PW13/A was obtained. He has stated that post mortem report Ext PW11/A was obtained. He has stated that statements of witnesses recorded as per their versions. He has stated that after completion of investigation case file was handed over to SHO. In cross examination he has stated that information about accident was received at 8.30 AM and immediately police officials visited the spot in government vehicle. He has stated that thereafter he visited hospital because injured persons were brought to hospital. He has stated that statement of Ranbir Singh was recorded. He has admitted that tie rod of the steering of vehicle was pulled out. He has denied suggestion that accused was driving vehicle in normal speed. He has denied suggestion that he conducted all investigation proceedings in police station. He has denied suggestion that he did not prepare site plan as per factual situation. He has denied suggestion that he has filed false case against accused in collusion with witnesses.

9. Statement of accused recorded under section 313 Cr.PC. Accused has stated that accident took place due to pull out of tie rod from steering of vehicle. He has stated that he is innocent and false case registered against him. Accused did not lead defence evidence.

10. Following documentaries evidence adducted by prosecution. (1) Ext PW1/A is the seizure memo of truck having registration No. HP-64-4045. (2) Ext PW4/A is the statement of Ranbir Singh recorded under section 154 Cr.PC (3) Ext PW7/A is x-ray film of injured Hitender Singh. (4) Ext PW8/A is FIR No. 31 dated 3.4.2005 registered under sections 279,337 and 304A IPC. (5) Ext PW 8/A is rapat No. 4 dated 3.4.2005. (6) Ext PW2/A is seizure memo of documents of vehicle No. HP-64-4045. (7) Ext PW9/A is MLC of Ranbir Singh. (8) Ext PW9/B is MLC of Kamal Kumar accused. (9) Ext PW9/C is MLC of Hitender Singh. (10) Ext PW11/A is post mortem report of Ram Rattan (11) Ext PW13/A is mechanical examination report of truck No. HP-64-4045. (12) Ext PW15/A is site plan. (13) Ext PW15/B is inquest report dated 3.4.2005. (14) Ext P1 to Ext P9 are photographs and Ext P10 to Ext P16 are negatives of photographs.

11. Submission of learned Additional Advocate General appearing on behalf of State that as per testimony of PW13 Jagpal Singh mechanical expert steering system of vehicle would not stop operating after pulling out of tie rod of steering system and on this ground appeal be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. PW13 Jagpal Singh is not eye witness of accident. PW13 Jagpal Singh was not present at spot at the time of accident. PW13 Jagpal Singh visited the spot after occurrence of accident. Eye witness namely PW4 Ranbir Singh and PW5 Hitender Singh have specifically stated when they appeared in witness box that accident did not take place due to negligence of accused. PW4 Ranbir Singh and PW5 Hitender Singh eye witnesses of the accident have specifically stated in positive manner that accused was driving truck in slow speed at the time of accident. Testimonies of PW4 Ranbir Singh and PW5 Hitender Singh are trustworthy, reliable and inspire confidence of Court. It is well settled law that when there are conflicts between ocular evidence and expert evidence then ocular direct eye evidence should be prevailed. See. JT 2015 (7) SCC 192 title Parhlad and another Vs. State of Haryana. It is well settled law that purpose of expert opinion is primarily to assist the Court for arriving at final conclusion. It is well settled law that expert report is not binding upon Court. It is well settled law that if testimony of eye witness is trustworthy then Court would be within its jurisdiction to discard expert evidence. See AIR 2012 SC 3046 title Dayal Singh Vs. Uttranchal.

12. Submission of learned Additional Advocate General appearing on behalf of State that learned Trial Court has disbelieved the testimony of official witnesses without any reasonable cause and on this ground appeal filed by State be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Official witnesses are not eye witnesses of the accident. Official witnesses visited the spot after occurrence of accident. Testimonies of eye witnesses namely PW4 Ranbir Singh and PW5 Hitender Singh are trustworthy, reliable and inspire confidence of Court because they are eye witness of accident and they were travelling in the vehicle at the time of accident.

13. Submission of learned Additional Advocate General appearing on behalf of State that judgment passed by learned Trial Court is contrary to law and contrary to facts and 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. Court has carefully perused testimony of prosecution witnesses. PW1 Prem Dutt is not eye witness of the accident and he was not present at the spot when accident took place. PW1 Prem Dutt visited the spot at later stage. Hence testimony of PW1 is not sufficient to convict accused. PW2 Asha Parkash is not eye witness of accident. PW2 Asha Parkash visited the spot after the occurrence of accident. Testimony of PW2 Asha Parkash is not sufficient to convict accused in present case. PW3 Smt. Pratiksha Chauhan is also not eye witness of the accident and she visited the spot after occurrence of accident and her testimony is not sufficient to convict accused. PW4 Ranbir Singh and PW5 Hitender Singh eye witness of the accident did not support prosecution case as alleged by prosecution. PW4 Ranbir Singh and PW5 Hitender Singh have specifically stated in positive manner that accused was driving vehicle in slow speed. PW4 and PW5 have specifically stated in positive manner that accident did not take place due to fault of accused. PW6 Bhagat Ram is not eye witness of the accident and he visited the spot after occurrence of accident. PW7 D.D.Sharma Radiologist is not eye witness of the accident and his testimony is only corroborative in nature. PW8 Kuldip Kumar is also not eye witness of accident and his testimony is corroborative in nature. PW9 Madan Dutt, PW10 Dr.Y.P. Sharma, PW11 Dr.Vikas Fotedar, PW12 Chain Ram, PW13 Jagpal Singh, PW14 Chain Ram and PW15 Chaman Lal are also not eye witnesses of the accident and their testimonies are merely corroborative in nature.

14. Submission of learned Additional Advocate General appearing on behalf of State that PW4 Ranbir Singh and PW5 Hitender Singh have been declared hostile in present case and their testimonies cannot be relied in any manner and on this ground appeal be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that evidence of hostile witness should not be totally discarded altogether but should be closely scrutinized. See 2016 (2) Him.L.R (SC) 1148 title Krishan Chander Vs. State of Delhi. See 2002 (7) SCC 543 title Balu Sonba Shinde Vs. State of Maharashtra. See Koli Lakshmanbhai Vs. State of Gujarat 1999 (8) SCC 624. See Prithi Vs. State of Haryana 2010 (8) SCC 536. See Ram Krishna Vs. State of Maharashtra 2007 (13) SCC 525. See Khujji alias Surendra Tiwari Vs. State of M.P. AIR 1991 SC 1853. See Bhajju alias Karam Singh Vs. State of M.P. 2012 (4) SCC 327. See Bhagwan Singh Vs. State of Haryana AIR 1976 SC 2002. See Ravindra Kumar Dey Vs. State of Orrissa AIR 1979 SC 170. See Syad Akbar Vs. State of Karnatka AIR 1979 SC 1848.

15. In the present case two views have emerged in prosecution story. PW13 Jagpal Singh mechanic has stated that steering system of vehicle would operate properly even after pull out of tie rod of steering system. On the contrary PW4 Ranbir Singh and PW5 Hitender Singh eye witnesses of the accident have specifically stated in positive manner that driver was driving vehicle in slow speed. It is well settled law that when two views have emerged in prosecution story then benefit of doubt should be given to accused. See 2006 (12) SCC 306 title Vikram Jit Vs. State of Punjab. See SLJ 1996 (2) 890 Apex Court title Mulak Raj Vs State of Haryana. See 2005 (5) JT 553 title State of UP Vs. Gambhir Singh and others. In view of above stated facts and case law cited supra point No.1 is answered in negative.

Point No.2 (Final order).

16. In view of findings upon point No.1 judgment of learned trial Court is affirmed by way of giving benefit of doubt to accused. Appeal filed by State of H.P. is dismissed. File of learned trial Court along with certified copy of judgment be sent back forthwith. Criminal appeal No. 72 of 2007 is disposed of. All pending application(s) 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.

Union of India and another …Petitioners.
Versus
Ram Kishan …Respondent.

CWPs No. 1849 of 2016 a/w
CWPs No. 1671, 1779, 1822,
to 1824 and 1832 of 2016
Decided on: 19.07.2016

Constitution of India, 1950- Article 226- The matter is covered by the judgment of Punjab and Haryana High Court in LPA No. 406 of 2009, titled as Senior Superintendent of Post Offices, Jalandhar Division, Jalandhar versus Darshan Ram decided on 28-2-2014- the courts should give respect to the law laid down by other High Courts- writ petition disposed of in terms of judgment of Punjab and Haryana High Court. (Para 3-6)

Case referred:
Neon Laboratories Limited versus Medical Technologies Limited and others, (2016) 2 Supreme Court Cases 672

For the petitioners: Mr. Ashok Sharma, Assistant Solicitor General of India, with Mr. Ajay Chauhan, Advocate.
For the respondent(s): Mr. Varun Rana, Advocate.

The following judgment of the Court was delivered:

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

It is stated that the issue involved in all these writ petitions is similar, based on similar facts. Accordingly, we deem it proper to club all these writ petitions and determine the same by this common judgment.

2. Issue notice. Mr. Varun Rana, Advocate, waives notice on behalf of the respective respondents.

3. Mr. Varun Rana, learned counsel for the respondent(s), stated at the Bar that the similar issue was raised before the High Court of Punjab and Haryana in a batch of writ petitions, which became subject matter of batch of LPAs, **LPA No. 406 of 2009,** titled as **Senior Superintendent of Post Offices, Jalandhar Division, Jalandhar versus Darshan Ram,** being the lead case, decided on 28th February, 2014, and **LPA No. 1363 of 2014,** titled as **Sr. Superintenent of Post Offices Hoshiarpur Division versus Kishan Chand and others,** alongwith other connected matters, decided on 25th August, 2014, which was also followed in **LPA No. 1875 of 2014,** titled as **The Senior Superintendent of Post Offices, Hoshiarpur Division, Hoshiarpur versus Hari Dev and others,** decided on 14th November, 2014, and prayed that these writ petitions be decided in terms of the judgments (supra).

4. We have examined the pleadings and gone through the judgments (supra), are of the considered view that the law thrashed out by the Punjab and Haryana High Court in the judgments (supra) is legally correct and we are also of the same view.

5. 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)*

6. At this stage, it is stated that the judgment in LPA No. 1875 of 2014 (supra) was questioned before the Apex Court by the medium of **SLP (C) No. 1819 of 2016,** titled as **The Senior Superintendent of Post officers Hoshiarpur versus Hari Dev,** which came to be dismissed on 1st February, 2016.

7. In view of the above, we deem it proper to dispose of all these writ petitions in view of the judgments (supra) made by the Punjab and Haryana High Court, shall form part of this judgment also.

8. The writ petitions are disposed of accordingly alongwith all pending applications.

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

Union of India through Secretary (Relief & Rehabilitation) & Ors. ……….Appellants.
Versus
Chander Pal Singh and another ………..Respondents.

LPA No.168 of 2015
Decided on: July 19, 2016.

Constitution of India, 1950- Article 226- Respondents were directed to process and settle the claim of predecessor-in-interest of the petitioners as per applicable law and there is no justification for filing the appeal- appeal dismissed. (Para 2-4)

For the Appellants: Mr.Shrawan Dogra, Advocate General, with M/s Romesh Verma & Anup Rattan, Addl.A.Gs. and Mr.J.K. Verma, Dy.A.G.
For the Respondents: Mr.Ajay Kumar, Senior Advocate, with Mr.Dheeraj K. Vashista, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

This appeal is directed against the judgment and order, dated 8th December, 2014, passed by a learned Single Judge of this Court in CWP No.2633 of 1995, titled Chander Pal Singh and another vs. Union of India & others, whereby the writ petition came to be disposed of with a direction to the writ respondents/appellants to process and settle the claim within a period of two months, (for short, the impugned judgment).

2. It is apt to reproduce the relevant portion of the impugned judgment hereunder:

> *"...........Therefore it is deemed it fit, just and expedient that the claim admittedly instituted by the predecessor-in-interest of the petitioners herein, be processed and settled by the respondents within a period of two months hereafter. In view of the above, the present petition stands disposed of, as also the pending applications, if any."*

3. It is apparent from the perusal of the operative portion of the impugned judgment, referred to above, that the writ respondents/ appellants have been directed to process and settle the claim of the predecessor-in-interest of the petitioners as per law applicable. Therefore, it is astonishing why the appellants/writ respondents chose to file the instant appeal.

4. Having glance of the above, there is no merit in the instant appeal and the same is dismissed, alongwith pending CMPs, if any. Consequently, the impugned judgment is upheld.

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

Bishan Singh .....Appellant.
Versus
State of H.P. and others .....Respondents.

FAO No. 129 of 2008
Reserved on: 28.06.2016
Date of Decision: 20.07.2016

Workmen Compensation Act, 1923- Section 4- Commissioner omitted to levy penalty upon the employer on the compensation awarded by him - matter remanded to Commissioner to determine the loss of earning capacity and disability and thereafter to assess the compensation and the penalty. (Para-1 and 2)

For the Appellant: Mr.K.D.Sood, Sr. Advocate with Mr. Ankit Aggarwal, Advocate.
For the respondents: Mr. Vivek Singh Attri, Dy. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, *Judge*

The instant appeal stands directed by the workman against the impugned rendition of the learned Workmen Compensation Commissioner (hereinafter referred to as the

Commissioner) whereby the hereinafter extracted reference stood answered by the Workmen Compensation Commissioner:-

"1.Whether the petitioner is workmen under Section 2(1) of the Workman Compensation Act? OPP.

2. Whether the petitioner sustained injuries arising out and in the course of employment, as alleged? OPP.

3. Whether the petitioner is entitled for compensation, if so, to what extent and form whom?OPP

4. Whether the petitioner is entitled for the amount of interest and penalty under Section 4-A(3) of the Workmen Compensation Act? OPP.

5. Whether the petitioner is guilty for performing service in a hazardous manner deliberately and avoiding safety measures himself, as alleged. OPR.

6. Relief.

whereupon he assessed compensation in the sum as disclosed therein. However, in the impugned award, the learned Commissioner omitted to within the contemplation of Section 4-A(1) of the Workmen's Compensation Act, 1923 (hereinafter referred to as 'the Act') levy penalty upon the employer vis.a.vis. the sum of compensation assessed by him vis.a.vis. the workman-appellant. The latter hence stands constrained to prefer an appeal therefrom before this Court for facilitating it to impose penalty upon the employer vis.a.vis the sum of compensation as stands assessed by the learned Commissioner qua the workman for the injuries sustained by him during the course of his rendering employment under his employer. Even though the factum of the manner of computation of compensation by the learned Commissioner stands not contested hereat by either of the contesting parties nonetheless dehors no contest qua the facet aforesaid standing articulated hereat, this Court is yet enjoined to advert to the apposite method besides mechanism contemplated under the Act, for enabling the learned Workmen Commissioner to in consonance therewith arrive at the sum of compensation assessable qua the workman for his standing entailed with a disability in sequel to his attaining injuries during the course of his rendering employment under his employer. The relevant provisions of the Act whereupon reliance is enjoined to be placed by the Commissioner for computing compensation assessable qua the workman qua the disability if any in whatever nature entailed upon his person in sequel to his sustaining injuries during the course of his rendering employment under his employer stand embodied in Section 4 of the Act, provisions whereof stand extracted hereinafter:

> 1) Subject to the provisions of this Act, the amount of compensation shall be as follows. namely :- (a) where death results an amount equal to 2[fifty] per cent of from the injury the monthly wages of the deceased work- man multiplied by the relevant factor; or an amount of 3[Eighty] thousand rupees, whichever is more;(b) where permanent total an amount equal to 4[sixty] per cent of disablement results from the monthly wages of the injured the injury workman multiplied by the relevant factor; or an amount of 5[Ninety] thousand rupees, whichever is more. Explanation 1: 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 6[four] thousand rupees, his monthly wages for the purposes of clause (a) and clause (b) shall be deemed to be 6[four] thousand rupees only;
>
> (c) where permanent partial disablement results from the injury(i) in the case of an injury specified in Part II of Schedule I, such percentage of the compensation which would have been payable in the case of permanent total disablement as is specified therein as being the percentage of the loss of earning capacity caused by that injury, and

(ii) in the case of an injury not specified in Schedule I, such percentage of the compensation payable in the case of permanent total disablement as is proportionate to the loss of earning capacity (as assessed by the qualified medical practitioner) permanently caused by the injury;

Explanation I.--Where more injuries than one are caused by the same accident, the amount of compensation payable under this head shall be aggregated but not so in any case as to exceed the amount which would have been payable if permanent total disablement had resulted from the injuries; Explanation II.--In assessing the loss of earning capacity for the purposes of sub-clause (ii), the qualified medical practitioner shall have due regard to the percentages of loss of earning capacity in relation to different injuries specified in Schedule I;

2. For attracting the aforesaid relevant provision which stand embodied in Clause (c) (ii) of Section 4 of the Act, an advertence to Ext.P-2 also an allusion to Ext.AW-3/1 which with the leave of the Court stood adduced hereat as additional evidence, is imperative. Both exhibits aforesaid respectively depict therein of Fracture L-1 with low I.Q constituting the injuries which befell upon the workman during the course of his performing employment under his employer. The injuries aforesaid as manifested in both the exhibits aforesaid remain unspecified in Part-II of Schedule-I. Consequently, with the injuries depicted respectively in Ext.P-2 and Ext.AW-3/1 not occurring in schedule-I rendered its attraction by the learned Commissioner to be inapt rather when the apt provision which holds workability occurs in Clause (c) (ii) of Section 4 of the Act enjoined the disability board concerned which assessed the percentum of disability entailed upon the workman to also on assessment thereof for theirs hence begetting compliance with the mandate of Clause (c) (ii) of Section 4 of the Act provisions whereof constitute the apt statutory method of computation of compensation hereat when Clause (c) (i) of Section 4 of the Act garners no attraction, as evident from the disability entailed upon the person of the workman remaining unspecified in Part II of Schedule 1, to with specificity enunciate therein the percentum of loss of earning capacity standing sequelled viz.a.viz the workman. However, both the aforesaid exhibits are reticent qua the percentum of loss of earning capacity standing encumbered upon the workman in sequel to his standing entailed with a disability as stands respectively portrayed therein. As a corollary, the mandate of Clause (c) (i) of Section 4 of the Act embodying the relevant statutory method to be employed by him for assessing compensation qua the workman gets infracted rendering hence the exhibits aforesaid to be unreadable also concomitantly rendering the rendition of the learned Commissioner to be vitiated, it employing an inapposite mode for computing compensation qua the workman.

3. Though an order of remand is hence warranted for facilitating elicitation of evidence in portrayal of satiation of ingredients of Clause (c) (i) of Section 4 of the Act standing begotten, evidence whereof is amiss in the aforesaid exhibits, for enabling the Commissioner to thereupon employ the relevant statutory mode constituted in clause (c) (i) of Section 4 of the Act, for computing compensation qua the workman, yet for reiteration with his adopting the inapposite statutory mode for computing compensation qua the workman whereupon an order of remand being made upon him is warranted also for an order of remand standing permeated with legal efficacy warrants as its necessary precursor the quashing of the impugned rendition besides the discounting by this Court qua the inappropriate statutory mode employed by him for assessing compensation qua the disability entailed upon the workman in sequel to the injuries standing attained by him during the course of his rendering employment under the employer. Preponderantly, when the apparent beside imminent illegality which upsurges is of the learned Commissioner despite palpably holding/imputing validity qua Ext.P-2 besides palpably with injuries depicted therein not finding reference in Schedule-I nor in Schedule-II whereupon the method of computation of compensation to be employed by him was the one displayed in Clause (c)(ii) of Section 4 of the Act yet his proceeding to adopt the hereinafter inapposite mode for assessing compensation qua the workman, reinforcingly warrants its standing quashed and set-aside.

1. The age of the workmen at the time of accident=40 years.
2. Monthly salary of the workman Rs.4000/-
3. Relevant factor as per Schedule IV of Workmen Compensation Act, 1923=184.17
4. Compensation admissible as per Section 4(b) of the Act.

$$\frac{4000}{100} \times \frac{60}{100} \times \frac{42}{100} \times \frac{184.17}{100}$$

4. Apparently also the method employed by the legislature in Schedule-IV was employable by him for assessing compensation qua the workman only when the statutory ingredient for its workability as embodied in its heading qua its attractability standing reared on the workman suffering evident death or his standing entailed with an evident permanent disablement whereas with both Ext.P-2 and Ext.AW-3/1 not making an apposite reflections therein of the disability incurred by the workman falling within the domain of permanent disablement rather both holding depictions therein of their being likelihood of improvement of the apposite disability also both recommending reassessment after three years of the condition of the workman are reflections which do not garner any conclusion of any permanent disablement standing incurred by the workman in sequel to his suffering injuries during the course of his performing employment under his employer. Since the invocation of Schedule-IV of the Act was arousable only on the workman standing encumbered with permanent disablement or his succumbing to the injuries entailed upon his person whereas when none of the aforesaid statutory ingredients for reasons aforesaid stand satiated, in sequel rendered its attraction to be grossly unwarranted. In aftermath the assessment of compensation by the learned Workmen Commissioner on anvil thereof suffers from his committing a gross illegality also with the workman as displayed by the reply to the petition filed by the employer yet rendering service under his employer wherefrom he is earning wages, constituted the disability entailed upon his person being construable to be not a permanent disability rendering also inefficacious the invocation of Schedule-IV by the learned Commissioner.

5. Consequently, this Court is constrained to remand the matter to the learned Workmen's Commissioner to after eliciting the requisite evidence from any member of the Medical Board who prepared Ext.P-2 and Ext.AW-3/1, the apposite communications by them qua the percentum of loss of earning capacity enjoined upon the workman in sequel to his standing encumbered with a percentum of disability as stands therebefore testified by them whereupon he shall proceed to assess compensation qua the workman by his employing the method constituted in Clause (c)(ii) of Section 4 of the Act. Also the learned Workmen's Compensation Commissioner is directed to in accordance with law on the anvil of Section 4-A(1) of the Act levy penalty, if any, imposable upon the employer for his purportedly not defraying compensation to the workman in quick succession to his suffering injuries during the course of his rendering employment under his employer. Records be sent back alongwith Ext.AW-3/1.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Dr. Mohinder Paul Sharma …. Petitioner

Versus

Union of India & Ors. …. Respondents

CWP No. 4352 of 2009
Reserved on: 01.07.2016
Date of decision: 20.07.2016

Constitution of India, 1950- Article 226- Petitioner was appointed as Medical Officer (Part-time) on a monthly salary of Rs. 5000/- under the scheme for Prevention of Alcoholism and Substances (Drugs) Abuse- rehabilitation centre was closed without the prior approval of respondents No. 1 and 2- hence, direction was sought to quash the order of closing the de-addiction and rehabilitation centre, Una- Respondent No. 1 stated that Indian Red Cross Society, Una, was running the De-addiction and Rehabilitation Centre - it has capacity of 15 beds only one beneficiary was found in the centre- many other deficiencies were also found- held, that de-addiction centre was not adhering to the conditions contemplated under the scheme- therefore, release of grant-in-aid was rightly stopped- appointment was on contract basis and the services could be terminated at any time without assigning any reason- closure of the de-addiction centre was not arbitrary- petition has been filed without any basis and is dismissed with cost of Rs.10,000/- (Para-8 to 13)

For the petitioner: Mr. Pushpender Kumar, Advocate.
For the respondents: Mr. Ashok Sharma, ASGI, with Mr. Nipun Sharma, Advocate, for respondent No. 1.
Mr. Vikram Thakur and Mr. Puneet Razta, Deputy Advocate Generals,for respondents No. 2 and 3.
None for respondent No. 4.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.:

This petition has been filed praying for the following reliefs:-

“(a) Entire records of the case may kindly be summoned and perused.

(b) Issue a writ of certiorari to quash the order closing the De-Addiction Rehabilitation Centre, Una passed by the respondent No. 3 and to oust the patients forcibly and to give possession of the premises of the Centre illegally without any due process of law and continue the said centre in the light of the scheme framed by the respondent No. 1 for the welfare of the people in the interest of the general public.

(c) Direction may kindly be issued by way of writ of mandamus to the respondents to release the salary for the period from 01.04.2008 till 25.07.2009, which has been illegally withheld by the respondents, alongwith interest @12% p.a. and to allow him to continue in service, as usual and they may be allowed to perform their duties in the centre.

(d) Any other writ, order or direction as this Hon’ble Court may deem just and proper in the peculiar facts and circumstances of the case, be issued.

(e) Cost of the petition be granted in favour of the petitioner, And justice may be done.”

2. The facts necessary for the adjudication of the present petition are that the petitioner was appointed as Medical Officer (Part-time) on a monthly salary of Rs.5000/- w.e.f. 25.10.2002 and he continued to serve as such till 25.07.2009. His appointment was under the scheme for Prevention of Alcoholism and Substances (Drugs) Abuse, under which scheme treatment-cum-rehabilitation centre was made functional on Takka Road, Una in July, 2001. The grievance of the petitioner is that the said rehabilitation centre has been forcibly closed without the prior approval of respondents No.1 and 2 and the closure of they same is in violation of the scheme. Accordingly, he has prayed for quashing the order passed by respondent No. 3 to close the de-addiction rehabilitation centre, Una and further he has also prayed that respondents be directed to release his salary for the period from 01.04.2008 till 25.07.2009 and to allow him to continue in service. As per the petitioner, the centre was closed with an ulterior

motive to give undue benefit to one Shri Harpal Singh, landlord of the building, where the said centre was running since 2001 in order to hand over the vacant possession of the premises to the land owner. It is further the allegation of the petitioner that said Harpal Singh happens to be father-in-law of reputed Advocate practicing at Una and, therefore, he had managed the affairs in connivance with the staff of respondent No. 3 with an ulterior motive. He has also stated in the petition that on 25.07.2009 staff of the centre closed the office at 5.00 P.M., when besides the patients who were staying there, Harpal Singh and his wife Smt. Ram Piari alias Manso Devi were there, who forcibly ousted the patients and locked the premises. It was on these grounds that the present petition was filed. Incidentally, the order passed by respondent No. 3 directing closure of de-addiction rehabilitation centre, Una, quashing of which has been sought by the petitioner is not on record. Though, personal allegations have been levelled against one Harpal Singh, however, said Harpal Singh has not been impleaded as a party respondent in the writ petition. Similarly, there are allegations of malafide alleged against the staff of respondent No. 3, however, it is not mentioned in the petition as to who was the member of the staff who has allegedly connived with Harpal Singh.

3. In its reply filed to the petition, the stand of respondent No. 1 was that the Ministry of Social Justice and Empowerment, Government of India formulated a scheme for Prevention of Alcoholism and Substances (Drugs) Abuse for identification counseling, treatment and rehabilitation of addicts through voluntary and other eligible organizations and under the said scheme, grant-in-aid is provided to eligible organization including a Society registered under the Societies Registration Act or any other relevant statutory provisions. In the present case, Indian Red Cross Society, Una, was running a de-addiction Rehabilitation Centre at Una. Deputy Commissioner-cum-Chairman of the District Red Cross Society, Una, sent a proposal of the organization for release of grant-in-aid for running of de-addiction centre at Una for the year 2006-2007 under the said scheme vide letter dated 11.09.2006. Scrutiny of the proposal revealed that during inspection of the project on 26.07.2006 only one beneficiary was found in the centre, whose bed capacity was 15. Besides this, deficiencies were also pointed out in the inspection report itself and the Deputy Commissioner-cum-Chairman, District Red Cross Society, Una, was asked as to why grant-in-aid should not be stopped forthwith. The response filed by the Deputy Commissioner-cum-Chairman was not found satisfactory. The proposal for the year 2007-2008 was received in the Ministry vide letter dated 07.08.2007 and when inspection was carried out, the same revealed that on the date of inspection, only four beneficiaries were found present against the bed strength of 15. In this background, communication dated 26.12.2007 was sent to the organization seeking explanation for non-utilization of full sanctioned capacity of the centre and as to why further grants should not be stopped. The response filed by the organization was not found satisfactory. The audit report also revealed that there was unspent balance of Rs.2,06,915.00 for the year 2005-2006. As per respondent No. 1, in view of the above situation, the grants could not be released to the centre. It was further mentioned in the reply that no proposal was received from the State Government for the year 2009-2010 and as per the "extant procedure" in the Ministry, the case had become time barred.

4. In its reply filed by respondent No. 3, it was been mentioned that the petitioner was given a contractual, conditional appointment subject to the success of the scheme for Prevention of Alcoholism and Intoxicating Substances Abuse framed under the aegis of Ministry of Social Justice and Empowerment of the Government of India. The de-addiction centre which was allotted was to be managed by the District Red Cross Society, Una. The same was to be run on the basis of receipt of the matching grant-in-aid upto 95% from the Government of India. It was the non-receipt of the grant-in-aid, which according to the said respondent, led to the closure of the de-addiction centre. The said respondent has further mentioned in its reply that with the closure of the said de-addiction centre, neither red Cross Society nor respondent No. 3 were going to be benefited in any manner. It was also denied that there was any personal or institutional interest common to the interest of the landlord in whose premises the said de-addiction centre was being run. Respondent No. 3 has further stated that it made all efforts

which were within its ambit to ensure that the de-addiction centre was kept functional, however, because central aid was stopped, therefore, in this view of the matter, all efforts made in this regard ended in vain leading to the closure of the de-addiction centre. It has further been mentioned by respondent No. 3 that the petitioner was paid the part time honorarium as long as he worked till his contract was terminated.

5. In its reply filed by respondent No. 2, the said respondent has stated that the appointment of the employees of the de-addiction centre, Una, was made by chairman, District Red Cross Society, Una and the staff of the said centre was under the direct control of the Chairman and respondent No. 2 had no role except to send proposal for grant-in-aid received from the District Red Cross Society, Una, to Government of India.

6. Rejoinder has been filed by the petitioner only to the reply filed by respondent No. 3. In the said rejoinder, the petitioner has reiterated the averments made in the petition and he has again alleged that everything was done at the behest and at the instance of respondent No. 4 who was not interested to run the centre with an ulterior motive.

7. I have hard learned counsel for the parties.

8. In my considered view, there is no merit in the present petition. The allegations which have been leveled in the writ petition are not only bald but not even an iota of evidence has been placed on record by the petitioner to substantiate the same. It is evident from the reply filed by respondent No. 1 that keeping in view the fact that de-addiction centre opened at Una was not adhering to the conditions contemplated under the scheme under which the same was opened, the said respondent rightly stopped the release of grant-in-aid in favour of respondent No. 3. The allegation of the plaintiff that everything was done at the behest of the landlord in order to ensure that he gets the vacant possession of his property do not have any merit. Neither these allegations have been substantiated by any material on record nor the landlord against whom these allegations have been made in petition, has been made a party respondent in the case. The petitioner has also not been able to prove any malafides against respondent No. 4 or for that matter against any other respondents. A conjoint reading of the reply filed by respondents No. 1 and 3 makes it clear that de-addiction centre was closed because respondent No. 1 stopped the release of grant-in-aid in its favour, as according to the said respondent, the de-addiction centre was not being run as per the norms of the scheme under which the same was opened.

9. Further, it is apparent from the appointment letter, which has been issued to the petitioner dated 22.10.2002 that his appointment as Medical Officer (Part-time) was purely on contract basis and his services could be terminated at any time without assigning any reason and he was not entitled to claim seniority and other benefits of Government services.

10. The appointment of the petitioner was against the post of Medical Officer (Part-time) for de-addiction centre, Una, which de-addiction centre was opened under aegis of Red Cross Society, Una, which is evident from the fact that the appointment letter has been issued to the petitioner by respondent No. 3 in his capacity as Chairman, District reed Cross society, Una.

11. Therefore, in my considered view, it cannot be said that the closure of the de-addiction centre, Una, was either arbitrary or the said de-addiction centre was closed with an ulterior motive to confer any benefit upon the landlord in whose premises the said de-addiction centre was being run. The petitioner has not been able to substantiate that any amount was due from respondent No. 3 to him as has been claimed in the petition. Bald and baseless allegations have been made in the petition without any material to substantiate the same and malafides have been alleged even against those persons, who have not been impleaded as party respondents in the petition.

12. This Court recognizes the legal right of a citizen to approach an appropriate Court of law for redressal of his/her grievance. But if a litigant does not approach the Court of law with clean hands and files frivolous petition(s), then the said trend has to be deterred by imposing cost on such like litigants.

13. Therefore, in view of what has been discussed above, there is no merit in the present writ petition and the same is accordingly dismissed with costs, assessed at Rs.10,000. Miscellaneous Application(s), pending, if any, also stands disposed of.

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

Jaidrath and others ..Appellants.
Versus
Deputy Commissioner, Mandi and others ..Respondents.

RSA No. 526 of 2004
Reserved on: 28.06.2016
Date of decision: 20/07/2016

Code of Civil Procedure, 1908- Section 100- A civil suit was filed by the plaintiffs pleading that they have Bartandari rights in the suit land according to Naksha Bartan and Wazib UI Arj- suit land is part of UPF and DPF- defendants allotted the suit land to defendant No. 3 in violation of Conservation of Forests Act- suit was dismissed by the trial Curt- an appeal was preferred, which was also dismissed- held, that Forest Guard had admitted that suit land was part of Jungle - customary rights were duly recorded in Wazib Ul Arj- merely because list of Bartandaran was not filed is not sufficient to doubt the plaintiff's version- provision of Section 91 of CPC were not applicable in the present case- appeal allowed- judgment and decree passed by the trial Court set aside. (Para-8 to 10)

For the appellants: Mr. G.R.Palsra, Advocate.
For the respondents: Mr. Vivek Singh Attri, Dy. A.G. No. 1 and 2.
Mr. J.R.Poswal, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Sureshwar Thakur, J:

The instant appeal stands directed against the impugned judgement and decree of the learned District Judge, Mandi, Himachal Pradesh, whereby he affirmed the rendition of the learned Senior Sub Judge, Mandi, District Mandi, whereby the suit of the plaintiffs stood dismissed. The plaintiffs standing aggrieved by the concurrently recorded renditions against them by both the learned Courts below, concert through the instant appeal constituted before this Court, to seek reversal of the concurrently recorded judgements and decrees of both the Courts below.

2. The facts necessary for rendering a decision on the instant appeal are that the plaintiffs stated to be permanent residents of village Panjethi, Illaqua Pachhiat, Tehsil Sadar, District Mandi and are having their immovable and moveable property in village Panjethi. It is alleged that the plaintiffs are having Bartandari rights according to Naksha Bartan and Uajiw UI Arj in the land comprised in Khewat Khatauni No. 59 min/115, Khasra No. 162 measuring 8-0-9 bighas, situated in village Pajethi/365, Tehsil Sadar, District Mandi, H.P. which is a part of UPF and DPF and Jungle Gandharav and is situated close to the house of the plaintiffs who have right

to protect the forest and to maintain ecological balance having nourished few spices of trees under the Social forestry scheme and are having right of lopping leaves from the fodder plants and collecting fuel wood etc. from the suit land. It is the further case of the plaintiffs that defendants No.1 and 2 without having any jurisdiction or power to allot the land to defendant No.3 allotted Khasra No. 162/1 measuring 2-6-7 bighas out of the suit land to defendant No.3. It is further alleged that no allotment could have been made within the municipal area or in view of the provisions of the Conservation of Forests Act and as such the allotment made to defendant No.3 is null and void and not binding on the rights of the plaintiff.

3. The suit of the plaintiffs was resisted by defendants on the ground of jurisdiction and locus standi. The pendency of litigation between defendant No. 3 and Ram Singh has not been disputed but it is alleged that as per direction of the Hon'ble High Court Nautor land had rightly been granted to defendant No.3 under the Special Scheme. It is further alleged that if anybody is aggrieved by the grant of nautor he could do so by challenging the said order before the Deputy Commissioner and if the Deputy Commissioner does not take any action, the plaintiffs could file an appeal before the Commissioner or challenge the order before the Hon'ble High Court. It is also alleged that the land comprised in Khasra No. 162 is not situated in the DPF Ghandharv. The rights of the plaintiffs of lopping the leaves, collecting fodder from DPF Gandharav is denied by the defendants and according to them the suit land was earlier neither UPF nor DPF and has wrongly been converted into UPF and DPF.

4. In the replication filed on behalf of the plaintiffs the averments as contained in the plaint were reiterated and those of the written statement contrary to the plaint were refuted.

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

(1) Whether the plaintiffs have Bartandari rights over the suit land, as alleged? OPP.

(2) Whether the allotment of the part of the suit land to the defendant No.3 by the defendants No. 1 and 2 is null and void? OPP.

(2)A. Whether the allotment is in contravention of mandatory provision of Conservation of Forest Act, 1980, and therefore, is null and void? OPP.

3. Whether the plaintiffs are entitled to the relief of Permanent Prohibitory Injunction? OPP.

4. Whether this Court has no jurisdiction to try and decide this suit? OPD.

5. Whether the plaintiffs have no locus standi to file this suit? OPD.

5-A Whether the plaintiffs have prescriptive easement rights of getting fresh air, Bartandari rights, collecting fuel woods and leaves fodder from the trees from the forefathers as claimed, as alleged? OPP.

6. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiffs besides the learned First Appellate Court dismissed the appeal preferred therefrom before it by the plaintiffs.

7. Now the plaintiffs/appellants instituted the instant Regular Second Appeal before this Court, assailing the findings recorded in its impugned judgment and decree by the learned first Appellate Court. When the appeal came up for admission on 1.12.2004, this Court admitted the appeal on the hereinafter extracted substantial questions of law:-

1. Whether the First Appellate Court as well as the trial Court has misread, misinterpreted and misconstrued the oral as well as documentary evidence of the parties especially Ext.PZ/A, Ext.P4 to P-6 and statement of PW-2, which has materially caused miscarriage and failure of justice to the appellants?

2. Whether the order dated 18.08.1994 is against the UPF and DPF Rules and the allotment order is prima facie null and void having no binding force upon the Bartandari rights of the appellants?

Substantial questions of law No. 1 and 2.

8. For the plaintiffs to attain success in their suit wherein they sought relief of cancellation of allotment by way of Nautor of the suit land to defendant No.3 by defendants No. 1 and 2 they stood enjoined to adduce clinching prove qua the suit land comprised in Khasra No. 162 constituting a part of UDF and DPF 'Jungle Gandharav' upsurgings whereof would sequel the ill-fate of its apposite allotment standing rescinded. Also the plaintiffs stood enjoined to adduce evidence in portrayal of theirs as espoused by them in the plaint holding therein Bartandari rights, rights whereof stood reflected in the relevant "Naksha Bartan Vajiw Ul Arj". Both the Courts below had validated the allotment of the suit land to defendant No.3 on the anvil of there existing no apposite notification in depiction of the suit land falling within the domain of UPF and DPF 'Jungle Gandharav'. The reason as assigned by the learned Courts below for theirs hence withholding relief to the plaintiffs qua allotment of the suit land to defendant No. 3 by defendants No. 1 and 2 warranting rescission wanders astray from the deposition of PW-2 the Forest Guard of the beat concerned, who in his testification unequivocally voices therein qua Jungle Gandharav standing in the apposite records reflected to be DPF. Even though he in his cross-examination feigns ignorance qua Khasra No.162 standing allotted as Nautor to defendant No.3 also he therein feigns ignorance qua the khasra number allotted as Nautor to defendant No.3 by defendants No. 1 and 2 falling within the domain of DPF or UDF, whereupon hence an inference may stand aroused of the plaintiffs not succeeding in proving qua the suit land falling within the domain of UDF and DPF Jungle Gandharav yet the aforesaid inference as may erupt therefrom ipso facto stands negated by a display occurring in Ext.D-2, the jamabandi apposite to the suit land wherein it stands reflected to be UPF and DPF. It appears that the testimony of PW-2 was enjoined to be read in entwinement with Ext.D-2 rather than in isolation therefrom. However, his deposition standing read in isolation vis.a.vis reflections aforesaid qua the suit land occurring in Ext.D-2 has led them to merely on his feigning ignorance qua the location of the Khasra number wherein allotment of land by way of Nautor was made to defendant No. 3 by defendants. 1 and 2, score off, his testimony of hence his not proving the factum of the suit land falling within the domain of UPF and DPF Jungle Gandharav whereas at the outset he in his testification echoes of Jungle Gandharav being a UDF and DPF wherein uncontrovertedly as denoted by Ext.D-2 the suit land stands located. Given the learned courts below subsuming the effect of Ext.D-2 also of theirs concluding qua the suit land not falling within the domain of UPF and DPF 'Jungle Gandharav' palpably stands sequelled by the rendition of this Court pronounced in Civil Writ Petition No. 16 of 1991 wherein this Court had rendered a verdict qua allotment of land by way of Nautor to the petitioner, hence, constraining them to erect an inference qua its unamenability for rescission. However, the aforesaid inference erected by the Courts below qua hence inviolability of apposite allotment of land by way of Nautor to defendant No.3 by defendants No. 1 and 2 besides its unamenability for rescission when stands breached by evidence palpably displaying its location occurring in UPF and DPF 'Jungle Gandharav' enjoins this Court to cull out from the pronouncement of this Court comprised in Ext.PZ/F qua this Court therein rendering a direction upon the allottees to dehors its location occurring in UPF and DPF Jungle Gandharav theirs yet proceeding to allot it to defendant No.3. In the aforesaid endeavour this Court proceeds to allude to the relevant portion of the pronouncement of this Court embodied in Ext.PZ/F, an allusion thereto unravels the factum of therein this Court meteing a direction to the Deputy Commissioner Mandi to allot, mutate and give land to defendant No.3 allotment whereof stood enjoined therein to occur in the very same Khasra Number wherein the land of the complainant/appellant therein occurs. However, there is no mandate rendered therein upon the allottors to proceed to allot it even when it is un-allotable under law. Though, in pursuance to Ext.PZ/F the Deputy Commissioner, Mandi, allotted land to defendant No.3 yet his hence implementing the directions of this Court embodied in Ext.PZ/F would not ipso facto validate the allotment of the suit land by way of Nautour to defendant No.3 unless the Deputy Commissioner, Mandi had satisfied himself

of the suit land being legally allotable to defendant No.3 it not falling within the domain of UDF and DPF Jungle Gandharav. Also in the event of the Deputy Commissioner, Mandi detecting the suit land to be the land allotable by way of Nautor to defendant No.3, its, adjoining the land of Ram Singh appellant/complainant in Cr.MP(M) No. 993/93 whereupon Ext.PZ/F stood pronounced by this Court, pronouncement embodied therein did not brook its standing breached, he stood also enjoined to prior thereto make a thorough inquiry qua its being legally allotable to defendant No.3 besides when in the course of a thorough inquiry held/embarked upon by him qua the legality of allotment of land adjoining the land of Ram Singh, his fathoming therefrom it being unallotable to defendant No.3, unallotability whereof stood spurred from its falling within the precincts of UDF and DPF 'Jungle Gandharav' as palpably depicted in Ext.D-2, exhibit whereof though existing in his records whereas the apposite manifestation occurring therein stood purportedly overlooked by him rather enjoined him to unveil the fate of his inquiry to this Court, for constraining it to make a review of its order pronounced in Cr.MP(M) No. 993/93. Prominently when this Court had not rendered a verdict upon the allottors to allot it even when it was legally unallotable. However, the Deputy Commissioner, Mandi omitted to do so. His omissions palpably has sequelled the legal mishap of his proceeding to make allotment of that part of the suit land to defendant No.3 despite it being unallotable to him, its standing located within UPF and DPF 'Jungle Gandharav', its location wherewithin as manifested by a pronouncement of this Court in Civil Writ Petition 16 of 1991 interdicted its allotment by way of Nautor to defendant No.3. Consequently, even if the Deputy Commissioner, Mandi implemented the orders of this Court pronounced in Cr.MP(M) No. 993/93 yet his omissions in the aforesaid regard impinging upon its allotment to defendant No.3 standing concomitantly interdicted, would not clothe the allotment of the suit land by the Deputy Commissioner, Mandi to defendant No.3 with any aura of solemnity or validity. Reiteratedly, even though defendant No.3 revered the pronouncement of this Court yet he breached the legal cannon of its being unallotable, fate whereof was obviable in case he had concerted this Court to make a review of its order by motioning it. In sequel any findings recorded by both the Courts below for validating the allotment of the suit land to defendant No.3 by defendants No. 1 and 2 on the anchorage of the rendition of this Court pronounced in Ext.PZ/F stands not founded upon theirs marshalling therefrom its proper spirit besides nuance rather stands embedded upon gross misappreciation by them of the impact of Ext.D-2 wherein palpable revelations are held of it falling within the precincts of UPF and DPF 'Jungle Gandharav' rendering hence its allotment as manifested by a pronouncement of this Court occurring in Civil Writ Petition No. 16 of 1991, relevant portion whereof stands extracted hereinafter, to be legally barred.

> "Having heard the learned counsel for the parties and gone through the record, we are clearly of the opinion that the land in question is not Nautor land and could not for that reason be allotted/granted as Nautor land to either the petitioner or anyone else. The revenue record, Annexure R/2 clearly indicates that the land is recorded in possession of the Forest Department and is undemarcated protected Forest and for that reason could not have been treated to be a Nautor land and allotted either to the petitioner or anyone else. It is not even the petitioner's claim that he was entitled to allotment of forest land. In this view of the matter the rejection of the petitioner's claim is strictly in accordance with the scheme."

9. Both the Courts below had also dispelled the espousal of the plaintiffs of theirs holding any Bartandari rights qua user of the suit land on the score of the plaintiffs not adducing "Naksha Bartan" or other relevant record from the department concerned. However, the aforesaid dispelling of the espousal of the plaintiffs stands aroused by theirs grossly overlooking the impact of Ext.PZ/A comprising the "Wajiw Ul Arj" qua the relevant area, with a disclosure therein of customary rights inhering in the estate right holders for using forest land. Since a clinching conclusion stands drawn by this Court qua the suit land falling within the precincts of UPF and DPF Jungle Gandharav besides with PW-2 deposing of the estates of the plaintiffs standing located in close vicinity to Jungle Gandharav sprouts an inference of with manifestations

standing unraveled in Ext.PZ/A, exhibit whereof constituting the apposite "Wajiw Ul Arj" qua customary rights inhering in the estate holders qua user of forest land located in vicinity to their estates, apposite revelations wherein embody all the purposes as stand embodied in the plaint. Consequently, with apposite delineations occurring in Ext.PZ/A of the plaintiffs holding leverage to exercise rights therein in incongruity with their staked user of adjoining Jungle Gandharav wherein the suit land is located it was inapt for both the learned Courts below to conclude of with the plaintiffs omitting to adduce evidence in display of theirs holding "Bartandari rights" therein of theirs hence standing barred to stake a claim for user of the suit land in the manner as espoused by them prominently when the conclusion arrived at by them suffers from gross mis-appreciation by them of the import of Ext.PZ/A. Even otherwise with a display occurring in Ext.D-2, the jamabandi apposite to the suit land with markings therein of the estate holders holding "Bartandaran rights", rights whereof viz.a.viz. the forest land adjoining their lands were exercisable by them in consonance with the apposite depictions in the relevant record, records whereof for reasons aforesaid stand comprised in Ext.PZ/A, the mere non adduction of list of "Bartan Darans" by the plaintiffs nor also the non occurrence therein of the names of the plaintiffs was not a tenable ground for the learned Courts below to repel their espousal of theirs holding rights as 'Bartan Darans' qua the suit land besides the forest land adjoining it. Since the suit land stood owned prior to its allotment to defendant No.3 by defendants No. 1 and 2 by the latter besides its falling within the domain of UDF and DPF 'Jungle Gandharav' also its allotment standing barred by a judicial pronouncement of this Court, relevant portion whereof stands extracted hereinabove, made it amenable for user by the estate right holders for the purposes embodied in Ext.PZ/A, purposes manifested wherein are pari materia vis-à-vis the purpose qua its user embodied in the plaint. In aftermath any insistence upon the plaintiffs by the learned Courts below to adduce the relevant list of "Bartan Darans" with a display of theirs names occurring therein would hold tenacity only in the event of evidence standing evinced of the plaintiffs not being the estate holders within the precincts of Jungle Gandharav hence theirs standing ousted from availing the customary rights qua its user by them. When the aforesaid evidence is amiss, reiteratedly the non adduction by the plaintiffs of the relevant list of "Bartan Darans" was not a tenable ground for the Courts below to hold of theirs not holding any "Bartan Daran" rights in the forest adjoining their habitat/homesteads especially when reflections in Ext.PZ/A also reflections in Ext.D-2 unravel of one of the estate holders, holding rights as a "Bartan Daran" in the forest land concerned, customary rights whereof being exercisable by "Bartan Darans" in consonance with the relevant record embodying the rights exercisable by them upon forest land. Imperatively when Ext.PZ/A is the relevant record embodying the rights exercisable by "Bartan Darans" upon forest land, even the plaintiffs who for want of evidence in display of theirs being not estate right holders in the relevant area are to be hence construable to be estate right holders therein concomitantly they are to be construed to be holding all customary rights qua user of forest land adjoining their estate besides qua user of the suit land on the anvil of manifestations occurring in Ext.PZ/A especially when all rights claimed therein by them find reflection therein dehors theirs not adducing the list of "Bartan Darans".

10. The learned First Appellate Court also non suited the plaintiffs by invoking the provisions of 91 of the Code of Civil Procedure, provisions whereof stand extracted hereinafter.

> "Public nuisances and other wrongful acts affecting the public.—
>
> [(1) in the case of a public nuisance or other wrongful act affecting, or likely to affect, the public, a suit for a declaration and injunction or for such other relief as may be appropriate in the circumstances of the case, may be instituted,—
>
> (a) by the Advocate General, or
>
> (b) with the leave of the Court, by two or more persons,even though no special damage has been caused to such persons by reason of such public nuisance or other wrongful act.]
>
> (2) Nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions.

However, the aforesaid invocation besides attraction by the learned first Appellate Court is wholly inapt prominently when its invocation would arise only when the aggrieved proclaim of omissions or commissions upon the suit land by the delinquent/delinquent(s) besides theirs tantamounting to public nuisance or his/their wrongful act affecting or likely to affect public. However, with the plaintiffs not proclaiming in their suit of the defendant No.3 by his omissions or commissions committing a public nuisance upon the suit land or his committing thereupon any wrongful act affecting or likely to affect the public contrarily with his holding the suit land as Nautor on its allotment standing made in his favour by defendants No. 1 and 2 he cannot be construed to be thereupon committing any wrongful act which affects or is likely to affect the public. Also during the subsistence of the apposite allotment to defendant No.3 by defendants No. 1 and 2 which for reasons aforesaid stands concluded by this Court to be rescindable, his holding or using the suit land is not amenable to a construction of its user by him affecting or likely to affect the public.

11. For the foregoing reasons, the substantial questions of law are answered in favour of the plaintiffs-appellants. The judgements and decrees rendered by both the Courts below are quashed and set-aside. Decree sheet be prepared accordingly. The parties are left to bear their own costs. All the pending applications also stand disposed of. Records be sent back forthwith.

****

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

Kewal Singh Shandil and others. …Petitioners

Versus

Union of India and Others. …Respondents

CWP No. 6902 of 2010
Judgment Reserved on 8.7.2016
Date of decision: 20.7.2016

Constitution of India, 1950- Article 226- Petitioners were on deputation with SJVN- they are aggrieved by the decision of the respondent to implement office memorandum, issue letter and circular for providing different salaries- held, that SJVN is a Mini Rattana Government Company- stipulations, guidelines, notifications and circulars issued from time to time by the Department of Public Enterprises or any other Department of Government of India are to be strictly followed by S.J.V.N.- petitioners are entitled to be paid what has been prescribed in the guidelines, notifications, circulars etc. issued from time to time- expectation based on sporadic, casual or random act or which is unreasonable, illogical or invalid cannot be legitimate expectation- no material was placed by the petitioner to indicate that any promise/assurance was made at any point of time by respondent No. 1- petitioners have failed to prove that they have any legal right to be paid allowance and other benefits –writ of mandamus cannot be issued in absence of breach of duty- petitioners were aware of office memorandums dated 26.11.2008 and 8.6.2009 and had opted for deputation despite knowledge - they have no other person to blame but themselves- petition dismissed. (Para-14 to 48)

Cases referred:

Navjyoti Housing Cooperative Group Housing Society and others vs. Union of India, 1992 (4) SCC 477

Supreme Court Advocate-on-Record Association and others vs. Union of India 1993 (4) SCC 441,

Food Corporation of India vs. Kamdhenu Cattle Feed Industries 1993 (1) SCC 71

Union Territory of Chandigarh vs. Dilbagh Singh and others 1993 (1) SCC 154.

Madras City Wine Merchants' Association and another vs. State of Tamil Nadu and another (1994) 5 SCC 509

Ram Pravesh Singh and others vs. State of Bihar and others (2006) 8 SCC 381

Secretary, State of Karnataka and other vs. Umadevi (3) and others (2006) 4 SCC 1
Confederation of Ex-Servicemen Associations and others vs. Union of India and others (2006) 8 SCC 399
Union of India and another vs. Lt. Col. P. K. Choudhary and others AIR 2016 SC 966
State of Uttar Pradesh and others vs. United Bank of India and others (2016) 2 SCC 757)
Zonal Manager, Central Bank of India Vs. Devi Ispat Limited and others (2010) 11 SCC 186
State of Punjab vs. Inder Singh and others (1997) 8, SCC 372
Gurinder Pal Singh and others vs. State of Punjab and others, 2005 (1) SLR, 629

For the Petitioners: Mr. Sunil Mohan Goel, Advocate.
For the Respondents: Mr.Ashok Sharma, Assistant Solicitor General of India with Mr.Angrez Kapoor, Advocate, for respondents No. 1 and 5.
Mr.J.S. Guleria, Assistant Advocate General, for respondent No. 2.
Mr.Ramakant Sharma, Senior advocate, with Ms.Devyani Sharma, Advocate, for respondent No. 3.
Mr.Satyen Vaidya, Senior Advocate, with Mr.Vivek Sharma, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J.

All the petitioners are regular employees of Himachal Pradesh State Electricity Board Limited (for short HPSEB), respondent No. 4 and are/were on deputation with Satluj Jal Vidyut Nigam (for short SJVN), respondent No. 3 and are aggrieved by the alteration of their conditions of deputation.

2. The chronological sequence of events is as follows:-

"23.7.1991	*An agreement was entered into between Hon'ble Chief Minister Himachal Pradesh and Union Minister of Power regarding execution of Nathpa Jhakri Hydro Electric Project (now SJVNL) regarding the organizational arrangement.*
6.1.1992	*The H.P. State Electricity Board notified terms and conditions of secondment of HPSEB personnel to NJPC on the basis of the agreement dated 23.7.1991.*
12.7.1998	*The Joint Action Committee of HPSEB staff submitted a detailed memorandum of grievance to the then Hon'ble Union Minister of Power, Government of India and Hon'ble Chief Minister Himachal Pradesh.*
3.6.1999	*The Joint Secretary, Government of India after careful consideration and prior consultation accepted the package deal finalized by the Board of Directors of NJPC.*
24.1.2000	*In this background agreement bearing No. 13/6/98-Hydel.II came to be executed between the Joint Secretary (Hydro) Government of India Ministry of Power, New Delhi and Secretary (MMP & Power) to the Government of Himachal Pradesh.*
4.2.2000	*Pursuant to the agreement Himachal Pradesh State Electricity Board vide Notification bearing No.HPSEB(Sectt)/103-44/2000-8573-607 dated 4/2/2000 notified terms and conditions of deputation including equivalence of HPSEB's regular staff, working in Nathpa Jhakri Power Corporation.*
11.4.2001/13.3.2002	*Pursuant to the aforesaid terms and conditions, office order was issued on 13.3.2002 by NJPC whereby the personnel's of HPSEB on deputation of NJPC had been drawing the allowances/Perks etc. at par with those admissible to the NJPC employees of equivalent status.*

26.11.2008	*The Under Secretary to the Government of India, Ministry of Heavy Industries & Public Enterprises, Department of Public Enterprises Government of India issued an office memorandum in which para iv of Annexure IV on the subject provides for variable pay-performance related pay.*
20.4.2009	*Board of Directors of Respondent No. 3 held meeting and under item No. 180/17, titled revision of scales of pay and fringe benefits, it was mentioned that pay revision of the employees of Public Sector Undertaking (PSUs) on Ida pattern is due w.e.f. 1.1.2007. The minutes further contained that Central Public Sector Enterprises (CPSEc) scales, perks and benefits, as per the relevant notification, will be given to only those government employees who come on permanent absorption basis. It further contained that in SJVNL, which is a joint venture of Respondents No. 1 and 2, the 724 deputaionists as per agreement will continue in the organization on deputation if it is not possible to absorb them. The minutes further contained that the Board agreed with the proposal to take up the issue with the Ministry of Power and Department of Public Enterprises and till the finalization of the same by the Government of India, the existing practice regarding pay and allowances be continued.*
24.4.2009	*The respondent No. 3 also took up the matter with the respondent Union of India, on the subject 'pay and allowances to deputationists in SJVNL'. It was mentioned in this communication that as per the DPE OM dated 26.11.2008, the Government Officers on deputation to CPSEs would draw salaries as per their entitlement in Parent Department.*
8.6.2009	*The Under Secretary to the Government of India, Ministry of Heavy Industries & Public Enterprises, Department of Public Enterprises Government of India issued an office memorandum on the subject 'Revision of scales of pay of executives of CPSE's w.e.f. 01.01.2007, pay etc. of Government Officers on deputation to the CPSEs. It is mentioned in the said office memorandum that Para 121, Annexure IV, Point No. iv of DPE O.M. No. 2(70)/08-DPE(WC), dated 26.11.2008 provides that Government Officers who are on deputation to the CPSEs will continue to draw salary as per their entitlement in the parent Department. Only those who come on permanent absorption basis will get the CPSE scales, perks and benefits.*
7.9.2009	*Petitioners made a representation to Respondent No. 3 wherein it was mentioned that there appears some contemplative move to disallow the perks and allowances of SJVNL in respect of those deputationists whose services were approved or taken over on deputation on or after 26.11.2008 and to allow them allowances of their parent Organization.*
14.9.2009	*The Additional General Manager (P&A) of respondent No. 3 wrote to respondent No. 4 on the subject 'Borrowing services of the personnel from HPSEB on deputation and allowing them salary and allowances of their parent Department in accordance with the DPE guidelines' in which it was mentioned that henceforth deputation terms with respect of employees from HPSEB stand revised as per the DPE guidelines. The changed deputation terms be brought to the notice of all employees of HPSEB willing to come on deputation to SJVNL.*
25.2.2010	*The Secretary of the Himachal Pradesh State Electricity Board, responded to the aforesaid letter and wrote to respondent No. 3 that the terms and conditions of deputation for the HPSEB deputation employees who are already on deputation as on 26.11.2008 or who go on deputation after 26.11.2008, should not be changed/altered as per the DPE guidelines in view of the agreement signed on 23.7.1991 between the Government of Himachal Pradesh and the Government of India. Reference was also made to Clause 3.3 of the agreement and it was specifically mentioned that the said Clause, inter alia,*

	provides that in so far as the deputation of the HPSEB personnel to NJPC is concerned, it shall be ensured that the terms of secondment will not be to the disadvantage of the HPSEB personnel. It was mentioned in the said letter that the letter issued by the SJVNL dated 14.9.2009 be withdrawn immediately.
29.4.2010	*Respondent No. 3 also issued Corporate Personnel Circular No. 205/2010, which inter alia, provides that adjustable ad hoc advance against performance related pay and revision of perks due w.e.f. 26.11.2008 will be payable, inter alia, to the deputationists who joined prior to 26.11.2008. In other words, the grant of performance related pay to the deputationists who joined after 26.11.2008 has been discontinued vide this circular.*
4.5.2010	*The Himachal Pradesh State Electricity Board Employees Union made a detailed representation against the discrimination towards its deputationists and the violation of the provisions of the agreement entered into in this regard between the concerned parties.*
26.5.2010	*The Special Officer of the HPSEB took up the issue with the Government of H.P. and has mentioned therein that the guidelines of CPSE should be treated as general guidelines, wherein specific agreements are there. In this background, the agreement shall prevail over the guidelines.*
21.7.2010	*The respondent No. 3 issued office Memorandum to the Heads of P&A Shimla/Projects and heads of F&A Shimla/Projects on the subject 'Salary to deputationists joined SJVNL, which reads as "As per DPE guidelines, deputationists joining SJVN after 26.11.08 are to be paid salary as per entitlement in the parent department/organization. In the wake of aforesaid guidelines matter was examined and submitted before the competent authority. As per approval of competent authority it has been decided that deputationists joining SJVN after 28.11.08 (including extension if any) be allowed to draw salary (including perks and allowances) as per their entitlement in the parent department."*

3. Aggrieved by the decision of the respondent Corporation in implementing OMs issued by the Department of Public Enterprises on 26.11.2008, 8.6.2009 and further issuance of letter dated 14.9.2009 and circular dated 29.4.2010 and inter office memorandum dated 21.7.2010, the petitioners had filed the instant writ petition on various grounds taken in the petition and have prayed for the following reliefs:-

"i) That this Hon'ble Court may be pleased to issue a writ of certiorari letter dated 14.9.2009 (Annexure P 14), office Circular dated 29.4.2010 (Annexure P 17) and Inter Office Memo dated 21.7.2010 (Annexure P 21) issued by Respondent No. 3.

ii) That this Hon'ble Court may be pleased to issue a writ of mandamus directing the Respondents to continue to govern the terms of deputation of the employees of the HPSEB and the Government of H.P. on deputation with the SJVNL in consonance with and as agreed between the Respondents vide agreement dated 24.1.2000 and notification dated 4.2.2000 and office orders dated 11.4.2001 and 13.3.2002 respectively, entered into between Respondents No. 1 and 2 and issued by Respondents No. 3 and 4 and not to re-determine the terms of deputation of the employees of the HPSEB or the Government of H.P. including the petitioners on the basis of the DPE guidelines issued vide OMs, dated 26.11.2008 and 8.6.2009.

iii) That this Hon'ble Court may kindly be pleased to issue an appropriate writ to the effect that the DPE guidelines issued by the Respondent No. 5 vide

office Memorandums dated 26.11.2008 and 8.6.20089 cannot be made applicable to determine the terms of deputation of the employees of the HPSEB and the Government of H.P. like the petitioners on deputation with the SJVNL and alternatively, the petitioners pray that if this Hon'ble Court is pleaded to come to the conclusion that the said guidelines have been made applicable, even in order to determine the terms of deputation of the employees of the HPSEB and Government of H.P., who are on deputation with Respondent No. 3, then this Hon'ble Court may kindly be pleaded to issue a writ of Certiorari quashing the applicability of the said guidelines viz a viz the employees of the HPSEB and the Government of H.P. on deputation with the SJVNL.

iv) That the Respondents may kindly be directed to produce all the relevant records of the case before this Hon'ble Court and to pay the costs of the petition."

4. Respondent No. 4 (HPSEB Ltd.) has supported the claim of the petitioners and it is averred that the personnel of HPSEB who are on deputation to the SJVNL are getting the pay scales as also the other perks and allowances in pursuance of the settled and agreed terms and conditions of various instruments/agreements, which cannot be altered to their determent unilaterally on the basis of Office Memorandum dated 26.11.2008 and 8.6.2009. It is apt to reproduce paras 18 and 20 of the reply, which read thus:-

"18. In reply to this para, the replying respondent submits with utmost respect that the personnel of HPSEB who are on deputation to the SJVNL are getting the pay scales as also the other perks and allowances in pursuance of the settled and agreed terms and conditions of various instruments/agreements, which cannot be altered to their determent unilaterally on the basis of Office Memorandum dated 26.11.2008 and 8.6.2009.

20. The contents of this para are admitted that the AGM (P&A) of Respondent No. 3 wrote letter dated 14/9/2009 (Annexure P-14) to the replying respondent in which it was inter-alia mentioned that henceforth deputation terms with respect to employees of the replying respondent stand revised as per the DPE guideline. The replying respondent vide letter dated 25/2/2010 (Annexure P-15) wrote to the Respondent No. 3 stating inter-alia therein that the terms and conditions of deputation for the HPSEB deputation employees who are already on deputation as on 26/11/2008 or who go on deputation after 26/11/2008, ought not to be changed/altered in the light of DPE guidelines. In the letter ibid it was stated that an agreement was signed on 23/7/1991 between the then two Governments i.e. the Government of India and the H.P. Government for the smooth and expeditious execution of the Nathpa Jhakri Hydro electric Project by the then NJPC now SJVNL. Clause No. 3.3 of the said agreement specifically provides that in so far as deputation of HPSEB Personnel to NJPC is concerned, it shall be ensured that the terms of secondment will not be the disadvantage of HPSEB personnel. From the above, it is evident that the guidelines issued by the DPE cannot supersede the sacrosanct agreement in between the two Governments. In view of the above, the replying respondent had requested the Respondents No. 3 to withdraw the letter dated 14/9/209 immediately."

5. Respondent No. 3, SJVNL has opposed the petition by filing a separate reply, wherein the maintainability of the petition itself has been questioned on the ground that the respondent was bound to follow the guidelines issued by respondent No. 1 vide office memorandum dated 26.11.2008 and guidelines dated 8.6.2009. It is further averred that the petition is liable to be dismissed on the ground that the replying respondent in its 118th meeting of Board of Directors held on 20th April, 2009 had agreed with the proposal to take up the issue with the Ministry of Power and Department of Public Enterprises and till finalization of the same,

the existing practice was permitted to be continued. Even the Executive Director of the replying respondent had written a communication dated 24.4.2009, but respondent No. 1 had not acceded to this request and vide communication dated 8.6.2009 (annexure P-10) had proceeded to issue the memorandum, which is binding upon the replying respondent.

6. Respondent No. 1 has also contested the petition by filing its separate reply, and has justified the issuance of impugned memorandum.

7. It has been averred that the Department of Public Enterprises (DPE) is the nodal Department in Government of India, to issue policy guidelines in respect of the Central Public Sector Enterprises (for short CPSEs) and has further clarified that the CPSEs are those Government Companies where the equity of Central Government is more than 50%, which have been established by an enactment of the Parliament and where the managements of such companies are controlled by Central Government, etc. It is further averred that as on 31.3.2009, there were 246 CPSEs in India having 15-35 lakh employees, who are working on the Industrial Dearness Allowance pay pattern, while the remaining are one Central Dearness Allowance pay pattern. The Ida pay pattern comprises two categories of employees viz (i) Executive (Board & below Board level) and non-unionized Supervisors and (ii) workmen Pay and Allowances etc.

8. In respect of the first category i.e. Executive (Board and below Board level) and non-unionized Supervisors is decided by the Government of India based on the recommendations of a Pay Revision Committee, headed by a retired Judge of Supreme Court of India. While the wage revision in respect of second category i.e. workmen, is based on the negotiations between the Trade-Unions and the Management of respective CPSEs, for which board guidelines are issued by the DPE, before such negotiations. With regard to CDA pattern employees, their pay structure (with some conditions is generally based on the pay structural of Central Government employees. Government of India vide Resolution dated 30.11.2006 had set up a Pay Revision Committee (hereinafter called as 2nd PRC) headed by Justice (Retd) M.J. Rao, Supreme Court of India, with other eminent persons as its Members, to give its recommendations for the pay structure in respect of Executives) Board below Board level) and non-unionized Supervisors of CPSEs, following Ida pattern, w.e.f. 1.1.2007. The 2nd PRC in their report at page III, para 6.2.3 (A) VI, recommended as under:-

> *"Government Officers on deputation to the CPSEs, will continue to draw the salary as per their entitlement in the parent department. Only those who come on permanent absorption basis will get the benefit of CPSE scales, perks, benefits."*

9. These recommendations of 2nd PRC were circulated by the DPE to all administrative Ministers/Departments and other agencies concerned, which included Ministry of Power that is the administrative ministry in respect of SJVN. Central Cabinet considered the recommendations of the 2nd PRC and also the comments of respective administrative Ministries/Department's/ Agencies including Ministry of Power. Government's decision has been conveyed in DPE O.M/Dated 26.11.2008 and 9.2.2009. The recommendation of 2nd PRC regarding pay etc. of Government officers on deputation to CPSEs (as referred above) was accepted in toto by the Government. The date of effect of the recommendation of the 2nd PRC including the aforesaid recommendation on deputationists was w.e.f. 1.1.2007. Further as per para '18' of the DPE OM dated 26.11.2008, there is a provision of Anomalies Committee, comprising Secretaries of Department of Expenditure, Department of Personnel & Training and DPE, to look into further specific issue/problem that may arise in implementation of Govt's decision on the recommendations of 2nd PRC.

10. Some Ministries/Departments had raised the issue of pay of deputationists w.e.f. 1.1.2007, as they were finding difficulties in its implementation. Based on the recommendations of the Anomalies Committee (as aforesaid), Government's decision was conveyed in O.M. dated 8.6.2009. This order in nut shell conveyed that the Government officers already on deputation with the CPSEs as on 26.11.2008 (instead of earlier effective date of 1.1.2007) will continue to avail of the option already available and exercised by them till the end of their tenure. Meaning

thereby that any Government officer (including State Government Officer) who has joined the CPSE after 26.11.2008, on deputation, his/her pay etc. would be regulated as per Annexure IV, point No. (iv) of O.M. dated 26.11.2008.

11. Therefore, all these petitioners who are Government Officers and have joined the SJVN after 26.11.2008 on deputation will draw the salary as per their entitlement in their parent department i.e. HPSEB and only those officers, who come on permanent basis, will get the CPSE pay scales, perks and allowances, performance Related Pay (PRP) etc.

12. It is averred that above provisions apply to all the CPSEs, be it Maharatna, Navratna, Miniratna CPSEs like NHPC, NHDC, THDC, which are similarly placed like SJVN. It is reiterated that above mentioned decision of the Cabinet is based on the duly constituted Pay Revision Committee headed by a former Judge of Supreme Court and also deliberations undergone. The impugned provisions are mandatory in nature and CPSEs are required to follow them in letter and spirit. It is also submitted that there is no disadvantage to the petitioners, as while on deputation to SJVN, they continue to get their pay etc. as per their entitlement in HPSEB and equal to their counterparts in HPSEB. It is further averred that there are many CPSEs, which have both IDA and CDA pattern of pay scales, which are altogether different pay structures, while they work in same CPSE or for that matter doing the same job. The applicability of revision of scales of pay in respect of employees on deputation with the CPSUs was clarified by the DPE vide their subsequent O.M. dated 8.6.2009 which rationalized the terms and conditions of deputation in respect of deputationist with the CPUs.

13. Now in so far as the State of H.P. is concerned, it has chosen to support the claim of the petitioner and it has been averred that the employees of HPSEB on deputation with SJVN were representing the State and consequently there cannot be any discrimination in the matter of salary, pay and perks etc. in violation of the specific agreements entered into on 24.5.1988, 23.7.1991, 6.1.1992, 24.1.2000 and notification dated 4.2.2000. It is further averred that the petitioners cannot be discriminated viz-a-viz the regular employees of SJVN, as the State Government is having 25% share capital in SJVN. It is further contended that the office memorandum dated 26.11.2008 (Annexure P-11) and the DPE guidelines may in normal course be applicable in the matter of deputationists from one department to another department, but the same are not at all applicable to the instant case, as it is different, distinct and distinguishable from the routine/normal deputation of employees to any State or Central Government Departments.

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

14. Before adverting to the relative merits of the case, it would be necessary to observe that the parties are *ad idem* that all the petitioners herein have joined on deputation with SJVNL only after Office Memorandum dated 26.11.2008 had already been issued. Another important aspect which shall have to be borne in mind while determining the instant lis is that the petitioners admittedly were not privy or party to the agreements upon which they seek to place reliance. Bearing in mind these important aspects, I now proceed to deal with the merits of the case.

15. Indubitably, respondent No. 3 is a Government Company as defined in Section 2(45) of the Companies Act, which reads thus:-

> *"2(45) "Government company" means any company in which not less than fiftyone per cent of the paid-up share capital is held by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments, and includes a company which is a subsidiary company of such a Government company."*

16. Clause 35A of the Memorandum of Association and Articles of Association deals with powers subject to Guidelines/regulations for Mini Ratna/Nav Ratna Companies and the same reads thus:-

> *"35A The Board/Chairman shall exercise all such Powers as are applicable to Mini Ratna companies and all such powers as applicable to Nav Ratna, upon such status as and when, bestowed subject to adherence of to the stipulations, guidelines, notifications, circulars as may be issued from time to time by the Department of Public enterprises or any other Department of the Government of India governing the status of Mini Ratna/Nave Ratna companies."*

17. It is not in dispute that respondent No. 3 is a Mini Ratna Company and therefore, in terms of the aforesaid clause, the stipulations, guidelines, notifications, circulars as may be issued from time to time by the Department of Public Enterprises or any other Department of Government of India governing the status of Mini Ratna Companies are to be strictly adhered to by respondent No. 3. Once it is so, can the petitioners claim a right dehors the instructions, notifications, circulars etc. issued by respondent No. 1, i.e. Department of Public Enterprises?

18. The petitioners virtually have no answer to this question, save and except to harp upon the agreements (supra) to contend that though they were not party or privy to the same, but being the beneficiaries of such agreements, the same could not have been nullified on the basis of the executive instructions issued by respondent No. 1.

19. This contention is sans merit, as it would be preposterous to hold that the employees would have a larger right than the one vested or conferred upon the employer i.e. respondent No. 3. The employer can only pay what is prescribed. After all it is out of the coffers of employer that pay and allowances of the petitioners are to be paid.

20. That apart, the petitioners are only entitled to be paid what has been prescribed in the guidelines, notifications, circulars etc. issued from time to time by respondent No. 1 and at the same time respondent No. 3 cannot deviate from what is envisaged in these circulars, notifications etc. Even otherwise, the petitioners have failed to point out that in case their plea is accepted, then where from and by whom the additional amount towards their pay and allowances would be made good.

21. The matter can be looked from a different angle. Admittedly, the petitioners have not assailed or prayed for quashing of any of the office memorandums issued by respondent No. 1, more particularly the ones issued on 26.11.2008 and 8.6.2009 and therefore, cannot be held entitled to any relief in view of the binding nature of these memorandums upon respondent No. 3 in term of clause 35A of the Memorandum of Association and Articles of Association.

22. In addition to this it was only after issuance of the memorandum dated 26.11.2008 that the petitioners with their eyes wide open have joined respondent No. 3 and therefore, cannot now turn around and question the memorandum at this stage.

23. The learned counsel for the petitioner would still argue that in light of various agreements executed from time to time, the petitioners have legitimate expectation to get the pay and perks as admissible to the employees of SJVNL.

24. The doctrine of legitimate expectation has been described in *Halsbury's Laws of England, 4th Edition*, in the following words:

> *"81.* ***Legitimate expectations****. – A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past practice."*

25. The same principle has been followed even by the Courts in India. Reference in this connection may be usefully made to the judgment of the Hon'ble Supreme Court in the case of ***Navjyoti Housing Cooperative Group Housing Society and others*** vs. ***Union of India, 1992 (4) SCC 477***, ***Supreme Court Advocate-on-Record Association and others*** vs. ***Union of India 1993 (4) SCC 441, Food Corporation of India*** vs. ***Kamdhenu Cattle Feed Industries 1993 (1) SCC 71*** and ***Union Territory of Chandigarh*** vs. ***Dilbagh Singh and others 1993 (1) SCC 154.***

26. In ***Madras City Wine Merchants' Association and another vs. State of Tamil Nadu and another (1994) 5 SCC 509*** the Hon'ble Supreme Court held that the legitimate expectation may arise:-

> "*(a) if there is an express promise given by a public authority; or*
>
> *(b) because of the existence of a regular practice which the claimant can reasonably expect to continue;*
>
> *(c) such an expectation must be reasonable.*
>
> *However, if there is a change in policy or in public interest the position is altered by a rule or legislation, no question of legitimate expectation would arise."*

27. In ***Ram Pravesh Singh and others*** vs**. *State of Bihar and others (2006) 8 SCC 381***, the question as to what is the legitimate expectation was directly in issue before the Hon'ble Supreme Court and it was held as under:

> *"15. What is legitimate expectation? Obviously, it is not a legal right. It is an expectation of a benefit, relief or remedy, that may ordinarily flow from a promise or established practice. The term 'established practice' refers to a regular, consistent predictable and certain conduct, process or activity of the decision-making authority. The expectation should be legitimate, that is, reasonable, logical and valid. Any expectation which is based on sporadic or casual or random acts, or which is unreasonable, illogical or invalid cannot be a legitimate expectation. Not being a right, it is not enforceable as such. It is a concept fashioned by courts, for judicial review of administrative action. It is procedural in character based on the requirement of a higher degree of fairness in administrative action, as a consequence of the promise made, or practice established. In short, a person can be said to have a 'legitimate expectation' of a particular treatment, if any representation or promise is made by an authority, either expressly or impliedly, or if the regular and consistent past practice of the authority gives room for such expectation in the normal course. As a ground for relief, the efficacy of the doctrine is rather weak as its slot is just above 'fairness in action' but far below 'promissory estoppel'. It may only entitle an expectant : (a) to an opportunity to show cause before the expectation is dashed; or (b) to an explanation as to the cause for denial. In appropriate cases, courts may grant a direction requiring the Authority to follow the promised procedure or established practice. A legitimate expectation, even when made out, does not always entitle the expectant to a relief. Public interest, change in policy, conduct of the expectant or any other valid or bonafide reason given by the decision-maker, may be sufficient to negative the 'legitimate expectation'. The doctrine of legitimate expectation based on established practice (as contrasted from legitimate expectation based on a promise), can be invoked only by someone who has dealings or transactions or negotiations with an authority, on which such established practice has a bearing, or by someone who has a recognized legal relationship with the authority. A total stranger unconnected with the authority or a person who had no previous dealings with the authority and who has not entered into any transaction or negotiations with the authority, cannot invoke the doctrine of legitimate expectation, merely on the ground that the authority has a general obligation to act fairly."*

28. In ***Secretary, State of Karnataka and other*** vs. ***Umadevi (3) and others (2006) 4 SCC 1,*** a Constitution Bench of the Hon'ble Supreme Court referred to the circumstances in which the doctrine of legitimate expectation can be invoked:

> *"The doctrine can be invoked if the decisions of the administrative authority affect the person by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there have been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn."*

29. In ***Confederation of Ex-Servicemen Associations and others*** vs. ***Union of India and others (2006) 8 SCC 399,*** another Constitution Bench of the Hon'ble Supreme Court referring to the doctrine of legitimate expectation held as under:

> *"No doubt, the doctrine has an important place in the development of Administrative Law and particularly law relating to 'judicial review'. Under the said doctrine, a person may have reasonable or legitimate expectation of being treated in a certain way by an administrative authority even though he has no right in law to receive the benefit. In such situation, if a decision is taken by an administrative authority adversely affecting his interests, he may have justifiable grievance in the light of the fact of continuous receipt of the benefit, legitimate expectation to receive the benefit or privilege which he has enjoyed all throughout. Such expectation may arise either from the express promise or from consistent practice which the applicant may reasonably expect to continue."*

30. The same reiteration of law is found in a recent judgment of the Hon'ble Supreme in ***Union of India and another*** vs***. Lt. Col. P. K. Choudhary and others AIR 2016 SC 966*** wherein it was held as under:

> *"42. In Food Corporation of India v. Kamdhenu Cattle Feed Industries (1993) 1 SCC 71: (AIR 1993 SC 1601) one of the earlier cases on the subject this Court considered the question whether Legitimate Expectation of a citizen can by itself create a distinct enforceable right. Rejecting the argument that a mere reasonable and legitimate expectation can give rise to a distinct and enforceable right, this Court observed:*
>
> > *"8.The mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision-making process. Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case. Whenever the question arises, it is to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant. A bona fide decision of the public authority reached in this manner would satisfy the requirement of non-arbitrariness and withstand judicial scrutiny. The doctrine of legitimate expectation gets assimilated in the rule of law and operates in our legal system in this manner and to this extent."*
>
> *(emphasis supplied)*

43. To the same effect is the decision of this Court in Union of India v. Hindustan Development Corporation and Ors. (1993) 3 SCC 499, where this Court summed up the legal position as under:

> *" 28..... For legal purposes, the expectation cannot be the same as anticipation. It is different from a wish, a desire or a hope nor can it amount to a claim or demand on the ground of a right. However earnest and sincere a wish, a desire or a hope may be and however confidently one may look to them to be fulfilled, they by themselves cannot amount to an assertable expectation and a mere disappointment does not attract legal consequences. A pious hope even leading to a moral obligation cannot amount to a legitimate expectation. The legitimacy of an expectation can be inferred only if it is founded on the sanction of law or custom or an established procedure followed in regular and natural sequence. Again it is distinguishable from a genuine expectation. Such expectation should be justifiably legitimate and protectable. Every such legitimate expectation does not by itself fructify into a right and therefore it does not amount to a right in the conventional sense."*
>
> *33. On examination of some of these important decisions it is generally agreed that legitimate expectation gives the applicant sufficient locus standi for judicial review and that the doctrine of legitimate expectation is to be confined mostly to right of a fair hearing before a decision which results in negativing a promise or withdrawing an undertaking is taken. The doctrine does not give scope to claim relief straightaway from the administrative authorities as no crystallised right as such is involved. The protection of such legitimate expectation does not require the fulfilment of the expectation where an overriding public interest requires otherwise. In other words where a person's legitimate expectation is not fulfilled by taking a particular decision then decision-maker should justify the denial of such expectation by showing some overriding public interest. Therefore even if substantive protection of such expectation is contemplated that does not grant an absolute right to a particular person. It simply ensures the circumstances in which that expectation may be denied or restricted. A case of legitimate expectation would arise when a body by representation or by past practice aroused expectation which it would be within its powers to fulfil. The protection is limited to that extent and a judicial review can be within those limits. But as discussed above a person who bases his claim on the doctrine of legitimate expectation, in the first instance, must satisfy that there is a foundation and thus has locus standi to make such a claim. In considering the same several factors which give rise to such legitimate expectation must be present. The decision taken by the authority must be found to be arbitrary, unreasonable and not taken in public interest. If it is a question of policy, even by way of change of old policy, the courts cannot interfere with a decision. In a given case whether there are such facts and circumstances giving rise to a legitimate expectation, it would primarily be a question of fact. If these tests are satisfied and if the court is satisfied that a case of legitimate expectation is made out then the next question would be whether failure to give an opportunity of hearing before the decision affecting such legitimate expectation is taken, has resulted in failure of justice and whether on that ground the decision should be quashed. If that be so then what should be the relief is again a matter which depends on several factors."*
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> *(emphasis supplied)*

44. Reference may also be made to the decision of this Court in Punjab Communications Ltd. v. Union of India and Ors. (1999) 4 SCC 727, where this Court held that a change in policy can defeat a substantive legitimate expectation if it can be justified on "Wednesbury reasonableness." The choice of policy is for the decision-maker and not the Court. The legitimate substantive expectation merely permits the Court to find out if the change of policy which is the cause for defeating the legitimate expectation is irrational or perverse or one which no reasonable person could have made. A claim based merely on legitimate expectation without anything more cannot ipso facto give a right. Similarly in Dr.Chanchal Goyal (Mrs.) v. State of Rajasthan (2003) 3 SCC 485, this Court declined relief on the plea of legitimate expectation on the ground that the appellants had not shown as to how any act was done by the authorities which created an impression that the conditions attached to the original appointment order were waived. No legitimate expectation could be, declared this Court, claimed on such unfounded impression especially when it was not clear as to who and what authority had created any such impression. The decisions of this Court in Ram Pravesh Singh v. State of Bihar (2006) 8 SCC 381, Sethi Auto Service Station and Anr. v. Delhi Development Authority and Ors. (2009) 1 SCC 180, Confederation of Ex-servicemen Association v. Union of India (2006) 8 SCC 399, and State of Bihar and Ors. v. Kalyanpur Cements Ltd. (2010) 3 SCC 274, reiterate the legal position stated in the decisions earlier mentioned. In Monnet Ispat and Energy Ltd. v. Union of India and Ors. (2012) 11 SCC 1, this Court reviewed the case law on the subject and quoted with approval the following passage in Attorney General for New South Wales (1990) 64 Aus LJR 327:

> *" To strike down the exercise of administrative power solely on the ground of avoiding the disappointment of the legitimate expectations of an individual would be set the courts adrift on a featureless sea of pragmatism. Moreover, the notion of a legitimate expectation (falling short of a legal right) is too nebulous to form a basis for invalidating the exercise of a power when its exercise otherwise accords law."*

31. It would be evident from the aforesaid exposition of law that the doctrine of legitimate expectation cannot be applied in cases of invalid expectation. The expectation should be legitimate, that is, reasonable, logical and valid. Any expectation which is based on sporadic or casual or random acts, or which is unreasonable, illogical or invalid cannot be a legitimate expectation. For the application of doctrine of legitimate expectation, representation or promise should be made by an authority, a person unconnected with the authority, who had no previous dealing and who has not entered into any transactions or negotiations with the authority cannot invoke doctrine of legitimate expectation. Therefore, a person who bases his claim on the doctrine of legitimate expectation has to satisfy that he has relied on the said representation and the denial of that expectation has worked to his detriment. (See: ***State of Uttar Pradesh and others*** vs***. United Bank of India and others (2016) 2 SCC 757).***

32. It can further be discernible from the aforesaid exposition of law that a case of legitimate expectation would arise when a body representation or by past practice aroused expectation which it would be within the power to fulfill. The protection is limited to that extent and judicial review can be within those limits. However, a person who bases his claim on the doctrine of legitimate expectation, in the first instance, must satisfy that there is a foundation and thus has locus standi to make such a claim. In considering the same several factors which give rise to such legitimate expectation must be present. The decision taken by the authority must be found to be arbitrary, unreasonable and not taken in public interest. If it is a question of policy, even by change of old policy, the Courts cannot interfere with a decision. In a given case whether there are such facts and circumstances giving rise to a legitimate expectation, it would primarily be a question of fact. It is more than settled that where there is no promise, the doctrine of legitimate expectation does not apply.

33. Bearing in mind the aforesaid principles, it would noticed that there is practically no material placed by the petitioners on record, which may even remotely indicate that any promise was made or any assurance at any point of time was ever held out to them by respondent No. 1 that they would be continued to be given pay, perks, allowances, as envisaged in the earlier agreements (supra). Rather, the memorandum and guidelines issued by respondent No. 1 is by way of conscious decision as is clearly evident from its reply and it is more than settled that the scope of judicial review in such like cases is extremely limited more particularly when the petitioners themselves have not sought quashing of the memorandum and DPE guidelines issued on 26.11.2008 and 8.6.2009, respectively.

34. Moreover, it is not in dispute that even though the State Government has 25% share capital, still the SJVNL is a CPSE and therefore, in terms of clause 35A of the Memorandum of Association and Articles of Association, is bound by not only the guidelines issued by respondent No. 1, but even bound by the stipulations, notifications, circulars, instructions issued by any other department of the Government of India.

35. The petitioners were required to show and establish on record that they have a legal right to claim the pay, allowances and other benefits as envisaged in the so called agreements and further establish that despite the provisions contained in clause 35A of the Memorandum of Association and Articles of Association, memorandums issued on 26.11.2008 and thereafter on 8.6.2009 are not applicable to their cases.

36. The object of issuance of writ of mandamus is to compel performance of a legal duty. In ***Zonal Manager, Central Bank of India Vs. Devi Ispat Limited and others (2010) 11 SCC 186***, the Hon'ble Supreme Court held that mandamus can be issued by the High Court under Article 226 of the Constitution, if a legal right exist and corresponding legal duty is liable to be performed by the State or its instrumentalities. It is apt to reproduce para 28 of the judgment, which reads thus:-

> *"28. It is clear that (a) in the contract if there is a clause for arbitration, normally, a writ court should not invoke its jurisdiction; (b) the existence of effective alternative remedy provided in the contract itself is a good ground to decline to exercise its extraordinary jurisdiction under Article 226; and (c) if the instrumentality of the State acts contrary to the public good, public interest, unfairly, unjustly, unreasonably discriminatory and violative of Article 14 of the Constitution of India in its contractual or statutory obligation, writ petition would be maintainable. However, a legal right must exist and corresponding legal duty on the part of the State and if any action on the part of the State is wholly unfair or arbitrary, writ courts can exercise their power. In the light of the legal position, writ petition is maintainable even in contractual matters, in the circumstances mentioned in the earlier paragraphs."*

37. A mandamus will be issued to a person aggrieved who approaches the Court, if he makes out (i) existence of a legal right in him and a corresponding obligation on the respondent to perform a legal duty and (ii) refusal, either express or implied, by the respondent to perform such duty, in spite of a demand. It is therefore, for the petitioners to prove the existence of legal right in their favour, after all it is they who have prayed for the issuance of writ in the nature of mandamus and are bound to establish the existence of a legal right in their favour and a corresponding legal duty upon the respondents to desist from implementing the OMs dated 26.11.2008 and 8.6.2009.

38. The petitioners were further required to establish that despite clause 35A of the Memorandum of Association and Articles of Association of respondent No. 3, it was still obligated upon respondent No. 3 to have continued paying the pay and other allowances and their condition of service would continue to be governed in terms of the agreements, as already referred to herein above. Having failed to prove aforesaid, no relief can be granted to them.

39. Evidently, respondent No. 1 has not chosen to deviate from the mandate of the OMs issued by it on 26.11.2008 and 8.6.2009 and on the other hand the same have essentially to be followed by respondent No. 3 in terms of clause 35A of the Memorandum of Association and Articles of Association. Therefore, once respondent No. 1 has refused to relax the stipulation in the OMs in issue, the Court cannot compel the respondents to relax the condition of OMs as that would amount to compelling the authorities to commit an illegality. Giving effect to such plea would be prejudicial to the interest of law and will do incalculable mischief to public interest. It will be a negation of law and rule of law.

40. The principle, on which the whole argument of the petitioners is based, eludes to a situation where extraordinary jurisdiction of this Court is sought to be invoked for compelling the authority to commit illegality by issuing a prerogative writ on the specious plea of Article 14 of the Constitution of India claiming infringement right of equality by practicing irrational discrimination. Obviously, this Court cannot be made privy to pass an illegal or unwarranted order. The extraordinary and discretionary power of this Court cannot be exercised for such a purpose.

41. Now adverting to the plea of the petitioners that they have been discriminated against. No doubt, it is true that Article 14 of the Constitution embodies a guarantee against arbitrariness, but it does not assume uniformity in mis-conceptualized plea based on erroneous assumption of mandate of law. It is trite that guarantee of equality being a positive concept, cannot be enforced in a negative manner. Any direction for enforcement of such claim was only tantamount to perpetuating an illegality, which cannot be permitted. A claim based on equality clause has to be just and legal.

42. As a last ditch effort, learned counsel for the petitioners would vehemently argue that once the petitioners get less pay, perks and allowances than their counter parts, who are regular employees of respondent No. 3, then there is discrimination writ large. Even this contention cannot be accepted, as it is only after obtaining the consent of the petitioners that they were deputed to work with respondent No. 3 at the time when OM dated 26.11.2008 had already been issued by respondent No. 1. It is more than settle that there can be no deputation without the consent of the person, so deputed and he would, therefore, know his rights and privileges in the deputation post.

43. What is the deputation has been succinctly dealt with by the Hon'ble Supreme Court in ***State of Punjab vs. Inder Singh and others (1997) 8, SCC 372,*** in the following terms:

> *"18. Concept of "deputation" is well understood in service law and has a recognised meaning. 'Deputation' has a different connotation in service law and the dictionary meaning of the word 'deputation' is of no help. In simple words 'deputation' means service outside the cadre or outside the parent department. Deputation is deputing or transferring an employee to a post outside his cadre, that is to say, to another department on a temporary basis. After the expiry period of deputation the employee has to come back to his parent department to occupy the same position unless in the meanwhile he has earned promotion in his parent department as per Recruitment Rules. Whether the transfer is outside the normal field of deployment or not is decided by the authority who controls the service or post from which the employee is transferred. There can be no deputation without the consent of the person so deputed and he would, therefore, know his rights and privileges in the deputation post. The law on deputation and repatriation is quite settled as we have also seen in various judgments which we have referred to above. There is no escape for the respondents now to go back to their parent departments and working there as Constables or Head Constables as the case may be."*

44. In service jurisprudence, deputation is resorted to in public interest to meet exigencies of public service. Deputation is a tripartite agreement as held by the Hon'ble Supreme Court in *Inder Singh's* case (supra) based on voluntary consent of the principal employer to lend the services of his employee, which decision has to be accepted by the borrowing Department/employer and also involves consent of the employee.

45. In ***Gurinder Pal Singh and others vs. State of Punjab and others, 2005 (1) SLR, 629***, a learned Division Bench of the Punjab and Haryana High Court observed that a deputation subsists so long as the parties to this tripartite arrangement do not abrogate it. However, if any one of the parties repudiate the agreement, the other two have no legally enforceable right to insist upon continuance of the deputation. It is apt to reproduce para 12 of the judgment which reads thus:

> *"12. In service jurisprudence, "deputation" is described as an assignment of an employee of one department or cadre to another department or cadre. The necessity for sending on deputation arises in "public interest" to meet the exigencies of "public service". The concept of deputation is based upon consent and voluntary decision of the employer to lend the services of his employee, corresponding acceptance of such service by the borrowing employer and the consent of the employee to go on deputation. A deputation subsists so long as the parties to this tripartite arrangement do not abrogate it. However, if any one of the parties repudiate the agreement, the other two have no legally enforceable right to insist upon continuance of the deputation. Even in the cases where deputationists continue for a pretty long period and options for their "absorption" in the borrowing department were taken, yet their repatriation to the parent department was upheld by the Apex Court in Rattilal B. Soni vs. State of Gujarat, AIR 1990 SC 1132: [1991 (3) SLR 77 (SC)] after holding that "the appellants being on deputation, they could be repatriated to their parent cadre at any time and they do not get any right to be absorbed on the deputation post."*
>
> *"Deputation" per se being a contractually made ad hoc arrangement, seldom confers any right upon a deputationist, either for completion of the term of deputation or regularisation of such stop-gap arrangement. The judgments relied upon by the learned counsel for the College in this regard squarely answer the controversy."*

46. Thus, there can be no gain saying that 'deputation' is the assignment of an employee of one Department/cadre to another Department /cadre and the deputation subsists so long as parties to tripartite agreement adhere to the same.

47. Once the petitioners were already aware of the OMs dated 26.11.2008 and 8.6.2009 and were fully aware of their rights and privileges in the deputation post and despite that still chose to proceed on deputation with respondent No. 3, then they have no one to blame for their folly apart from themselves. The petitioners cannot claim a higher right than they are entitled to in law.

48. In view of the aforesaid discussion, there is no merit in this petition and the same is accordingly dismissed. Consequently, the petitioners are directed to refund the excess amount together with the prevailing bank interest in terms of orders passed by learned Division Bench of this Court on 29.12.2010.

With these observations the petition stands disposed of, so also the pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Krishan Chand ....Appellant.
Versus
State of H.P. ....Respondent.

Cr. Appeal No. 123 of 2016.
Reserved on: July 19, 2016.
Decided on: July 20, 2016.

Indian Penal Code, 1860- Section 376- **Protection of Children from Sexual Offences Act, 2012-** Section 4 and 6- Accused had raped the prosecutrix- he was tried and convicted by the trial Court- held, in appeal that prosecutrix had categorically deposed that accused had raped her - her statement was duly corroborated by the statement of PW-4 to whom incident was narrated- Medical Officer found that prosecutrix was sexually assaulted- DNA profile obtained from the shirt of the prosecutrix matched with the DNA profile of the accused, which corroborates the statement of the prosecutrix- prosecutrix was proved to be minor- prosecution version was proved beyond reasonable doubt and the accused was rightly convicted by the trial Court- appeal dismissed. (Para- 18 to 24)

For the appellant: Mr. H.S.Rangra, Advocate.
For the respondent: Mr. V.S.Chauhan, Addl. Advocate General.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment/order dated 17/18.2.2016, rendered by the learned Special Judge, Mandi, H.P., in Sessions Trial No. 47 of 2014, whereby the appellant-accused (hereinafter referred to as the accused), who was charged with and tried for offence punishable under Section 376 IPC and Sections 4 & 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as the POCSO Act) was convicted and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs. 10,000/- under Section 6 of the POCSO Act and in default of payment of fine, he was ordered to undergo simple imprisonment for six months. The victim was held entitled to compensation under Victim Compensation Scheme and 50% of the fine amount was also ordered to be paid to the victim through her parents.

2. The case of the prosecution, in a nut shell, is that PW-1, prosecutrix was born on 13.5.2001, as per birth certificate Ext. PW-5/B. On 12.6.2014, she went to school at 8:00 AM. Her mother and father were not present in the house and PW-2 Roshani Devi, grandmother was present in the house. PW-4 Rakesh Kumar her Uncle left house in connection with his employment and met victim near temple who was coming out of the bushes and was crying. PW-1 prosecutrix disclosed to PW-4 Rakesh Kumar that the accused had pushed her into the bushes and committed forcible intercourse with her. PW-4 Rakesh Kumar called PW-2 Roshani Devi and narrated everything to her. PW-2 Roshani Devi made inquiries from PW-1 prosecutrix who disclosed that she was ravished by the accused. PW-4 Rakesh Kumar went in search of the accused along with his brother and one Balwant Singh. PW-2 Roshani Devi along with PW-1 prosecutrix went to the Police Station and moved application Ext. PW-1/A whereupon FIR Ext. PW-10/A was registered in the Police Station. PW-12 Dr. Lata Chandel examined the prosecutrix and issued MLC Ext. PW-12/B. The statement of the victim was also recorded before the Magistrate vide Ext. PW-1/B. The accused was arrested. He was produced before PW-9 Dr.

Parmod Guleria, who after examination issued MLC Ext. PW-9/B. The accused was also produced before PW-19 Dr. Dharam Pal and his blood on FTA card and DNA profiling was obtained. Similarly, PW-17 Dr. D.R.Sharma obtained the blood sample of victim on FTA card and Ext. PW-17/A was obtained. The matter 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 twenty witnesses. The accused was also examined under Section 313 Cr.P.C. He pleaded innocence. He examined two witnesses in defence. The learned trial Court convicted and sentenced the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. H.S. Rangra, Advocate, for the accused has vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. V.S.Chauhan, Addl. Advocate General has supported the judgment/order of the learned trial Court dated 17/18.2.2016.

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 is the prosecutrix. She has stated that accused had committed illegal act with her. She has signed application(s) Ext. PW-1/A and PW-1/B. She was produced before the doctor when she was medically examined. She had gone to the Court at Mandi. The learned Magistrate has made enquiries from her. The learned Public Prosecutor moved an application under Section 164-5A(a)(b) of Cr.P.C. and the victim was again examined. In her cross-examination, she deposed that she was sexually assaulted by the accused. She could not narrate her age. She could not tell her date of birth. She stayed at Kharidi. She could not narrate the subjects studied by her in 5th and 8th standard. Initially, she deposed that she was tutored to make statement, however, on a Court question put to her that as to whether she was making statement under pressure or something illegal happened with her. She categorically answered that she was making statement on her own and no one pressurized or tutored her to make statement. The learned trial Court from the demeanor of the prosecutrix observed that the witness was not mentally retarded but was having low mental I.Q. She was able to understand the questions and thereafter she gave answers to the questions. She denied the suggestion that nothing illegal was committed with her by the accused. She denied that she was sexually assaulted by Dutt. She denied that she had been tutored by her grandmother and Uncle to make false statement. She has narrated the incident to her Uncle about the illegal act committed by the accused.

7. PW-2 Roshani Devi testified that PW-1 prosecutrix was her granddaughter. On 12.6.2014, victim had gone to school at 8:30 AM. Her son Ramesh Kumar had gone for labour work at about 9:40 AM. Her son Sanju called her and disclosed that accused had sexually assaulted the victim. Thereafter, she went to the spot. She made enquiries from the victim. The victim disclosed that accused had committed sexual intercourse with her. Thereafter, her son Sanju directed her to make complaint to the Police Station and he went in search of the accused. An application Ext. PW-1/A was moved to the police and FIR was registered. The victim was produced before the doctor and was medically examined. The victim was also produced before the Magistrate and her statement Ext. PW-1/B was recorded. In her cross-examination, she admitted that the victim was not mentally fit since her birth. The victim left her school when she was in 8th class. Case was registered by her son Sanju and victim. She denied the suggestion that accused had seen victim and Dutt in compromising position in the first week of June, 2014.

8. PW-4 Rakesh Kumar is a material witness. He testified that on 12.6.2014, victim had gone to school at about 8:00 AM. After some time, he also left the house in connection with his employment. When he reached near temple, he met his niece who was coming out of bushes. She was weeping. He inquired from her about the reason of weeping. She disclosed that the accused forcibly took her into the bushes and committed forcible sexual intercourse with her. Thereafter, he called his mother and disclosed everything to her. He requested his mother to take the victim to the Police Station. He went in search of the accused along with his brother Ramesh

Kumar. On the way, Balwant also met them. They noticed accused at Kanda Pattan. He denied the suggestion that accused had seen victim and Dutt Ram at Thahra Shiyaral at 7:30 AM.

9. PW-5 Sarswati Nanda has issued birth certificate Ext. PW-5/B. The date of birth of the PW-1 prosecutrix was recorded as 13.5.2001. In his cross-examination, he deposed that the date of birth certificate was issued on the basis of admission register maintained in the school.

10. PW-6 Rajiv Kumar, Panchayat Secretary has proved birth certificate and copy of Pariwar Register vide Ext. PW-6/B and PW-6/C. As per the certificates, the date of birth of the prosecutrix was 13.5.2001.

11. PW-9 Dr. Parmod Guleria, has examined the accused and issued MLC Ext. PW-9/B.

12. PW-12 Dr. Lata Chandel has medically examined the prosecutrix. According to her, human semen was detected on Ext. 4-A shirt of the victim and blood was also detected in the traces of vaginal swab of the victim. Her final opinion was that sexual intercourse was committed in the last 24 hours from the date of her first clinical examination.

13. PW-13 Satish Kumar deposed that he was Up Pradhan of Sarskan. He remained associated in the investigation of this case on 13.6.2014. In his presence, victim identified the place vide memo Ext. PW-13/A. Two contraceptives and one wrapper were found on the spot. Those were taken into possession and kept in Cigarette boxes and were sealed with seal "Q". He was declared hostile and cross-examined by the learned Public Prosecutor. However, he admitted his signatures on Ext. PW-13/B.

14. PW-17 Dr. D.R. Sharma, deposed that the prosecutrix was produced before him. He filled in FTA Card Ext. PW-17/A. The blood sample was obtained and sealed.

15. PW-19 Dr. Dharam Pal deposed that the accused was produced before him and he obtained his blood on FTA Cards for DNA profiling.

16. PW-20 SI Purshotam Kumar deposed that he recorded the statement of grandmother of the victim. He went to the Police Post Dharampur where accused was present. He was arrested and sent to the Hospital. His MLC was obtained. The supplementary statement of the victim was recorded. The case property was taken into possession.

17. DW-2 Dr. P.L. Verma deposed that certificate Ext. DW-2/A was issued by him. He was Member of the Board. The victim was examined by them and the certificate was issued. The disability was found to be 75% qua intellectual impairment. The victim was suffering from mental retardation. He admitted that such type of patients could be tutored easily. In his cross-examination, he admitted that victim was not totally mentally retarded but was of low mental I.Q. She could understand if something has happened with her. She could also easily identify the persons who were familiar with her and also about their act and conduct.

18. PW-1 prosecutrix, in her statement, has categorically deposed that the accused had committed forcible sexual intercourse with her. The statement of PW-1 prosecutrix was also recorded vide Ext. PW-1/B. It is true that as per the statement of DW-2 Dr. P.L. Verma, the prosecutrix was found to be 75% intellectually impaired. However, in his cross-examination, he admitted that victim was not totally mentally retarded but was of low mental I.Q. She could understand if something happened with her. Initially, the prosecutrix has deposed that she was tutored but later on, upon a Court question put to her, she has categorically deposed that she was making the statement of her own and no one had tutored her to make the statement.

19. An application was filed before the learned ACJM, Sarkaghat vide Ext. PW-20/H for recording the statement of the prosecutrix under Section 164(5) on 16.6.2014. It was assigned to learned Judicial Magistrate, Court No. 2 Sarkaghat on 4.7.2014. Thereafter, the statement of the prosecutrix was recorded by the learned Judicial Magistrate after satisfying himself that the prosecutrix wanted to depose without any pressure and coercion from any person and understood the sanctity on oath. The learned Judicial Magistrate has also certified

that the child produced before him with her grandmother was making statement voluntarily without any pressure. The statement was recorded by the learned Judicial Magistrate in his own hand writing. The contents of the statement were read over to the prosecutrix. The prosecutrix in her statement recorded vide Ext. PW-1/B by the learned Judicial Magistrate has categorically stated that she was going to the school and the accused committed an illegal act with her. She narrated the incident to her Uncle and her grandmother.

20. According to Section 164 (5A) (b), the statement recorded under clause (a) of a person, who is temporarily or permanently mentally or physically disabled, is to be considered a statement in lieu of examination-in-chief, as specified in Section 137 of the Indian Evidence Act, 1987 such that the maker of the statement can be cross-examined on such statement, without the need for recording the same at the time of trial. Since the prosecutrix was found to be intelligent enough to get her statement recorded before the Court under Section 164 Cr.P.C., the assistance of interpreter was not required.

21. The date of birth of the prosecutrix was 13.5.2001, as per certificates Ext. PW-6/B and PW-6/C. The statement of the prosecutrix is duly corroborated by her Uncle PW-4 Rakesh Kumar who has seen the prosecutrix coming out of the bushes. The prosecutrix has told him that the accused had taken her behind the bushes and committed sexual intercourse with her. Thereafter, PW-4 Rakesh Kumar called his mother and disclosed everything to her and FIR was lodged.

22. The prosecutrix has been medically examined by PW-12 Dr. Lata Chandel. She issued MLC Ext. PW-12/B. According to her final opinion also, the victim was sexually assaulted. She noticed human semen on Ext. 4-A, shirt of the victim and blood was detected in the traces of vaginal swab of the victim. The blood samples of the prosecutrix and accused were taken. These were sent to FSL. According to report Ext. PX, the accused was having blood group “O” and victim was having blood group “A”.

23. According to the report Ext. PW-18/A, DNA profile pertaining to male was obtained from Ext.-1a (shirt of prosecutrix) and profile matched completely with the DNA profile obtained from Ext.-4a (blood sample on FTA Card of accused). The DNA profile obtained from Ext.-3 (pants of accused) matched completely with the DNA profile obtained from Ext.-4a (blood sample on FTA card of accused). The report Ext. PW-18/A further corroborates the statement of the prosecutrix. The statement of prosecutrix has been corroborated by PW-4 Rakesh Kumar and PW-12 Dr. Lata Chandel.

24. The case property remained in safe custody from its seizure till its production at the FSL. The prosecutrix has no enmity with the accused. The prosecution has duly proved that the accused committed aggravated penetrative sexual assault upon the prosecutrix at 8:30 AM at village Saraskan near temple. The prosecution has thus proved the case against the accused beyond reasonable doubt and there is no occasion for us to interfere with the well reasoned judgment/order of the learned trial Court dated 17/18.2.2016.

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

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BEFORE HON’BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Nand Lal ….Appellant/Plaintiff.
Versus
Uttam Chand & others … Respondents/Defendants.

RSA No. 111 of 2005.
Reserved on 22.6.2016.
Decided on: 20.07.2016.

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit for declaration pleading that suit land was recorded in the ownership of defendant No. 4- predecessor-in-interest of the plaintiff and proforma defendant No. 5 remained owner in possession of their share- mutation was wrongly sanctioned without following proper procedure- suit was decreed by the trial Court- an appeal was preferred, which was allowed- held, that mutation was attested by AC 2nd Grade, whereas, conferment of the proprietary rights could have been made by LRO/AC 1st Grade- mutation is bad in law void-ab-initio- AC 2nd Grade is not competent to attest the mutation or to settle the dispute between the landlord and tenant- Appellate Court had not noticed this fact- appeal allowed- judgment passed by the Trial Court set aside. (Para-10 to 13)

Cases referred:
Tara Chand Vs. State of Himachal Pradesh and others, 2007 (1) Latest HLJ (HP) 122
Ajudh Raj and others Vs. Moti, 1991(1) S.L.J. 659

For the appellant. : Mr. G.R. Palsra, Advocate.
For respondents No.1,2&4. : Mr. Neel Kamal Sharma, Advocate.
Remaining respondents. : Ex parte.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.

By way of this appeal, the appellant has challenged the judgment and decree dated 3.11.2004 passed by the Court of learned Presiding Officer, Fast Track Court, Mandi in Civil Appeal No. 93/1999, 62/2004 whereby the learned appellate court has set aside the judgment and decree passed by the Court of learned Sub Judge 1st Class, Court No.1, Mandi in Civil Suit No. 109/98(93) dated 17.5.1999.

2. This appeal was admitted on 22.8.2005, on the following substantial questions of law:-

> *"1. Whether there is total misreading of documents Ext.PA, Ext.PB, Ext. PC, Ext.P1, Ext.P2, Ext.P3 and Ext.P4 on the part of the ld. first appellate court who has misinterpreted and misconstrued the documents, which has caused miscarriage and failure of justice to the appellant?*
>
> *2. Whether the document Ext. PA mutation No. 76 dated 30.7.1975 has been attested in violation of the mandatory provisions and rules of H.P. Land Reforms and Tenancy Act, which has caused great miscarriage of justice to the appellant?*
>
> *3. Whether the ld. first appellate court is not right in holding that the appellant/plaintiff has to initiate proceedings of partition of the land of his share instead of placing this onus upon the defendants 1 and 2 Uttam Chand and Naginder Pal who are stranger and has purchased land from defendant No.3 Kanshi Ram?*
>
> *4. Whether the judgment and decree of the ld. first appellate court is perverse because the ld. appellate court has traveled beyond the scope of record especially documentary evidence which has materially prejudiced the case of the appellant/plaintiff as there is non-application of mind by the ld. first appellate court in appreciating the revenue record?*

3. However, at the stage of arguments Mr. G.R. Palsra, learned counsel for the appellant has confined his arguments to substantial question of law framed at Sr. No.2.

4. Brief facts necessary for the adjudication of this case are that plaintiff filed a suit for declaration and injunction as consequential relief on the ground that the suit land measuring 20-1-5 bighas, situated in Muhal Gadhiman/123, Pargana Sidhpur, Tehsil Chachiot, District

Mandi was recorded in the ownership of defendant No.4 to the extent of 4 shares and proforma defendant No.5 and one Sawanu son of Sh. Hukamia predecessor-in-interest of plaintiff are in exclusive possession of their 1/5th share in the land and rest of the shares i.e. 3/5th shares was under the occupancy tenancy of proforma defendant No.6 to 9. It was further his case that defendant No.3 and plaintiff are occupancy tenant of 1/5th shares along with his brother Lalman proforma defendant No.7 who had succeeded the occupancy tenancy from his father Kishan son of Harji. As per the plaintiff, the predecessor-in-interest of plaintiff and proforma defendant No.5 never inducted any occupancy tenancy over the share rather both of them remained as owner in possession of their respective shares. His further case was that mutation No. 76 sanctioned on 30.7.1975 under Section 94 of the H.P. Tenancy and Land Reforms Act vide which the proprietary rights were conferred was illegal, wrong and unwarranted in the eyes of law. It was further stated that the said mutation was against procedural law and it was illegal and AC 2nd Grande had not adopted any lawful procedure while sanctioning the said mutation. Further as per the plaintiff the effect of the said illegal mutation was that the share of the plaintiff and proforma defendants were diminished which was not sustainable in the eyes of law. The case of the plaintiff was contested by defendants who, *inter alia,* stated that the suit in fact was not maintainable and mutation which was under challenge in the suit was attested in the year 1975 which was never challenged by the plaintiff and same cannot be challenged in a civil suit. It was also the case of the defendant that consolidation operation had taken place in the village and orders had been passed by the competent court and partition also stood affirmed and therefore also the suit was barred by limitation.

5. On the basis of pleadings of the parties the learned trial court framed the following issues:-

> *"1. Whether mutation No. 76 dated 30.7.1975 has been wrongly sanctioned in favour of the defendants conferring the proprietary rights and has acquitted to sanction 3/5 share of the suit land, as alleged ? OPP.*
>
> *2. Whether the total share of the plaintiff and proforma defendant No.7 comes to 1/5 share measuring 4-0-5 bighas as alleged ? OPP*
>
> *3. Whether this Court has no jurisdiction to entertain and try the present suit? OPD.*
>
> *4. Whether the suit is not maintainable in the present form? OPD*
>
> *5. Whether the suit is not properly valued for court fee and jurisdiction? OPD.*
>
> *6. Whether the suit is barred by the principle of resjudicate? OPD.*
>
> *7. Whether the suit is barred under Order 2 Rule 2 CPC? OPD.*
>
> *8. Whether the sale of suit land by Sh. Kanshi Ram to defendant No.1 and 2 is wrong and illegal and not binding upon the plaintiff? OPP.*
>
> *9. Whether the suit land has been partitioned during the consolidation proceedings , as alleged? OPD.*
>
> *10. Relief."*

6. On the basis of material produced on record by the respective parties, the learned trial court returned the following findings on the said issues:-

> *"Issue No.1 : Yes.*
> *Issue No.2 : Yes.*
> *Issue No.3 : No.*
> *Issue No.4 : No.*
> *Issue No.5 : No.*
> *Issue No.6 : No.*
> *Issue No.7. : No.*
> *Issue No.8 : Yes.*

Issue No.9 *: No.*
Relief *: The suit of the plaintiff is decreed as per operative of the judgment."*

7. Accordingly, the learned trial court decreed the suit of the plaintiff by holding that the mutation under challenge made a mention that defendants had been conferred proprietary rights and had acquired 3/5th share of the suit land which entries were clearly against the earlier revenue entries and moreover the entries made subsequently were not in accordance with the earlier revenue record and no explanation and reasoning was given as to how revenue entries stood changed automatically in Ext. PA copy of Mutation No.76 dated 30.7.1975. On these bases, the learned trial court held that the mutation conferring 3/5th share in favour of defendant was wrong, illegal and null and void. It further held that title and share of plaintiff and proforma defendants comes to 1/5th which had not been challenged at any time before any forum. The suit of the plaintiff was accordingly decreed in the following terms:-

> "*It is ordered that the suit of the plaintiff is decreed. It is declared that Sawanu S/o Sh. Hukmia and proforma defendant No.5 has not inducted any occupancy tenant over the suit land and the shares of the plaintiff and proforma defendant No.7 has wrongly diminished in the suit land which is quite illegal, wrong and defendant No.1 and 2 are restrained from causing unlawful interference over the same and it is further ordered that there is no order as to costs."*

8. Feeling aggrieved by the said judgment by the learned trial court, the defendants therein filed an appeal which was accepted by the learned appellate court vide its judgment dated 3.11.2004. The learned appellate court held that mutation No. 76 dated 30.7.1975 cannot be set aside after the period of 18 years from the date of the attestation of the mutation and because the plea of the plaintiff was found to be barred by limitation, the entries in the revenue record defining the shares of the parties to the suit land on the basis of mutation No. 76 dated 30.7.1975 cannot be held to be illegal. It further held that the findings returned by the learned trial court to the effect that shares of the plaintiff and proforma defendant No. 7 in the suit land have been wrongly diminished were erroneous and the same cannot be sustained in the eyes of law. It further held that in view of the admission of plaintiff that in consolidation operation suit land has been divided amongst various co-sharers, it could be safely held to have been established on record and therefore, no relief of injunction could have been granted in favour of the plaintiff and against defendants No.1 and 2. On these bases, the learned appellate court set aside the judgment and decree passed by the learned trial court.

9. I have heard learned counsel for the parties and also gone through the records of the case as well as judgment passed by both the learned Courts below.

10. Mr. Palsra has argued that the Mutation No. 76 dated 30.7.1975 was *per se* bad in law and void-ab-initio because the same in fact was attested by AC 2nd Grade as was evident from a perusal of Ext. PA whereas the said officer had no authority in law to attest such mutation. Mr. Palsra has further argued that the said mutation was otherwise also not sustainable in the eyes of law as the same had been passed in the absence of either of the parties. The factum of the said mutation having been entered in the absence of either of the parties and its having been attested by AC 2nd Grade could not be denied by the learned counsel for the respondent. However, Mr. Neel Kamal Sharma, learned counsel for the respondents submitted that the suit land was not part of the land which was subject matter of mutation No. 76.

11. It has been held by this Court in **Tara Chand** Vs. **State of Himachal Pradesh and others**, 2007 (1) Latest HLJ (HP) 122 that Section 93 of the HP Tenancy and Land Reforms Act, provides therein that for the purposes of Chapter X of the said Act, the State Government shall appoint the Revenue Officer of the rank of Assistant Collector 2nd Grade. It has been further held that Section 104 of the Act read with Rule 27 to 29 deal with the conferment of the proprietary

rights on the non-occupancy tenants, attestation of mutations and settlement of disputes etc. Vide notification dated 20.5.1975 all the Tehsildar have been appointed as the Land Reforms Officers and all the Land Reforms Officers are A.C. 1st Grade., Chapter–X of the Act falls within the scope and jurisdiction of the Land Reforms Officer who is also Assistant Collector 1st Grade, whether it relates to the attestation of mutation of proprietary rights or settling the disputes *inter se* the landlord and the tenant. Therefore, AC 2nd Grade is neither competent to attest the mutation nor settle their dispute. Accordingly, this Court has held that AC 2nd Grade does not has any jurisdiction to deal with the cases of mutation.

12. It has been held by the Hon'ble Supreme Court in **Ajudh Raj and others** Vs. **Moti**, 1991(1) S.L.J. 659 that for deciding the question of limitation, if order impugned in the suit is such that it has to be set aside before any relief can be granted to the plaintiff, the provisions of Article 100 will be attracted and if no particular Article of the Limitation Act is applicable the suit must be governed by the residuary Article 113, prescribing a period of three years. It has further held that in the suit for title to an immovable property which has been the subject matter of a proceeding under a Special Act if an adverse order comes in the way of the success of the plaintiff, he must get it cleared before proceeding further. **It has been further held that on the other hand if the order has been passed without jurisdiction, the same can be ignored as nullity, that is, non-existent in the eye of law and it is not necessary to set it aside; and such a suit will be covered by Article 65**.

13. In my considered view there is merit in the contention raised by Mr. Palsra to the effect that Mutation No. 76 dated 30.7.1975 was *per se* bad in law and *void-ab-initio* as the same was attested by an authority who in law could not have attested the said mutation. It is apparent from the ratio of the judgments cited above that AC 2nd Grade is neither competent to attest the mutation nor settle the dispute *inter se* landlord and the tenant. This very important aspect of the matter has not been appreciated by the learned appellate court while reversing the judgment and decree passed by the learned trial court. As far as the factum of AC 2nd Grade not being competent to attest the mutation in issue is concerned, the same could not be disputed by the learned counsel for the respondent. However, he argued that the suit land was not part of that land which was subject matter of Mutation No. 76. On these bases, he submitted that even if this Court comes to the conclusion that Mutation No. 76 dated 30.7.1975 was bad in law and *void-ab-initio* even then there was no merit in the present appeal because the suit land in fact was not part of the land which was subject matter of Mutation No. 76. This contention of learned counsel for the respondent has been refuted by Mr. Palsra who has drawn the attention of this Court towards the relevant record from which it is clear that the suit land was in fact part of the land which was subject matter of Mutation No. 76.

In view of my findings returned above substantial question of law as to whether document Ext. PA, Mutation No. 76, dated 30.7.1975 was attested in violation of the mandatory provisions and Rules of H.P. Land Reforms and Tenancy Act is answered accordingly in the affirmative. The learned appellate court while adjudicating upon the issue of limitation has not taken into consideration the law laid down by the Hon'ble Supreme Court in Ajudh Raj and others Vs. Moti (Supra) and therefore, the judgment and decree passed by the learned appellate court is not sustainable in law. Though other substantial questions of law on which the present appeal was admitted were not argued on behalf of the appellant, however, keeping in view the findings which have been returned by this Court on substantial question of Law No.2 and the fact that this Court has set aside the judgment and decree passed by the learned appellate court, there is no occasion now for this Court to enter upon the other substantial questions of law. Accordingly the present appeal is allowed with costs and judgment and decree passed by the learned appellate court is set aside.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Onkar Singh (since dead) through LRs ....Appellants/Plaintiffs.
Versus
Malka Devi & Others ... Respondents/Defendants.

RSA No. 553 of 2004.
Reserved on 7.7.2016.
Decided on: 20.07.2016.

Indian Succession Act, 1925- Section 63- Plaintiff filed a civil suit for declaration that Will stated to be executed by late S was fraudulent, fictitious, fabricated and was an act of undue influence, coercion and misrepresentation- parties were governed by agricultural customs- there was prohibition regarding alienation of ancestral property without consent of the near reversioner- suit was dismissed by the trial Court- an appeal was preferred, which was dismissed- held, that signatures of the testator were identified by his son- attesting witness was also examined to prove the Will- plaintiff had failed to prove that Will was not valid but was a result of fraud, misrepresentation and undue influence- Will was rightly upheld by the Courts- appeal dismissed. (Para-13 to 19)

Cases referred:
Pentakota Satyanarayana and others Vs. Pentakota Seetharatnam and others, (2005) 8 Supreme Court Cases 67
H. Venkatachala Iyengar Vs. B.N. Thimmajamma and others, AIR 1959 Supreme Court 443
Mahesh Kumar (dead) by LRs Vs. Vinod Kumar and others (2012) 4 Supreme Court Cases 387

For the appellants. : Mr. A.K. Dhiman, Advocate.
For respondents No. 1 to 3 : Mr. Y.P. Sood, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.

By way of present appeal, the appellant has assailed the judgment and decree passed by the Court of learned Addl. District Judge-I, Kangra at Dharamshala in Civil Appeal No. 114-D/2002, vide which judgment the learned appellate court has upheld the judgment and decree passed by the Court of learned Senior Sub Judge, Kangra at Dharamshala in Civil Suit No. 320 of 1993 dated 26.7.2002 vide which the suit of the plaintiff therein was dismissed.

2. This appeal was admitted on 3.6.2005, on the following substantial question of law:-

> *"Whether a 'Will' can be termed as genuine and free from suspicion if it contains a factually incorrect and false recitation as its contents?*

3. Facts in brief necessary for adjudication of the present case are that the predecessor-in-interest of present appellant i.e. plaintiff Onkar Singh filed a suit for declaration to the effect that 'Will' dated 20.4.1992 said to be executed by late Salo Ram was fraud, fictitious, fabricated and was an act of undue influence, coercion and misrepresentation and was liable to be cancelled and 'Will' dated 29.6.1987 executed by late Salo Ram was genuine, natural and binding on parties in suit to inherit the suit property and further that the parties were governed by agricultural customs in the matters of alienation of the property which prohibits alienation of ancestral property without consent of the near reversioner and as such all legal heirs of deceased Salo Ram are entitled to inherit his property as per customs with consequential relief of permanent injunction restraining defendants No.1 to 3 from interfering in the peaceful ownership

and possession of plaintiff to the extent of his share in the property of deceased Salo Ram. It was stated in the suit that deceased Salo Ram was the father of plaintiff, defendants No. 2 3, 5 to 9 and husband of defendants No.1 and 4. He owned land situated in Mauza Nerti, Tehsil and District Kangra and this entire land was ancestral property. Salo Ram was an old man and unable to work in the fields and was also suffering from Asthma. The entire agricultural land of deceased Salo Ram was in possession of plaintiff being the eldest son, though deceased Salo Ram during his lifetime had distributed his entire land to his three sons and two wives in the year 1986. It was further stated in the suit that deceased Salo Ram executed a 'Will' dated 29.6.1987 which was duly registered 'Will' executed in presence of persons of the locality and by way of said 'Will', deceased Salo Ram executed property in favour of his three sons and two wives. After the death of his father, plaintiff enquired from local Patwari how to bring the legal heirs of deceased on record, on which he was told by Patwari that his step-mother (defendant No.1) had produced a 'Will' dated 20.4.1992 for mutation in her name. As per the plaintiff it was on this occasion when he first time came to know about the 'Will' dated 20.4.1992. Thereafter he applied for copy of said 'Will' before Registrar, Dharamshala and after he obtained the same, he came to know about the contents of the 'Will'. As per him the 'Will' was a false 'Will' and was a result of fraud, undue influence, coercion, misrepresentation because Salo Ram was an old person suffering Asthma and was unable to move and to understand the things properly. It was further averred that there was no witness from the locality or from the surrounding area who could identify the executant and as such the same was result of fraud, misrepresentation and undue influence. It was further averred that on the basis of the said 'Will' the defendants were trying to grab the entire property of deceased including the agricultural land which was in possession of the plaintiff. According to the plaintiff, he was entitled to inherit the property of deceased to the extent of his share on the basis of 'Will' dated 29.6.1987 which was a genuine and natural 'Will' executed by Salo Ram. Thus it was on these bases the suit was filed by the plaintiff.

4. There are three written statements on record. One written statement has been filed by defendants No.1 to 3. There is another written statement which was filed on behalf of defendant No.4 and there is third written statement along with counter claim which has been filed by defendants No. 5 to 9. Defendants No.1 to 3 denied the claim of plaintiff and stated that deceased had gifted away major portion of his landed property in the name of all his three sons who were in possession of their respective shares since the lifetime of deceased. According to them, deceased owned land in addition to the land situated in Mauza Nerti, Tehsil and District Kangra and deceased was fully competent to deal with his property as absolute owner and the property in question was not ancestral. It was further averred that replying defendants No. 1 to 3 along with plaintiff and defendant No.4 were helping Salo Ram in the cultivation of landed property during his lifetime. It was further averred that 'Will' dated 20.4.1992 was a genuine 'Will' and was binding on the legal heirs of deceased including the plaintiff. According to replying defendants, the deceased Salo Ram was full owner of the property and no agricultural custom could have estopped him in the matter of alienation. It was further stated that the 'Will' was duly witnessed by the witnesses and the executant was also duly identified, therefore, on these bases the claim of the plaintiff was disputed and denied.

5. Defendant No.4 (real mother of plaintiff) in her written statement stated that defendant No.1 was not legally wedded wife of deceased Salo Ram. It was further averred by said defendant that the suit land was ancestral and has to be inherited by plaintiff and defendants along with defendants No. 5 to 9 and the customs prevailing between the parties. Defendants No. 5 to 9 also partially supported the case of plaintiff and stated that property being ancestral and replying defendants being Class-I legal heirs were also entitled to inherit it as per the provision of Hindu Succession Act and deceased had never sought their consent before execution of the 'Will' in favour of plaintiff and any other person. They denied the factum of any 'Will' having been executed by Salo Ram either in favour of plaintiff or in favour of defendants.

6. On the basis of pleadings of the parties and material placed on record, the learned Trial Court framed the following issues:-

"1. Whether the 'Will' dated 29.6.1987 executed by late Shri Salo Ram is genuine and is binding upon the parties to the suit ? OPP.

2. Whether the suit land is ancestral and the parties are governed by the agricultural custom of Kangra District in the matters of alienation, if so its effect ? OPP.

3. Whether the plaintiff is entitled to joint possession, as alleged ? OPP.

4. Whether the 'Will' dated 20.4.1992 executed by late Shri Salo Ram is genuine, if so its effect ? OPD-1 to 3.

5. Whether deceased Salo Ram has gifted away a major portion of his landed property in the names of his three sons and they are in cultivating possession of their respective shares, as alleged, if so its effect ? OPD-1 to 3.

6. Whether the plaintiff is estopped by his act and conduct and acquiescence from filing the present suit ? OPD-1 to 3.

7. Whether the plaintiff has no cause of action against defendants? OPD-1 to 3.

8. Whether defendant No.1 is not legally wedded wife of late Sh. Salo Ram Ram, if so its effect ? OPD-4.

9. Whether the defendants 1 to 3 are not the legal representatives of deceased Salo Ram, if so, its effect ? OPD-4.

10. Whether the defendants 5 to 9 are entitled to get their shares in the suit land as per custom being Class-I legal heirs as alleged? OPD-5 to 9.

11. Relief."

7. The learned Trial Court returned the following findings on the said issues:-

"Issue No.1 :No.

Issue No.2 :No.

Issue No.3 :No.

Issue No.4 :Yes.

Issue No.5 :Yes.

Issue No.6 :No.

Issue No.7 :Yes.

Issue No.8 :No.

Issue No.9 :No.

Issue No.10 :No.

Relief :The suit dismissed as per operative part of the judgment."

8. The learned trial court dismissed the suit by holding that 'Will' dated 20.4.1992 executed by late Salo Ram was a genuine 'Will'. The learned trial court held that in view of the facts pleaded and the evidence led, though it stood proved that deceased Salo Ram had executed 'Will' dated 29.6.1987, however, the same was superseded by executing another 'Will' dated 20.4.1992. 'Will' dated 20.4.1992 was duly registered in the office of Sub Registrar as was evident from the deposition of Registration Clerk DW1 Sukhdev. DW2, B.K. Sood, Advocate had stated that 'Will' Ext. DW2/A was written in the handwritings of his father-in-law, Sh. Angat Ram Sood, Document Writer, Dharamshala and he had also produced copy of Register Ext. DW2/C which was maintained by his father-in-law. The learned trial court further held that S.S. Karki and S.K. Shashtri had entered into the witness box as DW3 and DW4 who were the attesting witnesses of 'Will' Ext. DW2/A. Both these witnesses in unison stated that the 'Will' was scribed by Sh. Angat Ram Sood, Document Writer on 20.4.1992 on the instructions of Salo Ram and thereafter the same was read over and explained to Salo Ram and after admitting the same to be correct, he appended his thumb impression on 'Will' Ext. DW2/A in their presence. The learned trial court

also held that defendant No.1, Malkan Devi who entered into the witness box as DW5 had deposed that her husband was physically and mentally sound in the year 1992. She had further stated that plaintiff had also given 1/3rd share in the residential house and one room of cattle shed by Salo Ram as per 'Will' Ext. DW2/A. This witness also stated that second wife, Smt. Phulan Devi was getting family pension of Salo Ram and her husband Salo Ram had also gifted major portion of property in favour of his three sons during his lifetime and the sons were in possession of the landed property. DW6 Ram Singh also categorically stated that Salo Ram had two wives and his wife Smt. Phulan Devi was getting family pension, whereas there was no provision for maintenance of defendant No.1, therefore, deceased Salo Ram executed 'Will' dated 20.4.1992 in favour of defendant No.1. He also deposed that 'Will' dated 20.4.1992 was also in favour of plaintiff as he was also given 1/3rd share in the residential house and one room in the cattle shed.

9. On these bases, the learned trial court concluded that not only 'Will' Ext. DW2/A was a legal and genuine 'Will', it also stood proved from the statements of witnesses on record that at the time of execution of said 'Will' its testator was mentally sound. Therefore, on the said basis, the learned trial court concluded that 'Will' dated 20.4.1992 Ext. DW2/A was a genuine 'Will' and it accordingly dismissed the suit of the plaintiff.

10. Feeling aggrieved by the said judgment passed by the learned trial court the plaintiff filed an appeal which was dismissed by the learned appellate court, vide judgment and decree dated 5.11.2003. The learned appellate court upheld the findings returned by the learned trial court. It was held by the learned appellate court that as far as execution of earlier 'Will' Ext. PW1/A dated 29.6.1987 the same was not seriously disputed by the defendants. However, as per the learned appellate court it also stood proved on record that Ext. DW2/A was the last 'Will' executed by testator Salo Ram which was dated 20.4.1992. It further held that a perusal of 'Will' Ext. DW2/A demonstrates that Salo Ram had not exclusively executed the 'Will' in favour of defendant No.1 but had also given 1/3rd share in the house and one room in the cattle shed to the appellant. It further held that there was no material on record from where it could be deduced that there was some suspicious circumstance attending the execution of second 'Will' Ext. DW2/A and on these bases it held that 'Will' dated 20.4.1992 was validly executed 'Will'. Learned appellate court also held that the appellant had failed to prove that 'Will' dated 29.6.1987 was the only genuine 'Will' executed by Salo Ram and it further held that in fact the appellant had suppressed the fact that in the subsequent 'Will' which was executed by his father, he had been given share in the residential house and cattle shed. On these bases, the learned appellate court dismissed the appeal and upheld the judgment and decree passed by the learned trial court.

11. Feeling aggrieved by the said judgments and decrees passed by both the learned courts below the appellant filed the present appeal.

12. I have heard learned counsel for the parties and also gone through the records of the case as well as judgments passed by both the courts below.

13. Section 63 of the Indian Succession Act clearly laws down that every testator shall execute his Will according to the following rules:-

(a) The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

(c) The will shall he attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in

the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

14. In the present case the scribe of the 'Will' was Sh. Angat Ram Sood who was since died. His son-in-law B.K. Sood, entered into the witness box as DW2 who was an Advocate by profession. He stated that document writer Sh. Angat Ram Sood was his father-in-law who had since died and the record of Angat Ram Sood was in his possession. He also deposed that he was very well acquainted with the signatures of Angat Ram Sood. He identified the signatures of Angat Ram Sood on 'Will' Ext. DW2/A as the scribe of the 'Will'. He also produced on record the register maintained by his father-in-law, in which factum of his having scribed the 'Will' was recorded. A perusal of his cross-examination reveals that the trustworthiness of the statement of this witness could not be impinged by the plaintiff. Similarly, S.S. Karki entered into the witness box as DW3 and deposed that 'Will' Ext. DW2/A dated 20.4.1992 was scribed by Angat Ram Sood which was signed by him as an attesting witness. He has clearly stated that the 'Will' was scribed on the asking of Salo Ram by Sh. Angat Ram Sood. He also deposed that the 'Will' was written in his presence and in the presence of Sh. S.K. Shastri both Advocates and the testator was in his senses and was mentally stable when he got the 'Will' scribed. He has further stated that testator had appended his thumb impression on the 'Will' in his presence and that the 'Will' was read over and after accepting the contents therein to be correct he (testator) appended his thumb impression. Similarly, DW4 S.K. Shastri has also deposed that the 'Will' was scribed by Sh. Angat Ram Sood on the asking of the testator who appended his signature upon the 'Will' in his presence after the 'Will' was read over to him. He has also deposed that he has signed the 'Will' as an attesting witness and the same was registered with the Registrar in his presence. A perusal of cross-examination of both the witnesses reveals that the plaintiff could not impinge the credibility or trustworthiness of both these witnesses. DW1, Malkan Devi has entered into the witness box as DW5 and has deposed that vide 'Will' dated 20.4.1992 plaintiff had been given 1/3rd share in the residential house and one room of cattle shed. She has also categorically stated that at the time when the 'Will' was executed the testator was in a good mental condition and he was in a position to understand what was good for him and what was bad for him. To same effect is the deposition of Ram Singh who has also categorically stated that at the time when the 'Will' in issue was executed by testator he was in a good mental condition.

15. The Hon'ble Supreme Court in **Pentakota Satyanarayana and others** Vs. **Pentakota Seetharatnam and others**, (2005) 8 Supreme Court Cases 67 has held that though the initial onus to prove the 'Will' is on the propounder of the 'Will' but thereafter it shifts to the party alleging undue influence or coercion in execution of the 'Will'.

16. In my considered view in the present case the appellant has not brought any material on record from where it could establish that 'Will' Ext. DW2/A was not a valid 'Will' but was a result of either a fraud or misrepresentation of undue influence exercised by the propounder of the 'Will' on its testator.

17. It has been held by Hon'ble Supreme Court in **H. Venkatachala Iyengar** Vs. **B.N. Thimmajamma and others,** AIR 1959 Supreme Court 443 as under:-

> "*21. Apart from the suspicious circumstances to which we have just referred in some cases the wills propounded disclose another infirmity. Propounders themselves take a prominent part in the execution of the wills which confer on them substantial benefits. If it is shown that the propounder has taken a prominent part in the execution of the will and has received substantial benefit under it, that itself is generally treated as a suspicious circumstance attending the execution of the will and the propounder is required to remove the said suspicion by clear and satisfactory evidence. It is in connection with wills that present such suspicious circumstances that decisions of English Courts often mention the test of the satisfaction of judicial conscience. It may be that the reference to judicial*

conscience in this connection is a heritage from similar observations made by ecclesiastical Courts in England when they exercised jurisdiction with reference to wills; but any objection to the use of the word 'conscience' in this context would, in our opinion, be purely technical and academic, if not pedantic. The test merely emphasizes that, in determining the question as to whether an instrument produced before the Court is the last will of the testator, the Court is deciding a solemn question and it must be fully satisfied that it had been validly executed by the testator who is no longer alive."

18. The Hon'ble Supreme Court in **Mahesh Kumar (dead) by LRs** Vs. **Vinod Kumar and others** (2012) 4 Supreme Court Cases 387, has recapitulated the said legal position and relevant paras of the said judgment are quoted herein below:-

28. In one of the earliest judgments in H. Venkatachala Iyengar v. B. N. Thimmajamma , the three Judge Bench noticed the provisions of Sections 45, 47, 67 and 68 of the Indian Evidence Act, 1872 and Sections 59 and 63 of the 1925 Act and observed: (AIR pp. 451-52, paras 18-21)

"18. ……….. Section 63 requires that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the will? Did he understand the nature and effect of the dispositions in the will? Did he put his signature to the will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills. It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribed by Section 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.

19. However, there is one important feature which distinguishes wills from other documents. Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills the court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated.

20. There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature, in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, courts would be reluctant to treat the document as the last will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter.

21. Apart from the suspicious circumstances to which we have just referred, in some cases the wills propounded disclose another infirmity. Propounders themselves take a prominent part in the execution of the wills which confer on them substantial benefits. If it is shown that the propounder has taken a prominent part in the execution of the will and has received substantial benefit under it, that itself is generally treated as a suspicious circumstance attending the execution of the will and the propounder is required to remove the said suspicion by clear and satisfactory evidence. It is in connection with wills that present such suspicious circumstances that decisions of English courts often mention the test of the satisfaction of judicial conscience. It may be that the reference to judicial conscience in this connection is a heritage from similar observations made by ecclesiastical courts in England when they exercised jurisdiction with reference to wills; but any objection to the use of the word "conscience" in this context would, in our opinion, be purely technical and academic, if not pedantic. The test merely emphasizes that, in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is deciding a solemn question and it must be fully satisfied that it had been validly executed by the testator who is no longer alive." (emphasis supplied)

29. The ratio of H. Venkatachala Iyengar's case was relied upon or referred to in Rani Purnima Devi v. Kumar Khagendra Narayan Deb , Shashi Kumar Banerjee v. Subodh Kumar Banerjee, Surendra Pal v. Saraswati Arora, Seth Beni Chand v. Kamla Kunwar, Uma Devi Nambiar v. T.C. Sidhan, Sridevi v. Jayaraja Shetty, Niranjan Umeshchandra Joshi v. Mrudula Jyoti Rao and S. R. Srinivasa v. S. Padmavathamma .

30. In Jaswant Kaur v. Amrit Kaur the Court analysed the ratio in H. Venkatachala Iyengar case and culled out the following propositions: (Jaswant Kaur case, SCC pp. 373-74, para 10)

"1. Stated generally, a will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters. As in the case of proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.

2. Since Section 63 of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by Section 68 of the Evidence Act, one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence.

3. Unlike other documents, the will speaks from the death of the testator and therefore the maker of the will is never available for deposing as to the circumstances in which the will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the will.

4. Cases in which the execution of the will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

5. It is in connection with wills, the execution of which is surrounded by suspicious circumstances that the test of satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.

6. If a caveator alleges fraud, undue influence, coercion etc. in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the will may raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter."

31. In Uma Devi Nambiar v. T.C. Sidhan, the Court held that active participation of the propounder/beneficiary in the execution of the Will or exclusion of the natural heirs cannot lead to an inference that the Will was not genuine. Some of the observations made in that case are extracted below: (SCC pp. 333-34, para 16)

"16. A Will is executed to alter the ordinary mode of succession and by the very nature of things, it is bound to result in either reducing or depriving the share of natural heirs. If a person intends his property to pass to his natural heirs, there is no necessity at all of executing a Will. It is true that a propounder of the Will has to remove all suspicious circumstances. Suspicion means doubt, conjecture or mistrust. But the fact that natural heirs have either been excluded or a lesser share has been given to them, by itself without anything more, cannot be held to be a suspicious circumstance especially in a case where the bequest has been made in favour of an offspring. As held in P.P.K. Gopalan Nambiar v. P.P.K. Balakrishnan Nambiar it is the duty of the propounder of the Will to remove all the suspected features, but there must be real, germane and valid suspicious features and not fantasy of the doubting mind. It has been held that if the propounder succeeds in removing the suspicious circumstance, the court has to give effect to the Will, even if the Will might be unnatural in the sense that it has cut off wholly or in part near relations. (See Pushpavathi v. Chandraraja Kadamba.) In Rabindra Nath Mukherjee v. Panchanan Banerjee it was observed that the circumstance of deprivation of natural heirs should not raise any suspicion because the whole idea behind execution of the Will is to interfere with the normal line of succession and so, natural heirs would be debarred in every case of Will. Of course, it may be that in some cases they are fully debarred and in some cases partly."(emphasis supplied)

The same view was reiterated in Pentakota Satyanarayana v. Pentakota Seetharatnam (supra).

19. The Hon'ble Supreme Court in **Pentakota Satyanarayana and others** Vs. **Pentakota Seetharatnam and others**, (2005) 8 Supreme Court Cases 67 held as under:-

"25. It is settled by a catena of decisions that any and every circumstance is not a suspicious circumstance. Even in a case where active participation and execution of the Will by the propounders/beneficiaries was there, it has been held that that by itself is not sufficient to create any doubt either about the testamentary capacity or the genuineness of the Will. It has been held that the mere presence of the beneficiary at the time of execution would not prove that the beneficiary had taken prominent part in the execution of the Will. This is the view taken by this Court in Sridevi & Ors vs. Jayaraja Shetty & Ors. In the said case, it has been held that the onus to prove the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will proof of testamentary capacity and the proof of signature of the testator as required by law not be sufficient to discharge the onus. In case, the person attesting the Will alleges undue influence, fraud or coercion, the onus will be on him to prove the same and that as to what suspicious circumstances which have to be judged in the facts and circumstances of each particular case."

Therefore, it is apparent and evident from the discussion made hereinabove as well as from the ratio of the judgments cited hereinabove that 'Will' Ext. DW2/A was a valid 'Will' executed by its testator in favour of defendant No.1 and therefore, in my considered view there is neither any infirmity nor any perversity with the findings which have been recorded in this regard by both the learned courts below. Substantial question of law is answered accordingly and the present appeal being devoid of any merit is dismissed with costs.

****

BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Seeta Devi and others ….Appellants.

Versus

Dev Raj and another … Respondents.

RSA No. 272 of 2007.
Reserved on 8.7.2016.
Decided on: 20.07.2016.

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit for declaration that he was coming in possession of suit land as non-occupancy tenant and had become owner- registered gift deed made by defendant No. 1 in favour of defendants No. 2 to 4 was wrong- suit was decreed by the trial Court- an appeal was preferred, which was dismissed- held, that plaintiff was recorded as tenant at Will on the payment of rent- defendant had more than 8 acres of land and was not entitled to resume the land- rights of defendants stood extinguished on the date of commencement of H.P. Tenancy and Land Reforms Act- defendants filed an application for resumption, which was dismissed- defendant No. 1 was not competent to execute the gift deed in favour of the defendants No. 2 to 4- suit was rightly decreed by the trial Court- appeal dismissed. (Para-12 to 16)

Cases referred:

Shankar Vs. Smt. Rukmani and others, 2003(1) Shim. L.C. 300
Ramesh Kumar and others Vs. Mandir Thor (Math Thor), 2007(2) Shim. LC 422

For the appellants. : Mr. Shyam Chauhan, Advocate vice counsel.
For respondents No.1 : Mr. N.K. Thakur, Sr. Advocate with Mr. Surinder Kumar, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.

By way of present appeal, the appellants have challenged the judgment and decree dated 17.12.2005 passed by the Court of learned Additional District Judge, Una in Civil Appeal No. 29/94(90) vide which, the learned appellate court has upheld the judgment and decree passed by the Court of learned Sub Judge 1st Class, Una in Civil Suit No. 87/1986, RBT-265/88.

2. This appeal was admitted on 17.12.2009, on the following substantial questions of law:-

> "*1. Whether the Civil Court can pass the decree in which the remedy of appeal/revision is there before the revenue authorities?*
>
> *2. Whether the Gift deed can be made after H.P. Tenancy and Land Reforms Act came into action?*
>
> *3. Whether the learned courts below have misread and mis-appreciated the oral and documentary evidence on record and the findings recorded are perverse and liable to be set aside?*

3. Brief facts necessary for the adjudication of this case are that respondent/plaintiff filed a suit for declaration to the effect that suit land measuring 5 kanals bearing khewat No. 186min, khatauni No. 263/1, khasra Nos. 21R/11/1, 1549/600 entered in jamabandi for the year 1982-83 situated in village Panoh, Tehsil and District Una was coming in possession of the plaintiff as non-occupancy tenant and he (plaintiff) had become owner thereof from the date of enforcement of H.P. Tenancy and Land Reforms Act (hereinafter to be referred as

'the Act'). Accordingly, registered Gift Deed No. 1022 dated 24.8.1974 made by defendant No.1 in favour of defendants No. 2 to 4 regarding suit land and mutation No. 1457 dated 16.2.1975 and mutation No. 1708 dated 26.4.1982 were wrong, baseless, unauthorized and ineffective against the plaintiff. Permanent injunction as a consequential relief was also sought against defendants restraining them from interfering with the possession of the suit land of the plaintiff and from getting the suit land assumed through Land Revenue Officer.

4. The case of the plaintiff was that the suit land was coming in his possession as non-occupancy tenant under defendant No.1 and he had become owner of the same from the date of enforcement of the Act i.e. 21.2.1974. Defendant No.1 being clever person, with dishonest intention of depriving the plaintiff of his ownership over the suit land executed a 'Sham' and fictitious gift deed dated 24.8.1974 in favour of defendants No. 2 to 4 (his wife and sons) and mutation No. 1457 dated 16.2.1975 was entered on the basis of said 'Sham' Gift, which was void and ineffective. As per the plaintiff, as he had become owner of the suit land w.e.f. 21.2.1974, the defendant could not have gifted something which was not owned by him vide gift deed dated 24.8.1974. It was further his case that revenue authorities sanctioned mutation No. 1539 dated 12.2.1977 in his favour regarding conferment of the said ownership but later on revenue officials wrongly reviewed the said mutation vide subsequent mutation No. 1708 dated 26.2.1982. Plaintiff moved an application for reviewing of mutation No. 1457 but the same was rejected on 4.1.1984. It was on these bases that the plaintiff had filed the suit praying for reliefs mentioned thereunder.

5. In the written statement, the defendants denied the case of plaintiff and stated that defendant No.1 had rightly and voluntarily executed gift deed in favour of defendants No.2 to 4, as he was competent to do so and mutation in favour of the plaintiff was wrongly sanctioned which was rightly reviewed subsequently. It was also stated that plaintiff did not contest the order of revenue authority in appeal or revision which has thus attained finality. On these bases, the claim of the plaintiff was denied.

6. On the basis of pleadings of the parties, the learned trial court framed the following issues:-

"1. Whether the plaintiff has been in possession of the suit land as a tenant and has become owner by operation of law? OPP.

2. Whether defendant No.1 had no right to execute the gift deed in question as alleged ? If so, its effect? OPP.

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

4. Whether the court has no jurisdiction ? OPD.

4A. Whether the suit is barred by limitation ? OPD

5. Relief."

7. On the basis of material on record produced by the respective parties, the learned trial court decided the issues so framed as under:-

"Issue No.1 : Yes.

Issue No.2 : Yes.

Issue No.3. : No.

Issue No.4 : No.

Issue No.4A : No.

Relief : Suit decreed as per operative part of this judgment."

8. The learned trial court on the basis of material on record held that as per copy of jamabandi for the year 1982-83 defendants No.2 to 4 were recorded to be owners of the suit land, whereas the plaintiff was recorded to be in possession as 'tenant at will' on payment of 'Battai Rent'. Ext. P2 copy of jamabandi for the year 1972-73 also reflected defendant to be owner of the suit land and plaintiff to be 'tenant at will' on payment of 'Battai Niswi' and vide Red Note it was

mentioned that mutation No. 1457 had been sanctioned in favour of defendants No. 2 to 4 on the basis of gift deed executed by defendant No.1. Ext. P10 was the copy of mutation No. 1539 sanctioned on 12.2.1977 as per which plaintiff was conferred the ownership rights of suit land under Section 104 of the Act. This was done on the ground that previously plaintiff was coming as non occupancy tenant under defendant No.1. Vide Ext. P11 copy of mutation No. 1708 sanctioned on 26.4.1982 ownership rights of plaintiff over the suit land were again vested in defendants No. 2 to 4. As per the learned trial court it stood proved that the suit land was owned and possessed by defendant No.1 but later on plaintiff came to be recorded in possession as 'tenant at will'. It further held that legislature has distinguished the case of a land owner who had more than 3 acres of land and a land owner who was entitled to resume the land under Section 104 of the Act. As per the learned trial court, latter landlord was covered under Section 104 (1)(iii) whereas a land owner who was not entitled to resume the land under the provisions of the Act was covered under Section 104(3) of the Act. The learned trial court further held that the Act was published in H.P. Rajpatra on 21.2.1974 and from the said date, the right, title and interest of land owners not entitled to resume land under the provisions of the Act stood immediately extinguished and vested in the State Government and thereafter in the tenants. Ext. P8 copy of jamabandi for the year 1972-73 clearly demonstrates that defendant No.1 had more than 3 acres of land on 21.2.1974, as a result of which, he was not entitled to resume the land under the provisions of the Act and as such his right, title and interest in the suit land immediately stood extinguished on 21.2.1974 and accordingly defendant No.1 had nothing thereafter he could gift later on. On these bases, the learned trial court further held that as on the date of execution of a gift deed i.e. 24.8.1974 defendant No.1 was having no ownership rights over the suit land and as such gift deed executed by him was a void transaction and consequent mutation No. 1457 sanctioned on 16.2.1975 was also null and void having no effect in law. It also held that plaintiff being a tenant of defendant No.1 was rightly conferred ownership rights, vide mutation No. 1539 dated 12.2.1977 and subsequent mutation No. 1708 decided on 26.4.1982 was also void because defendants No.2 to 4 had got nothing from defendant No.1 by way of 'Will'. The learned trial court also hold that keeping in view the fact that plaintiff had raised the dispute of title which could be adjudicated upon only by a Civil Court competent in this regard, therefore, the Court had jurisdiction to adjudicate upon the issue notwithstanding the provisions of Section 112 of the Act. Thus the learned trial court decreed the suit of the plaintiff.

9. Feeling aggrieved by the said judgment passed by the learned trial court, appeal was filed by the defendants, which was dismissed by the Court of Additional District Judge, Una vide judgment and decree dated 17.12.2005.

10. The learned appellate court held that the plaintiff had been found recorded as 'tenant at will' qua the suit land and defendant No.1 had executed gift deed in favour of his wife and sons and the question that arose for consideration was whether defendant No.1 was competent to execute the gift or not after coming into operation of the H.P. Tenancy and Land Reforms Act. The learned appellate court held that there was evidence on record to the effect that defendant No.1 had earlier filled LRV form to resume the land but when his application was dismissed then defendant adopted another method to defeat the rights of the plaintiff and he executed the Gift deed. On these bases, the learned appellate court held that the learned trial court had rightly appreciated the evidence and concluded in favour of the plaintiff. The learned appellate court also held that there was no illegality and infirmity with the judgment and decree passed by the learned trial court and it dismissed the appeal.

11. I have heard learned counsel for the parties and also gone through the records of the case as well as judgment passed by both the learned Courts below.

12. Section 112 of the HP Tenancy and Land Reforms Act provides that save as otherwise expressly provided validity of any proceeding or order taken or made under Chapter 10 of the HP Tenancy and Land Reforms Act shall not be called in question in any civil court or before any other authority. In the present case, it is an admitted fact that the plaintiff was recorded as 'tenant at will' on payment of rent under the defendant. Further the said defendant

had more than 8 acres of land as on 21.7.1974 and thus he was not entitled to resume the land under the provisions of Section 104 (1) (i) & (ii) of the Act. It is also not a fact in issue that Section 104 (1) (iii) of the Land provides for immediate extinguishment of the rights, title and interest of the land owners who are not entitled to resume the land under the above mentioned provisions of the Act from the date so notified in this regard by the government in official gazette and the land in the tenancy vests free from all encumbrances. The date so notified by the government was 21.2.1974 meaning thereby that w.e.f. 21.2.1974 all rights, title and interests over the suit land of defendant No.1 stood extinguished and the same vested from free from all encumbrances upon the plaintiff. It is also a matter of record that defendant No.1 had filled LRV forms (Ext. P16 to P18) to resume the suit land but when his application was dismissed thereafter he gifted the suit land in favour of his wife and children.

13. In my considered view after coming into force of the provisions of Section 104(3) of the Act by the notification of the effective date in the official gazette i.e. 21.2.1974, defendant lost all rights, title and interests over the suit land. Not only this the plaintiff became owner of the suit land free from all encumbrances, therefore, the subsequent act of the defendant of transferring the suit land in favour of his wife and sons by way of a gift was *void-ab-initio*, as has been rightly held by both the learned courts below. Not only this, the factum of the defendant having filled LRV form to resume the land is an admission on his part that plaintiff was a tenant under him. Now in these circumstances when very genesis of the mutations which were entered in favour of defendants No.2 to 4 was void-ab-initio, the subsequent mutations so entered on the basis of the said gift also were *non est*. Even otherwise mutations do not confer title. The suit was filed by the plaintiff on the basis of his title and in this view of the matter it cannot be said that the suit filed by him was not maintainable in view of the provisions of Section 112 of the Act.

14. In **Shankar** Vs. **Smt. Rukmani and others**, 2003(1) Shim. L.C. 300 this Court has held:-

> *"4. So far the ratio in judgment in Chuhniya v. Jindu Ram's case (supra) is concerned, the reference before the Full Bench was whether the Civil Court has the jurisdiction in respect of order of conferment of proprietary rights under Section 104 of the H.P. Tenancy and Land Reforms Act, 1972 (hereinafter called 'the Act') which has been answered in the negative except in a case where it is found that the statutory authorities envisaged by the Act have not acted in conformity with the fundamental principles of judicial procedure or where the provisions of the Act have not been complied with.*
>
> *5. The acquisition of proprietary rights by tenants other than non-occupancy tenants is dealt with in Chapter X of the Act. This Chapter consists of Sections 104 to 117. Section 112 of the Act provides for bar of jurisdiction of Civil Court for calling in question the validity of any proceedings or orders taken or made under this Chapter. By providing appeal and revision against the order passed by the Land Reforms Officer under this Chapter, further bar of jurisdiction has been provided under Section 115 to call in question any order made by the Collector, Commissioner or Financial Commissioner by declaring them final. It is also observed by the Full Bench in Chuhniya Devi v. Jindu Ram's case (supra) that from the Scheme of Chapter X it is clear that there are bound to be occasions when the dispute about the relationship of landlord and tenant would arise in the proceedings which need to be adjudicated upon by the authorities as provided therein, before conferment of proprietary rights upon a tenant or before resumption of land by the land owner.*
>
> *6. Referring to sub-section (4) of Section 104 and Rule 29, the Full Bench has concluded in para 39 that:*
>
>> *"………It is implicit in sub-section (4) of Section 104 that the Legislature envisaged that a dispute may arise whether a person cultivating the land of a landowner is a tenant or not, when proceedings were in progress*

under Chapter X, and provided that it shall be decided by the authorities contemplated under this Chapter who shall require the landowner to establish that a person cultivating his land is not a tenant."

7. It was in this context that the Full Bench further held in paragraph 40:

"Any inquiry by a Civil Court on the question was barred by the legislature by specifically providing in Sections 112 and 115, both occurring in Chapter X, that the validity of any order made under the Chapter shall not be called in question in any court and that the order shall be final except as expressly provided in the Chapter. The legislature knew its mind fully well. Where it wanted a dispute to be determined by the Civil Court, it provided so in Chapter X itself. One has only to look at Sections 107 and 109 (2). Not only that the Legislature ruled out any determination by a Civil Court, by necessary implication, of other matters, it expressly said so in Sections 112 and 115."

8. While discussing the rationale for exclusion of Civil Court, the learned judges have held in paragraph 44 that:

"The exclusion of the jurisdiction of the Civil Court, in the matter of determination of the question whether a person cultivating the land of a landowner is his tenant or not for purposes of Chapter X, is both reasonable and understandable. Permitting such a question to be determined by the civil court also would have introduced an element of unpredictability, spread over a long period while the matter was under adjudication before the Civil Court at the trial or an appellate stage, which could have made the effective implementation of measures of land reform aimed at by the Act, uncertain. The legislature could legitimately think of ruling out such a situation. It has done so by excluding the jurisdiction of the civil court expressly in that matter."

9. After analyzing the judgment in Chuhniya Devi v. Jindu Ram's case (supra), we have no doubt that the jurisdiction of the Civil Court is barred under the Act if the dispute pertaining to the relationship of landlord and tenant arises during the proceedings of conferment of proprietary rights upon the tenant and resumption of land by the land owner and the order in respect thereof has been passed by the authorities under the Act except in a case where it is found that the statutory authorities envisaged by that Act had not acted in conformity with the fundamental principles of judicial procedure or where the provisions of the Act had not been complied with. But if the dispute of landlord and tenant arises independent of the proceedings under the Act, the Civil Court has the jurisdiction.

10. Coming to the case in hand, it is not averred by the either party that either the proceedings were initiated or the order was passed under Chapter X of the Act. Therefore, we have no hesitation to hold that the ratio of judgment in Chuhniya Devi v. Jindu Ram's case is not applicable to the facts and circumstances of the present case and the Civil Court has the jurisdiction to decide the suit of the plaintiff."

15. This judgment has been followed by this Court in **Ramesh Kumar and others** Vs. **Mandir Thor (Math Thor)**, 2007(2) Shim. LC 422.

16. Besides this, when all rights title and interests in the suit land of defendant No.1 stood extinguished on 21.2.1974 he had no legal right to transfer the suit land in favour of defendants No.2 to 4. Gift can be made of a property which is owned by a person and when a person is not owner of a property in law, he has no right to transfer the same in favour of another person by executing a gift.

Therefore, in view of what has been discussed above, in my considered opinion, it cannot be said that the learned courts below have either misread or mis-appreciated the oral and documentary evidence produced on record. Perusal of judgments and decrees passed by learned courts below demonstrate that they have minutely gone into all aspects of the matter and after appreciating both the ocular and documentary evidence produced on record, the learned trial court has decreed the suit of the plaintiff. Similarly even the learned appellate court has appreciated the evidence on record in its correct perspective and only thereafter it has upheld the findings returned by the learned trial court. Even otherwise, learned counsel for the appellant could not substantively point out as to what was that material evidence on record which was either misread or mis-appreciated by either of the learned courts below. The substantial questions of law are answered accordingly as aforesaid and keeping in view the fact that there is no merit in the present appeal, the same is dismissed with costs.

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

State of H.P. ….Appellant

Versus

Vijendra Kumar son of late Shri Ram Nath ….Respondent/Accused

Cr. Appeal No. 110 of 2007
Judgment Reserved on 20th May 2016
Date of Judgment 20th July 2016

Indian Penal Code, 1860- Section 279 and 337- Accused was driving the vehicle in a rash and negligent manner so as to endanger human life and personal safety of others - he struck the vehicle with informant Gurpal Singh who was walking by side of road- accused was tried and acquitted by the trial Court- held, in appeal that PW-2 had specifically stated that vehicle was approaching from Shimla to Solan in fast speed and had hit the injured- this testimony is corroborated by the testimony of PW-3- Medical Officer noticed injuries on the person of the injured- there is no material contradiction between the testimonies of PW-2 and PW-3- minor contradictions are bound to come with the passage of time- trial Court had not properly appreciated the evidence- prosecution case was proved beyond reasonable doubt- appeal allowed and accused convicted of the commission of offences punishable under Sections 279 and 337 of I.P.C. (Para-12 to 22)

Cases referred:

C. Muniappan and others vs. State of Tamil Nadu, (2010)9 SCC 567
Sohrab and another vs. The State of Madhya Pradesh, AIR 1972 SC 2020
State of U.P. vs. M.K. Anthony, AIR 1985 SC 48
Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat, AIR 1983
State of Rajasthan vs. Om Parkash, AIR 2007 SC 2257
Prithu alias Prithi Chand and another vs. State of Himachal Pradesh, (2009)11 SCC 588
State of Uttar Pradesh vs. Santosh Kumar and others, (2009)9 SCC 626
Appabhai and another vs. State of Gujarat, AIR 1988 SC 696
Rammi alias Rameshwar vs. State of Madhya Pradesh, AIR 1999 SC 3544
State of H.P. vs. Lekh Raj and another, (2000)1 SCC 247
Laxman Singh vs. Poonam Singh and others, (2004) 10 SCC 94
Kuriya and another vs. State of Rajasthan, (2012)10 SCC 433
Bhee Ram vs. State of Haryana, AIR 1980 SC 957
Rai singh vs. State of Haryana, AIR 1971 SC 2505
Sudip Sen alias Biltu vs. State of West Bengal, AIR 2016 SC (Weekly) 300

Seeman alias Veeranam vs. State, JT 2005(5) SC 555
Jose vs. State of Kerala. AIR 1973 SC 944
Raja vs. State, (1997)2 Crimes 175 (Delhi)
State of U.P. vs. Kishanpal and others. (2008)8 JT 650
Lallu Manjhi and another vs. State of Jharkhand, AIR 2003 SC 854
Kushal Singh vs. State of H.P., Latest HLJ 2009(HP) 588
State of H.P. vs. Parmodh Singh, Latest HLJ 2008(HP) 1360
State of H.P. vs. Chandu Lal, Latest HLJ 2008(HP) 954
State of H.P. vs. Bhagat Singh, Latest HLJ 2008(HP) 885
State of H.P. vs. Balak Ram, Latest HLJ 2008(HP) 712

For the Appellant: Mr. M.L. Chauhan Additional Advocate General.
For the Respondent: Mr. B.S. Kanwar Advocate.

The following judgment of the Court was delivered:

P.S. Rana, Judge

Present appeal is filed under Section 378 of Code of Criminal Procedure 1973 against the judgment of acquittal passed by learned Judicial Magistrate 1st Class Court No.3 Shimla in criminal case No. 43/2 of 2006 title State of H.P. versus Vijendra Kumar decided on 8.1.2007.

Brief facts of the case

2. It is alleged by prosecution that on 5.3.2006 at 1.15 PM at NH 22 Tara Devi near Goyal Motors accused was driving vehicle Alto Car bearing No. HP-03C-1281 in rash and negligent manner as to endanger human life and public safety of others upon public road and struck the vehicle with complainant Gurpal Singh who was walking by side of road and caused simple injuries on his person. It is alleged by prosecution that rapat Ext.PW7/A and statement of complainant Ext.PW2/A recorded and on the basis of statement of complainant FIR Ext.PW8/A was registered. It is alleged by prosecution that I.O. prepared spot map Ext.PW8/B as per factual position and it is further alleged by prosecution that vehicle having registration No. HP-03C-1281 took into possession along with documents vide seizure memos Ext.PW4/A and Ext.PW1/A. It is alleged by prosecution that I.O. filed application Ext.PW5/A before medical officer for medical examination of injured and obtained MLC Ext.PW5/B.

3. Notice of accusation put to accused by learned Trial Court under Sections 279 and 337 IPC on 11.9.2006. Accused did not plead guilty and claimed trial.

4. Prosecution examined eight oral witnesses in all and also tendered documentaries evidence.

5. Learned Trial Court acquitted the accused qua offence punishable under Sections 279 and 337 IPC by way of giving him benefit of doubt.

6. Feeling aggrieved against the judgment passed by learned Trial Court State of H.P. filed present appeal.

7. Court heard learned Additional Advocate General appearing on behalf of the State and learned Advocate appearing on behalf of the respondent and also perused the entire record carefully.

8. Following points arise for determination in present appeal:-

Point No.1

Whether appeal filed by State of H.P. is liable to be accepted as mentioned in memorandum of grounds of appeal?

Point No.2

Final Order.

9. Findings upon Point No.1 with reasons

9.1. PW1 Jagdish has stated that he is posted as Sub Inspector since 2005 and he joined investigation on 5.3.2006. He has stated that accused handed over vehicle No. HP-03C-1281 along with documents i.e. R.C., insurance certificate to Investigating Agency vide seizure memo Ext.PW1/A. He has stated that he has signed seizure memo as marginal witness. He has stated that other witness namely Mahavir also signed seizure memo. He has stated that seizure memo was prepared in police station.

9.2 PW2 Gurpal Singh injured has stated that he is owner of maruti car No. 24A-08295. He has stated that on 5.3.2006 he along with his friend Inderjit came to Tara Devi Shimla at 6.30 AM for service of vehicle in Goyal Motors workshop. He has stated that at 1.15 PM he and his friend Inderjit were moving upon side of public road at a distance of 100 yards from Goyal Motors to take lunch then Alto car No. HP-03C-1281 came from Shimla side and struck against him due to fast speed. He has stated that accused was driving vehicle No. HP-03C-1281 at the time of accident. He has stated that police officials came in hospital and his statement was recorded. He has stated that MLC is Mark A and further stated that his X-ray and CT Scan were also conducted. He has stated that his statement is Ext.PW2/A. He has denied suggestion that he sustained injuries due to fall. He has denied suggestion that he requested the accused to take him to IGMC in his vehicle. He has stated that accident took place at National Highway. He has denied suggestion that accident was caused due to his own fault. He has denied suggestion that he was walking upon middle of road. He has stated that Goyal Motors Agency is situated at a distance of 100 yards from place of accident.

9.3 PW3 Inder Singh eye witenss of incident has stated that he and injured on 5.3.2006 came to Tara Devi Goyal Motors Agency for service of vehicle. He has stated that at about 1.15 PM he and injured were moving upon side of public road for consumption of lunch. He has stated that vehicle having registration No. HP-03C-1281 Alto came in fast speed and struck with injured Gurpal Singh. He has stated that injured Gurpal Singh sustained injuries and he was brought to IGMC for his medical treatment. He has stated that police officials also came. He identified accused in Court and stated that accident took place due to negligence of accused. He has admitted that injured was brought to hospital in vehicle of accused. He has denied suggestion that he has deposed falsely against the accused.

9.4 PW4 Anju Thakur has stated that accused is known to her. She has stated that accused has produced driving licence in her presence which was took into possession vide seizure memo Ext.PW4/A.

9.5 PW5 Dr. R.S. Dadhwal has stated that in the month of March 2006 he was posted in IGMC. He has stated that on 5.3.2006 at about 2.25 PM he examined Gurpal Singh who was brought to him with alleged history of public road accident. He has stated that Gurpal Singh was hit by vehicle No. HP-03C-1281 while he was walking near Goyal Motors resulting in multiple injuries. He has stated that he examined the injured and found following injuries. (1) Contusion injury on back region, red in colour and tenderness was present. (2) Contusion injury on right hip, red in colour and tenderness was present. (3) Contusion injury on left hip, red in colour and tenderness was present. (4) Contusion injury was on chest. (5) Blunt injury upon abdomen. (6) Contusion injury was found on lumposacral region. He has stated that he advised X-ray of spine, right hip and chest. He has further stated that all injuries mentioned in MLC were simple in nature and duration of injury was less than three hours. He has stated that he issued MLC. He has also stated that injuries mentioned in MLC Ext.PW5/B could be caused in road accident. In cross examination he has stated that injuries mentioned in MLC could be sustained by falling on hard surface.

9.6 PW6 Lokender Singh has stated that he is photogrpaher and on 6.3.2006 he joined the investigation. He has stated that he took photographs Ext.PW6/A-1 to Ext.PW6/A-3 and negatives of photographs are Ext.PW6/A-4 to Ext.PW6/A-6.

9.7 PW7 C.Param Dev has stated that since 2½ years he is posted as constable and he brought the nakal rapat. He has stated that rapat roznamcha Ext.PW7/A is correct as per original record.

9.8 PW8 HC Manoj Kumar has stated that he is posted as I.O. and on 5.3.2006 he received the information that at place Tara Devi Goyal Motors accident took place and injured was brought to IGMC. He has stated that he recorded statement of injured Ext.PW2/A and thereafter FIR Ext.PW8/A was registered. He has stated that he prepared site plan Ext.PW8/B and driving licence took into possession vide seizure memo Ext.PW4/A and RC and insurance policy took into possession vide seizure memo Ext.PW1/A. He has stated that MLC of injured obtained and X-ray film also obtained. He has stated that photographs obtained and negatives of photographs were also obtained by him. He has stated that he recorded statements of prosecution witnesses as per their versions. He has stated that after completion of investigation file was handed over to SHO and further stated that SHO prepared investigation report. He has stated that accused himself brought the injured to IGMC for his medical treatment. He has denied suggestion that injured himself fell upon hard surface.

10. Following documentaries evidence adduced by the prosecution. (1) Ext.PW8/A is FIR No. 40 dated 5.3.2006 registered under Sections 279 and 337 IPC. (2) Ext.PW2/A is statement of injured Gurpal Singh recorded under Section 154 Cr.P.C. (3) Ext.PW7/A is nakal rapat No. 19 dated 5.3.2006. (4) Ext.PW8/B is site plan. (5) Ext.PW4/A is seizure memo of driving licence. (6) Ext.PW1/A is seizure memo of vehicle No. HP-03C-1281 and documents i.e. RC and insurance policy. (7) Ext.PW5/A is application filed by I.O. to medical officer for medical examination of Gurpal Singh injured. (8) Ext.P3 is copy of driving licence. (9) Ext.PW5/B is MLC of injured Gurpal Singh. (10) Ext.PW6/A-1 to Ext.PW6/A-3 are photogrpahs and Ext.PW6/A-4 to Ext.PW6/A-6 are negatives of photographs.

11. Statement of accused recorded under Section 313 Cr.P.C. Accused has stated that on 5.3.2006 his vehicle did not meet with any accident. He has stated that he went to Goyal Motors Tara Devi for repair of his vehicle and when he was coming back he given lift to injured. He has stated that he has been falsely implicated in present case.

12. Submission of learned Additional Advocate General appearing on behalf of State that criminal offence under Sections 279 and 337 IPC is offence against public at large and same is proved beyond reasonable doubt against the accused is accepted for the reasons hereinafter mentioned. Court has carefully perused testimony of PW2 Gurpal Singh injured and PW3 Inder Singh who are eye witnesses of accident. PW2 injured has specifically stated in positive manner that Alto car No. HP-03C-1281 was approaching from Shimla to Solan in fast speed upon public road and same struck with injured PW2 Gurpal Singh and caused injuries upon body of injured namely Gurpal Singh. Testimony of PW2 is trustworthy reliable and inspire confidence of Court. There is no reason to disbelieve the testimony of PW2. Testimony of PW2 is corroborated with independent eye witness namely PW3 Inder Singh. PW3 Inder Singh has stated in positive manner that Alto car No. HP-03C-1281 came in fast speed and struck with injured PW2 and caused injuries upon body of PW2 Gurpal Singh. Testimony of PW3 is also trustworthy reliable and inspire confidence of Court.

13. Testimonies of PWs 2 and 3 are also corroborated with testimony of medical officer PW5 namely Dr.R.S.Dadhwal who has medically examined the injured immediately on 5.3.2006 at 2.30 PM. It is proved on record that injured namely Gurpal Singh had sustained six injuries due to accident i.e. (1) Contusion injury on back region, red in colour and tenderness was present. (2) Contusion injury on right hip, red in colour and tenderness was present. (3) Contusion injury on left hip, red in colour and tenderness was present. (4) Contusion injury was on chest. (5) Blunt injury upon abdomen. (6) Contusion injury on lumposacral region.

Testimonies of PWs 2 and 3 are also corroborated with MLC Ext.PW5/B. Testimonies of PWs 2 and 3 are also corroborated with other corroborative evidence of PW1 Jagdish Ram, PW4 Anju Thakur, PW6 Lokinder Singh, PW7 Param Dev and PW8 Manoj Kumar.

14. Testimonies of PWs 1 and 2 are also corroborated with documentaries evidence i.e. FIR Ext.PW8/A, statement of injured recorded under Section 154 Cr.P.C. Ext.PW2/A, nakal rapat No. 19 Ext.PW7/A, site plan Ext.PW8/B, seizure memo Ext.PW4/A, seizure memo Ext.PW1/A, MLC Ext.PW5/B and X-ray films placed on record.

15. It is well settled law that rash and negligent driving upon public path is a criminal offence against the public at large. It is well settled law that all drivers driving vehicles upon public path are under legal obligation to drive the vehicle in cautious manner with object to save the life of general public at large.

16. Submission of learned Advocate appearing on behalf of respondent that there is material contradiction between testimonies of PWs 2 and 3 who are eye witnesses of accident and on this ground appeal filed by State be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused testimonies of PWs 2 and 3. There is no material contradiction between testimonies of PWs 2 and 3 which goes to the root of case. It is well settled law that minor contradictions are bound to come in criminal case when statements of prosecution witnesses are recorded after a gape of sufficient time. In present case accident took place on 5.3.2006 at about 1.15 Noon and testimonies of prosecution witnesses were recorded in Court on 7.11.2006 and 12.12.2006. ***See (2010)9 SCC 567 title C. Muniappan and others vs. State of Tamil Nadu . See AIR 1972 SC 2020 title Sohrab and another vs. The State of Madhya Pradesh. See AIR 1985 SC 48 title State of U.P. vs. M.K. Anthony. See AIR 1983 SC 753 title Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat. See AIR 2007 SC 2257 title State of Rajasthan vs. Om Parkash. See (2009)11 SCC 588 title Prithu alias Prithi Chand and another vs. State of Himachal Pradesh. See (2009)9 SCC 626 title State of Uttar Pradesh vs. Santosh Kumar and others. See AIR 1988 SC 696 title Appabhai and another vs. State of Gujarat. See AIR 1999 SC 3544 title Rammi alias Rameshwar vs. State of Madhya Pradesh. See (2000)1 SCC 247 title State of H.P. vs. Lekh Raj and another. See (2004) 10 SCC 94 title Laxman Singh vs. Poonam Singh and others. See (2012)10 SCC 433 title Kuriya and another vs. State of Rajasthan.*** Concept *falsus in uno falsus in omnibus* is not applicable in criminal cases. ***See AIR 1980 SC 957 title Bhee Ram vs. State of Haryana. See AIR 1971 SC 2505 title Rai singh vs. State of Haryana.***

17. Submission of learned Advocate appearing on behalf of respondent that testimonies of PW2 Gurpal Singh and PW3 Inder Singh are not sufficient for conviction is rejected being devoid of any force for the reasons hereinafter mentioned. Testimonies of PW2 Gurpal Singh and PW3 Inder Singh eye witnesses are trustworthy reliable and inspire confidence of Court. It is well settled law that conviction can be sustained on testimony of single witness in criminal case if same is turstworthy and reliable.***See AIR 2016 SC (Weekly) 300 title Sudip Sen alias Biltu vs. State of West Bengal. See JT 2005(5) SC 555 Seeman alias Veeranam vs. State. See AIR 1973 SC 944 Jose vs. State of Kerala.***

18. Submission of learned Advocate appearing on behalf of respondent that fact of rash and negligent driving is not proved as per testimonies of PWs 2 and 3 is also rejected being devoid of any force for the reasons hereinafter mentioned. As per Section 134 of Indian Evidence Act 1872 no particular number of witnesses are required for proof of any fact. It is well settled law that Courts are concerned with merits of statements of particular witnesses and Courts are not concerned with number of witnesses examined by prosecution. ***See (1997)2 Crimes 175 (Delhi) title Raja vs. State.*** It is well settled law that Courts should judge quality of evidence and not quantity of evidence. ***See (2008)8 JT 650 title State of U.P. vs. Kishanpal and others.*** It is well settled law that law of evidence does not require any particular number of witnesses should be examined in proof of fact. It is well settled law that testimony of witnesse could be classified into three categories. (1) Wholly reliable. (2) Wholly unreliable. (3) Neither wholly reliable nor

wholly unreliable. ***See AIR 2003 SC 854 title Lallu Manjhi and another vs. State of Jharkhand.***

19. Facts of case law cited by learned Advocate appearing on behalf of accused i.e. ***Latest HLJ 2009(HP) 588 title Kushal Singh vs. State of H.P., Latest HLJ 2008(HP) 1360 title State of H.P. vs. Parmodh Singh, Latest HLJ 2008(HP) 954 title State of H.P. vs. Chandu Lal, Latest HLJ 2008(HP) 885 title State of H.P. vs. Bhagat Singh, Latest HLJ 2008(HP) 712 title State of H.P. vs. Balak Ram*** and facts of present case are entirely different and distinguishable and case law cited by learned Advocate appearing on behalf of accused are not applicable upon facts of present case**.**

20. Submission of learned Advocate appearing on behalf of accused that accident took place due to own fault of injured when injured was walking upon middle of public path is rejected being devoid of any force for the reasons hereinafter mentioned. Accused did not lead any positive evidence that accident took place due to fault of injured. Plea of accused is defeated on the concept of *ipse dixit* (An assertion made without proof).

21. It is held that judgment of learned Trial Court is perverse and it is further held that learned Trial Court did not properly appreciate oral as well as documentary evidence placed on record relating to criminal offence punishable under Sections 279 and 337 IPC. It is held that it is proved beyond reasonable doubt that accused had driven vehicle upon public way in rash or negligent manner and endangered human life of injured person and caused hurt to injured endangering his life. Point No.1 is answered in affirmative.

Point No. 2(Final Order)

22. In view of findings upon point No.1 above appeal is accepted. Judgment passed by learned Trial Court is set aside and accused Vijendra Kumar son of late Shri Ram Nath is convicted under Sections 279 and 337 IPC. Now convict be heard on quantum of sentence. Convict be produced before Court on ***05.08.2016.***

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

Vinod Chadha ....Petitioner.
Versus
State of H.P and another. ....Respondents.

Cr.MMO No. 122 of 2016
Date of decision: 20th July, 2016

Code of Criminal Procedure, 1973- Section 438- Accused was declared a proclaimed offender by the Court of Judicial Magistrate 1St Class, Manali- he applied for bail- held, that ordinarily a person who has been declared a proclaimed offender should not be granted anticipatory bail- however, matter was compromised in the present case- therefore, direction issued not to arrest the applicant on the way to appear and surrender in the Court- it is left open to the trial Judge to consider and pass appropriate order on the bail application. (Para-2 to 5)

Case referred:

State of Madhya Pradesh versus Pradeep Sharma, (2014) 2 Supreme Court Cases 171

For the petitioner: Mr. Sajal Koser, Advocate.
For the respondents: Mr. D.S. Nainta and Mr. Virender Verma, Addl. A.Gs for respondent No.1.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral).

The petitioner has been declared proclaimed offender vide order dated 30.11.2010 passed by learned Judicial Magistrate 1st Class, Manali, District Kullu in a complaint under Section 138 of the Negotiable Instruments Act registered as Criminal Case No. 274-I-08. The copy of the order has been placed on record by filing an application, Cr.M.P No. 552 of 2016. Learned counsel has produced certified copy of order passed in another complaint registered as Case No. 273-I-08 and in that case also, the petitioner has been declared as proclaimed offender.

2. During the course of arguments, learned counsel representing the petitioner has apprised this Court that in an outside Court settlement, the accused-petitioner has settled the matter with the complainant amicably in both the cases. The relief in this petition, has also been restricted only to the extent of protecting the accused-petitioner from his arrest in order to enable him to put in appearance in the Court of learned Judicial Magistrate 1st Class at Manali, District Kullu, so that he can settle both the cases with the complainant (respondent No.2 herein) amicably.

3. The provisions contained under Section 41(1) (c) Cr.P.C. reveal that a person having been declared as proclaimed offender can be arrested by the police even without issuance of any warrant of arrest also. Not only this but, as per Section 43 of the Act, such person can even be arrested by a private person. The apprehension of the accused-petitioner, therefore, is that while on the way to appear in the Court, there is likelihood of his being arrested.

4. True it is that the Apex Court in ***State of Madhya Pradesh*** versus ***Pradeep Sharma, (2014) 2 Supreme Court Cases 171*** has held that a person, who has been declared as proclaimed offender, cannot be granted anticipatory bail. The order proposed to be passed in this application, however, is not to grant anticipatory bail to the accused-petitioner and rather to protect him from his arrest so that while in transit to surrender in the trial Court he is not arrested. The compromise having been arrived at between the accused-petitioner and the complainant also weigh with this Court while granting him protection to this limited extent.

5. The petition, as such, is allowed. Consequently, there shall be a direction that the accused-petitioner, Vinod Chadha, who has been declared as proclaimed offender by learned Judicial Magistrate 1st Class, Manali in criminal Cases No. 273-I-08 and 274-I-08, shall not be arrested on his way to appear and surrender in the trial Court on or before 4th August, 2016. It is made clear that this order will remain in force only up to 4th August, 2016. It is left open to learned trial Judge to consider and pass appropriate order as to whether the accused-petitioner is to be released on regular bail or detained in custody.

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

Dasti ***copy***.

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

Amar Nath Rana …Appellant.

Versus

State of Himachal Pradesh and others …Respondents.

LPA No. 286 of 2012
Reserved on: 14.07.2016
Decided on: 21.07.2016

Constitution of India, 1950- Article 226- Respondent No. 2 issued an advertisement for filling up 15 posts of Assistant District Attorney- petitioners had also participated in the selection process- respondents were selected- petitioners filed a writ petition seeking quashing of the selection- held, that once a candidate had participated in the selection process, he cannot question the same- he is caught by principles of estoppel, waiver and acquiescence – writ petition was rightly dismissed – appeal dismissed. (Para-7 to 11)

Cases referred:

Amrit Lal Sharma and others versus State of H.P. and others, 2014 (Suppl) Him L.R. 2115 (DB)
Madras Institute of Development Studies and another versus K. Sivasubramaniyan and others, (2016) 1 Supreme Court Cases 454

For the appellant: Mr. Bipin C. Negi, Senior Advocate, with Mr. Pranay Pratap Singh, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Romesh Verma, Additional Advocate General, and Mr. J.K. Verma & Mr. Kush Sharma, Deputy Advocate Generals, for respondent No. 1.
Mr. D.K. Khanna, Advocate, for respondent No. 2.
Respondents No. 3, 6, 7, 10, 12 and 15 already ex-parte.
Mr. Balwant Singh Thakur, Advocate, for respondent No. 4.
Mr. Manish Kumar Gupta, Advocate, for respondent No. 5.
Mr. Parveen Chandel, Advocate, for respondents No. 8, 11 and 13.
Ms. Archana Dutt, Advocate, for respondent No. 9.
Ms. Tamanna Rana, Advocate, vice Mr. P.P. Chauhan, Advocate, for respondent No. 14.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

Challenge in this appeal is to judgment and order, dated 24th April, 2012, made by the Writ Court/learned Single Judge in CWP No. 6713 of 2010, titled as Shri Amar Nath Rana versus State of Himachal Pradesh and others, whereby the writ petition filed by the appellant-writ petitioner came to be dismissed (for short "the impugned judgment").

2. Heard.

3. The core question involved in this appeal is – whether a candidate, who has participated in a selection process, failed to make a grade, can question the selection process and the procedure adopted? The answer is in the negative for the following reasons:

4. Respondent No. 2-Himachal Pradesh Public Service Commission (for short "HPPSC") issued advertisement No. VI/2009, on 7th October, 2009 (Annexure P-1 to the writ petition) for filling up fifteen posts of Assistant District Attorney in the Department of Home (Prosecution), H.P. The appellant-writ petitioner, private respondents and others responded and participated in the selection process. The appellant-writ petitioner had also participated in the selection process so far it relates to the posts reserved for OBC category. Interview was conducted and the appellant-writ petitioner failed to make a grade and the private respondents came to be selected.

5. The appellant-writ petitioner invoked the jurisdiction of the Writ Court by the medium of CWP No. 6713 of 2010, praying therein for quashment of selection and for writ of mandamus commanding the respondents-authorities to hold written test and thereafter to conduct the interview.

6. It is not the case of the appellant-writ petitioner that after quashment of the selection and appointment of the private respondents, he be appointed. Virtually, he has prayed that a fresh selection process be drawn.

7. The Writ Court has discussed all the facts including issuance of advertisement notice, application of Rules and also quoted Rule 7 of the Himachal Pradesh, Prosecution Department, Assistant District Attorney, Class-I (Gazetted) Recruitment and Promotion Rules, 2009 (for short "Rules of 2009") in para 3 of the impugned judgment. The Writ Court has also given details as to how many candidates participated in the selection process belonging to all categories. The discussion has rightly been made by the Writ Court from paras 2 to 7 of the impugned judgment.

8. This Court has laid down the tests in a case titled as **Amrit Lal Sharma and others versus State of H.P. and others,** reported in **2014 (Suppl) Him L.R. 2115 (DB),** and, while discussing the law, which was in place at that point of time, right from paras 6 to 16, held that once a candidate has participated in the selection process, he cannot make a u-turn and question the very selection process and the appointments made. It is apt to reproduce para 16 of the judgment herein:

> *"16. Coming back to the challenge to the selection, it is well settled law that a candidate after remaining unsuccessful cannot challenge the selection process and the constitution of the Selection Committee. If the petitioners entertained any doubts as to the fairness of the members of the Selection Committee, they ought to have objected then. The petitioners however having proceeded with the interviews before Selection Committee to which the objections have now been taken, cannot be permitted to object after remaining unsuccessful (Refer: **Madan Lal and others vs. State of Jammu & Kashmir and others AIR 1995 SC 1088, Amlan Jyoti Borooah vs. State of Assam and others (2009) 3 SCC 227 and Manish Kumar Shahi vs. State of Bihar and others (2010) 12 SCC 576).**"*

9. The Apex Court in a latest judgment in the case titled as **Madras Institute of Development Studies and another versus K. Sivasubramaniyan and others,** reported in **(2016) 1 Supreme Court Cases 454,** has discussed how a candidate can be said to be caught by estoppel, acquiescence and waiver. It is apt to reproduce paras 14 to 18 herein:

> *"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 G. Sarana v. University of Lucknow, (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 v. State of J&K., (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 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 v. 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 Ramesh Chandra Shah v. Anil Joshi, (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."

10. It is also apt to record herein that in the instant case, the appellant-writ petitioner has not sought his appointment, as discussed hereinabove, but has sought quashment of the selection process, which was also the prayer made by the writ petitioner in the writ petition filed before the High Court of Judicature at Madras, which has given birth to the judgment in **K. Sivasubramaniyan's case (supra).** It would be profitable to reproduce para 13 of the judgment herein:

"13. Be that as it may, the respondent, without raising any objection to the alleged variations in the contents of the advertisement and the Rules, submitted his application and participated in the selection process by appearing before the Committee of experts. It was only after he was not selected for appointment, turned around and challenged the very selection process. Curiously enough, in the writ petition the only relief sought for is to quash the order of appointment without seeking any relief as regards his candidature and entitlement to the said post."

11. Applying the tests in the instant case, the writ petition was not maintainable and the Writ Court has rightly made the impugned judgment, needs no interference.

12. Having glance of the above discussions, the impugned judgment is upheld and the appeal is dismissed alongwith all pending applications.

****

BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J

Shri Bachan Singh …Plaintiff/petitioner.

Vs.

Shri Rattan Singh and another …Defendants/respondents.

CMPMO No.: 4197 of 2013
Reserved on: 08.07.2016
Date of Decision: 21.07.2016

Code of Civil Procedure, 1908- Order 6 Rule 17- Plaintiff filed a civil suit for declaration, which was decreed by the trial Court- an appeal was preferred asserting that deceased had revoked the earlier Will by executing a revocation deed- however, it was not suggested during the course of trial that Will was revoked by deceased - application for amendment was filed after eight months of filing of appeal for incorporating the fact that Will was revoked– it was pleaded that this fact could not be mentioned earlier as it came to the notice of the applicant when the summons were received from the Court of learned Civil Judge (Junior Division), Bilaspur during the pendency of the appeal- application was allowed by the Appellate Court- held, that application for amendment cannot be allowed after the commencement of trial, 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 the trial- due diligence means diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation- it was specifically asserted in the memo of appeal that Will was revoked- it was falsely explained that applicant came to know about the revocation after receiving the summons – there was no due diligence and the application could not have been allowed- petition allowed and order of the Appellate Court set aside- application dismissed. (Para-9 to 26)

Cases referred:

Radhey Shyam and another Vs. Chhabi Nath and other (2015) 5 Supreme Court Cases 423
Pirgonda Hongonda Patil Vs. Kalgonda Shidgonda Patil and others AIR 1957 SC 363
Revajeetu Builders and Developers Vs. Narayanaswamy and sons and others (2009) 10 Supreme Court Cases 84
State of Madhya Pradesh Vs. Union of India and another (2011) 12 Supreme Court Cases 268
Chander Kanta Bansal Vs. Rajinder Singh Anand (2008) 5 Supreme Court Cases 117
Union of India Vs. Pramod Gupta and others (2005) 12 SCC 1

For the petitioner: Mr. Neeraj Gupta, Advocate.
For the respondents: Mr. Rajiv Jiwan, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. :

By way of present petition filed under Article 227 of the Constitution of India, the petitioner/plaintiff has challenged the order passed by the Court of learned District Judge, Bilaspur in CMP No. 298/06 of 2013 dated 05.09.2013 in Civil Appeal No. 3-13 of 2012 vide which, learned Appellate Court has allowed the application filed by respondents/defendants under Order 6 Rule 17 read with Section 151 of the Code of Civil Procedure to amend the written statement at the appellate stage.

2. Brief facts necessary for the adjudication of the present case are that the petitioner/plaintiff filed a suit for declaration and injunction to the effect that he be declared joint owner in possession to the extent of ½ share with defendant No. 1 qua the suit property situated in villages Behal and Lakhala, Pargana Fatehpur, Tehsil Shri Naina Devi Ji, District Bilaspur on the basis of a Will executed by his late father Shri Sukh Ram dated 29.12.1993. Plaintiff also sought a decree of permanent prohibitory injunction against the defendants restraining them from causing any interference in his share of the suit land.

3. The said suit was resisted by the defendants on the grounds that they were exclusive owners in possession of the suit land as per registered Will of late Shri Sukh Ram dated 21.08.2003 and defendants and plaintiff were joint owners in possession of the suit land to the extent of 1/3rd share and not half share.

4. At this stage, it is pertinent to mention that both plaintiff and defendant No. 1 are sons of late Shri Sukh Ram, whereas defendant No. 2 is the wife of defendant No. 1, i.e. daughter-in-law of deceased Sukh Ram.

5. The case of the plaintiff was that he and defendant No. 1 were owners of ½ share of the suit land as per the Will set up by the plaintiff, whereas case of the defendants was that they alongwith the plaintiff were owners of 1/3rd share of the suit property on the basis of Will set up by them dated 21.08.2003.

6. Learned trial Court on the basis of the pleadings of the parties framed the following issues on 09.11.2004:

"1. Whether the plaintiff is joint owner in possession of the suit land alongwith defendants as alleged? OPP

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

3. Whether the suit is not maintainable? OPD

4. Whether the plaintiff has no cause of action to file the present suit? OPD

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

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

7. Whether the deceased Sukh Ram executed a valid 'Will' dated 21.08.2003 in favour of defendants? OPD

8. Whether the defendants are exclusive owners in possession of suit land? OPD

9. Relief.

7. Learned trial Court on the basis of the evidence led by the respective parties, returned the following findings to the issues so framed:

Issue No. 1:	*Yes.*
Issue No. 2:	*Yes.*
Issue No. 3:	*No.*
Issue No. 4:	*No.*
Issue No. 5:	*No.*
Issue No. 6:	*No.*
Issue No. 7:	*No.*
Issue No. 8:	*No.*
Relief:	*The suit of the plaintiff is hereby decreed with costs as per operative part of the judgment.*

8. Accordingly, learned trial Court decreed the suit and declared Will Ex. DW1/A dated 21.08.2003 as null and void. It also declared mutations attested on the basis of said Will in favour of defendants as wrong, illegal, null and void. It also held plaintiff joint owner in possession of the suit land to the extent of ½ share on the basis of Will Ex.-PX dated 29.12.1993 with the defendants.

9. Feeling aggrieved by the said judgment passed by learned trial Court, the defendants therein filed an appeal in the Court of learned District Judge, Bilaspur, which was prepared and filed on 19.01.2012. It is relevant to quote paragraphs No. 5 and 7 of the grounds of appeal:

> *"5. Sh. Sukh Ram deceased during his old age Sh. Bachan Singh plaintiff has also been given 1/3rd share in the suit land therefore the plaintiff has no right to challenge the last volition of his father so as to take benefit of his own ingenuity. The plaintiff was aware of the fact that his father Sh. Sukh Ram has revoked his earlier will dated 29.12.1993 by executing a revocation deed on 17.7.1998 and the said revocation deed was registered before Sub Registrar Shri Naina Devi Ji, but this fact was never disclosed by the plaintiff and has taken the benefit by suppressing material facts on the basis of a document which stood revoked by Sukh Ram on 17.7.1998, therefore the findings are illegal, wrong and deserves to be set aside. Issue No. 8 seems to be casted wrongly as defendants are not exclusive owner in possession of the total suit land. It is alleged by the defendants that they are exclusive owners in possession to the extent of their share but the issue has been framed so as to show the defendants to be exclusive*

owner in possession which has resulted into a great matter of suspicion to the court and the court might have thought that no share sis given to plaintiff and the said mistake has resulted in setting aside the last Will of Sh. Sukh Ram, therefore, the findings under this issue deserved to be set aside. The grounds which have been taken by the trial Court to be set aside the will are some suspicious circumstances, but these suspicious circumstances are nto well founded and of are very common in village life and small. Every person has a right to dispose of his property on the basis of his free volition and the volition of the person has to be respected and given effect unless and unless the suspicion are well founded. None of the points taken for discussion as suspicious grounds are well founded but are of very poor and frail character. Therefore should have been ignored. The Court has no power to disturb the last volition of a person lightly. At present the women are not domestic servants but they have a right to acquire property on their names independently under law.

………………..

7. That the findings under issue No. 3 and 4 are wrong therefore deserves to be set aside. The plaintiff has no cause of action to challenge the will dated 21.8.2003 as the will dated 29.12.1993 has been revoked independently by Sh. Sukh Ram and the recovation deed is in possession of daughters of Sh. Sukh Ram."

10. Before proceeding further, it is relevant to take note as is borne out from the records that during the course of trial, it was not the case put forth by the defendants that Will dated 29.12.1993 Ex. PX had been revoked by Sh. Sukh Ram and the revocation deed was in possession of daughters of Shri Sukh Ram.

11. Appeal No. 3/13 of 2012 was filed in January, 2012. On 27.08.2012, i.e. after 8 months, respondents/defendants filed an application before the learned Appellate Court under Order 6 Rule 17 read with Section 151 C.P.C. for amendment of the written statement. The proposed amendment sought in the written statement was by way of adding paragraph No. 7 in the preliminary objection to the following effect:

"Para-7 "That the will dated 29.12.1993 has been revoked by Sh. Sukh Ram deceased father of the plaintiff through a registered revocation deed dated 17.07.1998, therefore, the plaintiff has no right to file the present suit on the basis of revoked will and to challenge registered will dated 21.8.2003 which is last volition of deceased Sh. Sukh Ram without getting declaration for setting aside the revocation deed dated 17.7.1998 as well."

12. The reasons mentioned in the said application as to why what was being proposed to be added by way of amendment of the written statement could not be earlier incorporated in the written statement, were that after the respondents/defendants suffered the decree in the suit filed by the present petitioner and they challenged the same by filing an appeal before the learned appellate Court, they received summons from the Court of learned Civil Judge (Junior Division), Bilaspur, H.P. during the pendency of the appeal alongwith a copy of plaint to appear on 11.07.2012 and from the same it has come to the notice of respondents that daughters of deceased Sukh Ram have filed a suit for declaration that they have also inherited the suit land after the death of their father as Will dated 29.12.1993 had been revoked by their deceased father Sh. Sukh Ram on 17.07.1998 through a registered revocation deed. It was further the case set up in the said application that the fact of revocation of the Will was not disclosed by the plaintiff in the plaint or during the trial of the suit and the plaintiff obtained decree from the learned trial Court on the basis of a Will which stood revoked by Shri Sukh Ram, which act of the plaintiff was a clear case of fraud committed by him upon the Court as well as upon the defendants and said revocation deed was now in the power and possession of learned Civil Judge (Junior Division), Bilaspur in a suit filed by the daughters against Bachan Singh and Rattan Singh etc. which was

fixed for 01.09.1012. Therefore, on the basis of the said explanation and justification, the amendment in the written statement was sought by the respondents/defendants.

13. This application filed under Order 6 Rule 17 of the Code of Civil Procedure was opposed by the present petitioner. In reply which was filed to the said application before the learned appellate Court, the stand taken by the present petitioner was that the defendants had not made out any case to allow them to amend the written statement and rather they intend to re-open the entire case by seeking the alleged amendment which was not permissible. It was further mentioned in the reply by way of preliminary objections that after filing of the suit, issues were framed by the learned trial Court on 09.11.2004 and the suit remained pending adjudication from 14.06.2004 till 20.12.2011 when it was finally decided. During the pendency of suit, defendants could not produce any so called document and even otherwise, the defendants had taken a specific plea in the written statement that the last Will executed by deceased Sukh Ram was dated 21.08.2003 and when the said Will was declared null and void by the learned trial Court, now they have come up with the new plea that Will dated 29.12.1993 had been revoked. It was further mentioned in the preliminary objections that in fact the defendants after declaration by the learned trial Court to the effect that Will dated 21.08.2003 was null and void, had cleverly got instituted another suit through sisters, who had sided in favour of the defendants in order to avoid the judgment and decree passed by the learned Lower Court dated 20.12.2011. It was further mentioned in the reply to para-3 of the application that the defendants had come up with the false story because it stood mentioned by the defendants/applicants about the alleged documents in the grounds of appeal, therefore, it stood proved that the contentions being raised by them that they came to know about the existence of the said documents only after they received summons from learned lower Court in a suit filed by their sisters was a concocted version.

14. In the rejoinder which was filed to the said reply, the defendants evaded any straight reply to the factum of their already having mentioned the existence of the alleged documents in the grounds of appeal.

15. Learned Appellate Court vide its order dated 05.09.2013 allowed the application filed under Order 6 Rule 17 read with Section 151 of the Code of Civil Procedure and permitted the defendants to amend their written statement. Learned Appellate Court held that the object of Order 6 Rule 17 is to allow either party to alter or amend his pleadings in such manner and on such terms as may be necessary and just. It further held that amendment of written statement cannot be considered on the same principles as an amendment to the plaint. As per the learned Appellate Court, it was easy to amend the written statement rather than the plaint. Further, learned Appellate Court disagreed with the contention of the learned counsel for the plaintiff that proposed amendment would change the nature of the suit. As per the learned Appellate Court, the alleged revocation deed was in continuation of the impugned Will and it showed the intention of the testator. Learned Appellate Court thereafter adjudicated upon as to whether the defendants were diligent in prosecuting the case and when they for the first time came to know about this document. The findings returned by learned trial Court in this regard in paragraphs No. 14 and 18 of the order impugned are reproduced hereinbelow:

> *"14. The learned counsel for the plaintiff/respondent has made reference to para No. 5 of the grounds of appeal, claiming that the appellants/defendants were aware about this document before the ld. Trial Court. In para No. 5, the appellants/defendants have mentioned that the plaintiff/respondent Sh. Sukh Ram had revoked the Will dated 29.12.1993 by executing the revocation deed dated 17.07.1998. In contrast, it is mentioned in para Nos. 4 and 5 of the application under Order 6 Rule 17 CPC that the appellants/defendants came to know about this document after receiving notice of the suit filed by the daughters of Sh. Sukh Ram for 11.07.2012. From the perusal of the evidence on record, knowledge cannot be foisted on appellants/defendants that they were aware about this document prior to decision of the suit. Hence, I am*

of the opinion that it cannot be said that the appellants/defendants have not acted in a diligent manner and have not produced the revocation deed before the learned trial Court.

....

18. In view of the law and facts as discussed above, it is quite clear that the revocation deed is an important document to determine the controversy in question. There is nothing on record on the basis of which it can be said that the appellants/defendants have not acted in a diligent manner and that they have not intentionally produced the document before the learned trial Court. This can also not be presumed because by withholding the document they were not going to reap any benefit. In these circumstances, I think that the amendment of the written statement is necessary and essential to settle the controversy and therefore, this application is allowed subject to costs of Rs.500/-. The application after due registration be tagged with the main appeal file.

16. Feeling aggrieved by the said order passed by learned Appellate Court, the plaintiff has filed the present petition under Article 227 of the Constitution of India.

17. Before proceeding further, it is relevant and pertinent to take into consideration the scope of Article 227 of the Constitution of India.

18. The Hon'ble Supreme Court in **Radhey Shyam and another** Vs. **Chhabi Nath and other** (2015) 5 Supreme Court Cases 423 has held that judicial orders of Civil Courts are not amenable to writ of certiorari under Article 226 of the Constitution of India. It has further held that jurisdiction under Article 227 is distinct from jurisdiction under Article 226 of the Constitution of India. It further held that all the Courts in the jurisdiction of a High Court are subordinate to it and subject to its control and supervision under Article 227. The Hon'ble Supreme Court has further held as under:

"26. The Bench in Surya Dev Rai also observed in para 25 of its judgment that distinction between Articles 226 and 227stood almost obliterated. In para 24 of the said judgment distinction in the two articles has been noted. In view thereof, observation that scope of Article 226 and 227 was obliterated was not correct as rightly observed by the referring Bench in Para 32 quoted above. We make it clear that though despite the curtailment of revisional jurisdiction under Section 115 CPC by Act 46 of 1999, jurisdiction of the High Court under Article 227 remains unaffected, it has been wrongly assumed in certain quarters that the said jurisdiction has been expanded. Scope of Article 227 has been explained in several decisions including Waryam Singh and another vs. Amarnathand anotherst, Ouseph Mathai vs. M. Abdul Khadir[12], Shalini Shyam Shetty vs. Rajendra Shankar Patil[13] and Sameer Suresh Gupta vs. Rahul Kumar Agarwal[14]. In Shalini Shyam Shetty, this Court observed :

> *"64. However, this Court unfortunately discerns that of late there is a growing trend amongst several High Courts to entertain writ petition in cases of pure property disputes. Disputes relating to partition suits, matters relating to execution of a decree, in cases of dispute between landlord and tenant and also in a case of money decree and in various other cases where disputed questions of property are involved, writ courts are entertaining such disputes. In some cases the High Courts, in a routine manner, entertain petitions under Article 227 over such disputes and such petitions are treated as writ petitions.*
>
> *65. We would like to make it clear that in view of the law referred to above in cases of property rights and in disputes between private individuals writ court should not interfere unless there is any infraction of statute or it*

can be shown that a private individual is acting in collusion with a statutory authority.

66. We may also observe that in some High Courts there is a tendency of entertaining petitions under Article 227 of the Constitution by terming them as writ petitions. This is sought to be justified on an erroneous appreciation of the ratio in Surya Dev and in view of the recent amendment to Section 115 of the Civil Procedure Code by the Civil Procedure Code (Amendment) Act, 1999. It is urged that as a result of the amendment, scope of Section 115 CPC has been curtailed. In our view, even if the scope of Section 115 CPC is curtailed that has not resulted in expanding the High Court's power of superintendence. It is too well known to be reiterated that in exercising its jurisdiction, High Court must follow the regime of law.

67. As a result of frequent interference by the Hon'ble High Court either under Article 226 or 227 of the Constitution with pending civil and at times criminal cases, the disposal of cases by the civil and criminal courts gets further impeded and thus causing serious problems in the administration of justice. This Court hopes and trusts that in exercising its power either underArticle 226 or 227, the Hon'ble High Court will follow the time honoured principles discussed above. Those principles have been formulated by this Court for ends of justice and the High Courts as the highest courts of justice within their jurisdiction will adhere to them strictly."

(emphasis supplied)

19. It is in this background that this Court will examine the order under challenge in exercise of its supervisory jurisdiction.

20. Order 6 Rule 17 of the CPC permits a party to alter or amend pleadings in such manner and on such terms as may be just at any stage of the proceedings. The said provision is quoted hereinbelow:

*"**Order VI Rule 17. Amendment of pleadings.**-*

The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties:

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

21. It is apparent from the perusal of this statutory provision 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 the trial.

22. As far as the facts of the present case are concerned, admittedly the application for amendment of the written statement was filed during the pendency of the appeal before the learned Appellate Court. Accordingly, the question which has to be adjudicated by this Court is whether learned first Appellate Court has rightly concluded that the amendment which has been permitted by it could not have been raised earlier by the applicants in spite of due diligence.

23. "Due diligence" has been defined in Advanced Law Lexicon as under:

"Due diligence. Such watchful caution and foresight as the circumstances of the particular case demands."

24. "Due diligence" has been defined in Black's Law Dictionary as under:

"Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by , a reasonable and prujdent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case."

25. The Hon'ble Supreme Court in **Pirgonda Hongonda Patil** Vs. **Kalgonda Shidgonda Patil and others** AIR 1957 SC 363 has held that the principles to be followed while allowing amendment in the pleadings are that the amendment sought should satisfy two conditions;

(a) 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.*

26. The Hon'ble Supreme Court in **Revajeetu Builders and Developers** Vs. **Narayanaswamy and sons and others** (2009) 10 Supreme Court Cases 84 has held:

"31. In our considered view, Order VI Rule 17 is one of the important provisions of the CPC, but we have no hesitation in also observing that this is one of the most misused provision of the Code for dragging the proceedings indefinitely, particularly in the Indian courts which are otherwise heavily overburdened with the pending cases. All Civil Courts ordinarily have a long list of cases, therefore, the Courts are compelled to grant long dates which causes delay in disposal of the cases. The applications for amendment lead to further delay in disposal of the cases.

63. On critically analyzing 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 VI Rule 17. These are only illustrative and not exhaustive.

64. The decision on an application made under Order VI Rule 17 is a very serious judicial exercise and the said exercise should never be undertaken in a casual manner. We can conclude our discussion by observing that while deciding applications for amendments the courts must not refuse bona fide, legitimate, honest and necessary amendments and should never permit mala fide, worthless and/or dishonest amendments."

27. The Hon'ble Supreme Court in **State of Madhya Pradesh** Vs. **Union of India and another** (2011) 12 Supreme Court Cases 268 has held:

"6. In order to consider the claim of the plaintiff and the opposition of the defendants, it is desirable to refer the relevant provisions. Order VI Rule 17 of the

Code of Civil Procedure, 1908 (in short `the Code') enables the parties to make amendment of the plaint which reads as under:

> *"17. Amendment of pleadings - The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:*
>
> *Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."*

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 inBaldev 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."

28. The Hon'ble Supreme Court in **Chander Kanta Bansal** Vs. **Rajinder Singh Anand** (2008) 5 Supreme Court Cases 117 has held that whether a party has acted with due diligence or not, would depend upon the facts and circumstances of each case. It has further held that this would, to some extent, limit the scope of amendment to pleadings, but would still vest enough powers in courts to deal with the unforeseen situations whenever they arise. The Hon'ble Supreme Court further held that the entire object of the said amendment is to stall filing of applications for amending a pleading subsequent to the commencement of trial, to avoid surprises and the parties had sufficient knowledge of the other's case. It also helps in checking the delays in filing the applications. It has further held that once the trial commences on the known pleas, it will be very difficult for any side to reconcile. The Hon'ble Supreme Court further held that in spite of the same, an exception is made in the newly inserted proviso. Where it is shown that in spite of **due diligence,** a party could not raise a plea, it is for the Court to consider the same. Accordingly, the Hon'ble Supreme Court has held that it is not a complete bar nor shuts out entertaining of any later application. It also held that the reason for adding proviso is to curtail delay and expedite hearing of cases. Paragraphs No. 15 and 16 of the said judgment are quoted hereinbelow:

"15. As discussed above, though first part of Rule 17 makes it clear that amendment of pleadings is permitted at any stage of the proceeding, the proviso imposes certain restrictions. It makes it clear that after the commencement of trial, no application for amendment shall be allowed. However, if it is established that in spite of "due diligence" the party could not have raised the matter before the commencement of trial depending on the circumstances, the court is free to order such application.

16. The words "due diligence" has not been defined in the Code. According to Oxford Dictionary (Edition 2006), the word "diligence" means careful and persistent application or effort. "Diligent" means careful and steady in application to one's work and duties, showing care and effort. As per Black's Law Dictionary (Eighth

> *Edition), "diligence" means a continual effort to accomplish something, care; caution; the attention and care required from a person in a given situation. "Due diligence" means the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation. According to Words and Phrases by Drain-Dyspnea (Permanent Edition 13A) "due diligence", in law, means doing everything reasonable, not everything possible. "Due diligence" means reasonable diligence; it means such diligence as a prudent man would exercise in the conduct of his own affairs."*

29. Therefore, it is evident from the law which has been discussed above that as per the Hon'ble Supreme Court that **"*due diligence" means diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation.***

30. Further, in view of the law declared by the Hon'ble Supreme Court, another very important aspect of the matter which has to be taken into consideration while deciding an application praying for an amendment in the pleadings is that whether an application for amendment is **malafide or bonafide.**

31. Coming to the facts of the present case, the present petitioner filed the suit for declaration and injunction against the respondents on 14.06.2004. The said suit was decreed on 20.12.2011, which is evident from copy of judgment dated 20.12.2011 (Annexure P-1). Appeal against the judgment and decree dated 20.12.2011 was filed by the present respondents on 19.01.2012 as is evident from grounds of appeal (Annexure P-2).

32. This Court has already taken note of the fact that in paragraph No. 7 of the grounds of appeal, it was specifically pleaded by the present respondents that the plaintiff therein, i.e. present petitioner had no cause of action to challenge Will dated 21.08.2003 as the Will dated 29.12.1993 had been revoked independently by Shri Sukh Ram and the revocation deed was in possession of daughters of Sh. Sukh Ram. It is also a matter of record that this fact was never pleaded by the respondents in the written statement filed to the suit nor during the pendency of the suit any application was filed for amendment of the written statement to bring this fact on record. Incidentally, this fact was subsequently sought to be brought on record by way of an amendment in the written statement at the appellate stage by moving an application under Order 6 Rule 17 of the Code of Civil Procedure. The explanation given in the said application to justify 'due diligence' as to why the amendment was being sought at such belated stage was that it was during the pendency of the appeal that the respondents received notice from the Court of learned Civil Judge (Junior Division) Bilaspur to appear before the said Court on 11.07.2012 in a Civil Suit filed by the daughters of Shri Sukh Ram alongwith which copy of plaint was also appended, from where they derived this knowledge that late Shri Sukh Ram had revoked Will dated 29.12.1993 on 17.07.1998 through a registered revocation deed.

33. In my considered view, the explanation which was put forth by the respondents in the said application of theirs to explain "due diligence" was incorrect, wrong and concocted. This is evident from the fact that though the explanation which has been given in the application for filing application for amending the written statement at such a belated stage was that they came to know about the factum of late Sukh Ram having revoked Will dated 29.12.1993 from the plaint which they had received along with notice in a case which had been filed by the daughters of Sukh Ram, but the fact of the matter remains that the averments to this effect had already been incorporated in the grounds of appeal by the appellant which appeal was filed in January, 2012. The application for amendment of the written statement is dated 27.08.2012. There is no explanation as to how the averments qua the factum of revocation of the Will by deceased Sukh Ram were incorporated in the grounds of appeal if the version of the defendants is to be believed that they came to know of this fact only after they received a copy of the plaint along with summons in a subsequent suit filed by the daughters of late Shri Sukh Ram. Thus, it is clear that the applicant has not approached the Court praying for amendment of the written statement with

clean hands. This gives credence to the contention of the learned counsel for the petitioner that in fact the Civil Suit which had been filed by the daughters of Sukh Ram is at the behest of respondents. A copy of the said Civil Suit is also on record as Annexure P-4 with the present petition. The filing of the application at such a belated stage otherwise also apparently does not seem to be a bonafide act on behalf of the respondents/applicant.

34. The Hon'ble Supreme Court in **Union of India** Vs. **Pramod Gupta and others** (2005) 12 SCC 1 has held that delay and laches on the part of the parties to the proceedings would also be a relevant factor for allowing or disallowing an application for amendment of the pleadings.

35. In my considered view, in the facts and circumstances of the present case, it cannot be said that the respondents/applicants had duly explained the delays and laches in moving application for amendment of the written statement at the appellate stage, especially in view of the fact that the explanation which has been given by the respondents/applicants in this regard is incorrect and not trustworthy. Further, the defendants have also not been able to explain that **"due diligence"** was exercised by them, but despite this, they could not be file the application praying for amendment of the written statement earlier. I have already held above that filing of the application at such a belated stage coupled with the averments on the basis of which the said application was filed was a clear indicator that there were smacks of malafide in filing of the application and the prayer for amending the written statement was not a bonafide innocuous act on the part of the respondents/applicants. Not only this, the amendment which has been allowed by learned Appellate Court, even otherwise could not have been allowed as apparently it has changed the entire nature of the case. All these relevant aspects of the matter have not been gone into by the learned Court below while allowing the application filed by respondents/applicants to amend the written statement.

36. Therefore, in my considered view, the order dated 05.09.2013 passed by the learned Appellate Court vide which it has allowed the application filed by the respondents/applicants to amend the written statement is not sustainable in law and the same is accordingly set aside and the petition is allowed in the above terms. No order as to costs.

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

Kans Raj. ......Petitioner.

Versus

State of Himachal Pradesh. ......Respondent.

Cr.MP(M) No. 860 of 2016.
Date of decision: July 21, 2016.

Code of Criminal Procedure, 1973- Section 436- Accused was found in possession of 1.5 grams Heroin- held, that quantity of drug recovered from the accused is small quantity and the offence is bailable – the fact that three cases had been registered against the accused for the commission of offence punishable under NDPS Act and he had been convicted in the one of the cases or that one case had been registered against him under Excise Act is of no significance as he is entitled to bail under Section 436 of Cr.P.C- bail granted. (Para-2 to 5)

For the petitioner : Mr. Gaurav Sharma, Advocate.
For the respondent-State: Mr.D.S. Nainta and Mr. Virender Verma, Addl. AGs.
ASI Rajinder Kumar, P.S. Indora, District Kangra, in person.

The following judgment of the Court was delivered:

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

Petitioner is an accused in FIR No. 86/16 registered under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the ' NDPS Act' in short) in Police Station, Indora, District Kangra, H.P.

2. The police party headed by ASI Rajinder Kumar has nabbed the accused on 2.3.2016 at such a time when he was coming from Meerthal bridge and going towards village Milwan. On seeing the police, he tried to turn back. This has resulted in suspicion that the accused-petitioner may be in possession of "Heroin" a narcotic drug. He was apprehended and his search was conducted after giving him option qua exercise of his legal right of being searched before a nearby Magistrate or a gazetted officer in the presence of the independent witnesses. He allegedly opted for being searched by the police present at the spot. When his search conducted in the presence of independent witnesses *Heroin* kept in a white coloured polythene pack was recovered from right side pocket of his trouser. On weighing the recovered drug, it was found 1.5 grams including the weight of polythene packet. After resorting to sealing process and seizure of the drug allegedly recovered from the accused-petitioner and also complying with other provisions of the Act, the accused-petitioner was arrested. Since learned Special Judge has dismissed the application he filed for the grant of bail vide Annexure A-1 to this petition, therefore, the accused-petitioner is still in judicial custody.

3. Learned Additional Advocate General has strenuously contended that in view of three more cases having been registered against the accused–petitioner under the provisions of NDPS Act, whereas in one of the case under the Excise Act he has already been convicted, learned Special Judge, Kangra at Dharamshala has rightly dismissed the application he filed for grant of the bail. On the other hand, learned defence Counsel has come forward with the version that in view of the present is a case of recovery of small quantity of drug allegedly recovered from the accused-petitioner and that as per Section 21 of the Act in the event of he is ultimately held guilty can only be sentenced to imprisonment for a period not exceeding one year, he could have not been detained in custody and rather released on bail.

4. As a matter of fact, the rigor of Section 37 of the Act is not attracted in this case for the reason that stringent condition for grant of bail prescribed under Section 37(1)(b) are applicably only to those offences punishable under Section 19, 24 and 27A as well as the offences involving 'commercial quantity'. The conditions in Section 37 do not apply to any other offence. The accused-petitioner has been booked for the commission of an offence under Section 21 of the NDPS Act. The quantity of the drug allegedly *Heroin* recovered from him is small quantity. Therefore, the present being a case under Section 21 of the NDPS Act and pertains to the alleged recovery of IHeroin *in* small quantity, he is entitled to be admitted on bail in terms of Section 436 of the Code of Criminal Procedure. I am drawing support in this regard from the judgment of High Court of Delhi dated 8.5.2012 in *WP(CRL) 338/2012 & CRL.M.A. 2824/2012* titled ***Minnie Kadim Ali Kuhn*** Versus ***State NCT of Dellhi & Ors***.

5. No doubt, there are three more cases registered under the NDPS Act against the accused-petitioner, whereas he has been convicted in one of the case which was registered against him, under the Excise Act. However, in view of the legal position discussed hereinabove, the registration/pendency of such cases against him is hardly of no consequence so far as his legal right to be admitted on bail in this case is concerned. The application as such is allowed. Consequently, the accused-petitioner, who has been arrested in connection with FIR No. 86/16, under Section 21 of the NDPS Act, Police Station, Indora District Kangra is ordered to be released on bail subject to his furnishing personal bond in the sum of Rs.25,000/- with one surety in the like amount to the satisfaction of learned Special Judge (Sessions Judge) Kangra at Dharamshala. The accused-petitioner, however, shall abide by the following conditions:

That he shall:-

a. not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

b. not make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police officer; and

c. not leave the territory of India without the prior permission of the Court.

6. It is clarified that if the accused-petitioner misuses his liberty or violates any of the conditions imposed upon him; the Investigating Agency shall be free to move this Court for cancellation of the bail.

7. The observations hereinabove shall remain confined to the disposal of this petition and have no bearing on the merits of the case. The application stands disposed of.

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

Krishan …..Petitioner.
Versus
State of H.P. & others ….Respondents.

Cr.W.P. No. 29 of 2015.
Reserved on: 14.07.2016.
Date of Decision: 21st July, 2016.

Constitution of India, 1950- Article 226- Son of the petitioner was engaged as the conductor in a JCB machine- one J was employed as driver in the machine- machine developed some defect – defective parts were taken to Chandigarh in a pickup**-** driver boarded the jeep but the deceased did not accompany the driver and slipped into a gorge causing his death- matter was reported to police on which FIR was registered - it was contended by the father of the deceased that investigation was not conducted properly and a prayer was made for investigation by CBI- material shows that investigation was conducted properly- there is no merit in the petition, hence, dismissed. (Para-2 and 3)

For the Petitioner: Ms. Archana Dutt, Advocate.
For the Respondents: Mr. M.A. Khan, Additional Advocate General.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge.

The petitioner's deceased son named Karan stood engaged as a conductor in a JCB machine. One Jaswinder Singh stood deployed as a driver on the aforesaid JCB Machine. The aforesaid JCB machine was deployed for carrying construction of road, Drabil to Khadrari in District Sirmaur, Himachal Pradesh. On 1.1.2015, the JCB machine developed operational defects, for removal whereof, the relevant defective part thereof stood opened by both Jaswinder Singh and Karan, whereupon it was loaded in a Pick UP jeep. Jaswinder Singh, the driver of the JCB machine went aboard the jeep aforesaid to Chandigarh for begetting thereat the relevant repairs thereto. However, deceased Karan did not accompany Jaswinder Singh to Chandigarh in the jeep aforesaid. Deceased Karan Singh is alleged to slip into a gorge from a narrow passage

whereupon his demise occurred. The postmortem report stands appended to the writ petition as Annexure P-2, wherein, revelations occur of subdual hemorrhage besides haemothorax begetting the demise of the deceased. Photographs reflecting the injuries entailed upon the body of the deceased also stand annexed to the petition as Annexure P-6. On an apposite FIR qua the occurrence standing registered in the police station concerned, investigations stood commenced by the Investigating Officer. Investigations culminated in the Investigating Officer concluding qua the demise of deceased Karan occurring on account of his slipping into a deep gorge from a narrow passage.

2. The petitioner standing aggrieved with the investigations held by the Investigating Officer lodged a complaint with the Superintendent of Police, Sirmour at Nahan, who ordered for the holding of fresh investigations. On the matter coming to re-investigated by respondent No.4, the latter arrived at a conclusion analogous to the one which he had arrived at earlier. The petitioner repels the conclusions arrived at by the Investigating Officer concerned by emphasizing upon video clips of 1.1.2015 purportedly existing in the mobile of the deceased displaying therein qua the JCB machine on the aforesaid date holding construction activity at the relevant site, hence, he contends through his counsel qua the narration of its driver Jaswinder Singh of a part of JCB machine developing a defect on 1.1.2015, for rectification whereof it was loaded in a jeep whereon Jaswinder Singh remained aboard upto Chandigarh whereupto it stood carried for the purpose aforesaid, standing belied. Consequently, the petitioner nurses a grievance of the Investigating Officer not holding a thorough impartisan investigation. Thereupon a prayer is made of the Investigation being ordered to be held afresh by the Central Bureau of Investigation (hereinafter referred as the CBI).

3. In nut shell, the aforesaid falsity ascribed to the relevant investigations by the father of the deceased is enjoined to be adjudicated upon by this Court. In case, this Court disinters from the relevant material qua the espousal of the father of the deceased holding veracity it would proceed to order for the investigations hereinafter standing handled by the CBI. Respondent No.3 has in her sworn affidavit of 01.07.2016 unraveled therein of the Investigating Officer after eliciting the presence of the petitioner on 11.6.2016 he in his presence examining the CD/video clippings sent by the petitioner to police station, Rejuka Ji. Also she swears therein of on the aforesaid date on the CD/video clippings purveyed by the petitioner to the Investigating Officer concerned standing sighted thereat by the petitioner along with Gain Chand and Gurdial Singh, no emanation upsurging therefrom nor any clue emerging in display of the demise of his son Karan standing begotten by a cause other than the one ascribed by the Investigating Officer in his earlier apposite reports. Moreover, articulations occur therein of the statements of the petitioner and of Gain Chand and Gurdial Singh in consonance with the depictions in the CD/video clips standing recorded wherein they displayed qua CD/video clips not unveiling any incriminatory role vis-a-vis Jasiwnder Singh. Consequently, with the statements of the petitioner also of Gain Chand and Gudial Singh unfolding their concurrence with the display in the CD/video clip which stood sighted by them at Police Station, Renuka Ji, estops them to constrain a conclusion from this Court of the aforesaid CD/video clips holding any visible display in purported inculpation of Jaswinder Singh. Furthermore, with the petitioner dehors the aforesaid CD/video clip not holding any material to dispel the efficacy of of the recitals made in his report by the Investigating Officer wherein he ascribes the cause of the demise of the deceased to his accidentally slipping into a deep gorge from a narrow passage, concomitantly, hinders this Court to show its dissatisfaction with the investigations held by the Investigating Officer nor hence this Court is constrained to order for the CBI holding investigations.

4. Be that as it may, also in the affidavit sworn on 01.07.2016 by respondent No.3, an echoing occurs therein of the JCB machine concerned disclosed by Jaswinder Singh, its driver, to hold a defect on 1.1.2015, for removal whereof he carried its relevant defective part in a jeep to Chandigarh, not standing ingrained with any tinge of falsity. The aforesaid manifestations occurring in the affidavit of respondent No.3 sworn on 1.07.2016 when stand anchored upon the aforestated disclosures occurring therein as a corollary they dispel the espousal of the counsel

for the petitioner of the aforesaid narrations of Jaswinder Singh qua the unworkability of JCB machine on 1.1.2015 standing imbued with a vice of inveracity. As a corollary, reiteratedly the reason for the demise of the deceased as stand ascribed by the Investigating Officer concerned in his apposite reports appears to be holding the virtue of truth.

5. The summom bonum of the discussion is of the Investigations held by the Investigating Officer concerned not suffering from any taint of partisanship nor the relevant investigations suffering from any frailty qua theirs being not either threadbare or incisive. In aftermath, there is no merit in the instant petition and accordingly, it is dismissed. Pending applications, if any, also stand disposed of.

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

Mohan Lal .....Appellant.
Versus
State of H.P. ......Respondent.

Cr. Appeal No. 67 of 2016.
Reserved on: 14th July, 2016.
Date of Decision:21st July, 2016.

Indian Penal Code, 1860- Section 376 and 506- **Protection of Children from Sexual Offences Act, 2012-** Section 4- Mother of the prosecutrix left matrimonial home due to beatings given by the father of the prosecutrix/accused- accused used to ravish the prosecutrix - she left home and was noticed by the police at ISBT, Shimla - she was taken to Kasturba Balika Asharam, Durgapur - she left the asharm with her friend and was apprehended by the police- she narrated the incident to police, on which FIR was registered- accused was tried and convicted by the trial Court- held, that prosecutrix was born on 4.3.2000 according to school leaving certificate- she has given her date of birth as 3.3.2000 in her testimony but that is not sufficient to doubt her version- she was minor on the date of incident - she has supported the prosecution version- there is no reason to disbelieve her testimony- trial Court had rightly appreciated her testimony- appeal dismissed. (Para-10 to 24)

For the Appellant: Mr. M.S. Verma and Mr. Yashveer Singh, Advocates.
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 judgment rendered on 19.06.2015 by the learned Special Judge, Shimla, District Shimla, H.P. in Sessions trial No.18-S/7 of 2014, whereby, the learned trial Court convicted and sentenced the appellant/accused as under:

Sr. No.	**Sections**	**Sentence imposed**
1.	376, IPC	Sentenced to undergo rigorous imprisonment for a period of seven years and to pay a fine of Rs.30,000/-. In default of payment of fine, the convict shall further undergo simple imprisonment for a period of two months.
2.	506, IPC	Sentenced to undergo rigorous imprisonment for a period of six

		months and to pay a fine of Rs.1000/-. In default of payment of fine amount, the convict shall further undergo simple imprisonment for a period of 15 days.
3.	Section 4 of the POCSO Act.	Sentenced to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs.30,000/-. In default of payment of fine amount, the convict shall further undergo simple imprisonment for a period of four months.

2. Brief facts of the case which are necessary to determine the appeal are that the prosecutrix made a statement under Section 154 of the Code of Criminal Procedure (hereinafter referred as Cr.P.C.) disclosing therein that she is residing at Kasturba Balika Asharam, Durgapur from 29.3.2014. Her father is agriculturist, whereas, her mother had left her matrimonial home about four years ago. According to the prosecutrix, her mother had solemnized marriage. They are five brothers and sisters and she is the eldest one. Her father used to beat her mother as well as his children. Due to this act of the father of the prosecutrix, her mother left the matrimonial home. Father of the prosecutrix is also stated to be in the habits of drinking. When the mother of the prosecutrix left her matrimonial home, her father used to ravish her continuously. Due to the fear and beatings given by the accused, the prosecutrix has not disclosed this fact to anyone or her relatives. On 28.3.2014, she left the house of her father and came to Shimla. On 29.3.2014, she was noticed by the police at ISBT, Shimla, thereafter, the workers from child help line were called to take the prosecutrix to Kasturba Balika Ashram, Durgapur. Prosecutrix further got recorded that she has not disclosed this fact to anyone and after residing in the said Ashram for a week, on 4.4.2014, she left the Ashram along with her friend. Both of them had gone to Solan where both of them were nabbed by the police and were brought to Police Station, Dhalli. On inquiry by the police, she disclosed all these facts to the police. On the basis of said statement, the police of Police Station, Dhalli recorded zero FIR under Sections 376, 506, IPC read with Section 4 of the Protection of Children from Sexual Offences Act (hereinafter referred to as the "POCSO Act"). The zero FIR was sent to Police Station, Chirgaon, where FIR No.21/2014 under Sections 376(2), 506 IPC and Section 4 of POCSO Act was registered. After the registration of the FIR, the police started the investigation in the case and concluded all the formalities thereto.

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

4. The accused was charged by the learned trial Court for his committing offences punishable under Sections 376, 506 IPC read with Section 4 of the Protection of Children from Sexual offences Act to which he pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution examined 13 witnesses. On closure of prosecution evidence, the statement of accused, under Section 313 of the Code of Criminal Procedure, was recorded in which he pleaded innocence. However, he has not led any defence evidence.

6. On an appraisal of the evidence on record, the learned trial Court, returned findings of conviction against the accused/appellant.

7. The accused/appellant is aggrieved by the judgment of conviction recorded 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 being not based on a proper appreciation of the evidence on record, rather, theirs being sequelled by gross mis-appreciation of the material on record. Hence, he contends qua the findings of conviction being reversed by this

Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of acquittal.

8. On the other hand, the learned Addl. Advocate General has with considerable force and vigour, contended qua the findings of conviction recorded by the Court below being based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

9. 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.

10. At the outset it is imperative to determine the paramount factum qua the prosecutrix at the stage of hers standing subjected to forcible sexual intercourses by the accused/appellant hers holding an age to mete consent to his subjecting her to sexual intercourses. Evidence which discloses the factum of the prosecutrix being a minor at the stage contemporaneous to hers standing allegedly subjected to forcible sexual intercourses, stands constituted in Ex.PW10/A, exhibit whereof is her school leaving certificate issued by the school concerned. Ex.PW10/A holds a reflection of hers standing born on 4.3.2000. It acquires evidentiary vigour given the pronouncement in the deposition of PW-10 of the prosecutrix standing admitted in school by the accused/appellant also with PW-10 testifying qua the time whereat the accused/appellant getting the prosecutrix admitted in school his signing the relevant application. Consequently, the factum of Ex.PW10/A standing unaccompanied by the birth certificate of the prosecutrix would not denude the efficacy of the apposite reflections occurring therein , rather the reflections occurring therein qua the date of birth of the prosecutrix acquire corroborative vigour from the factum of the learned defence counsel while holding the prosecutrix to cross-examination qua the factum deposed by her in her examination-in-chief of hers holding an age of 14 years, not putting apposite suggestions to her for shattering the factum aforesaid deposed by her in her examination-in-chief. In sequel, the omission aforesaid of the learned defence counsel does foment an apt conclusion of the defence conceding to the factum as deposed by the prosecutrix in her examination-in-chief of hers standing aged 14 years. Even the factum of the prosecutrix in her deposition disclosing her date of birth to be 3.3.2000, deposition whereof of the prosecutrix is minimally in variation vis-a-vis the reflections qua her date of birth existing in Ex.PW10/A. Consequently, the minimal variations inter se the date of birth of the prosecutrix as testified by her vis-a-vis the apposite reflections in Ex.PW10/A hold no ground for the learned counsel appearing for the accused/appellant to contend of the apposite reflections in Ex.PW10/A being meritless. With this Court concluding of the prosecutrix holding an age depriving her to mete consent to the accused for his subjecting her to sexual intercourses, as a corollary the effect of consent, if any, meted by the prosecutrix to the accused in the latter perpetrating penal sexual misdemeanors upon her fades into insignificance.

11. The prosecutrix in proof of the genesis of the prosecution case had stepped into the witness box. She being a child witness, therefore, the learned trial Court was enjoined to pronounce upon her competence to depose as a witness, pronouncement whereof by it was enjoined to stand preceded by its quizzing the prosecutrix for its hence adjudging her intelligibility. The learned trial court had declared her a competent witness to testify before it only when prior thereto it by quizzing her had assessed her intelligibility, in sequel, the pronouncement by the learned trial Court qua her competence to depose as a witness empowers this Court to read her testimony. The prosecutrix in her testification before the learned trial Court has made communications therein in wholesome harmony vis-a-vis the recorded recitals qua the penal sexual misdemeanors delineated in FIR Ex.PW7/A. She stood subjected to the ordeal of a rigorous cross-examination, yet she has come out unscathed in the aforesaid ordeal. In sequel, her testimony qua the genesis of the prosecution case as aptly concluded by the learned trial Court is both trustworthy besides inspire the confidence of this Court.

12. The prosecutrix in her testification has therein throughout named the accused/appellant to be her “Pita ji”. The prosecutrix hails from a remote far flung area of District

Shimla. She, on her mother abandoning the company of the accused/appellant, continued to stay with him. She being a minor, the accused/appellant while holding her custody was enjoined to ensure of her virginity remaining undefiled. However, the accused/appellant despite his holding her custody at his home wantonly subjected her to forcible sexual intercourses. The espousal of the defence of the accused/appellant insisting upon the prosecutrix to mete appropriate attention towards her studies, insistence whereof by him upon the prosecutrix reared a motive in the prosecutrix to falsely implicate the accused/appellant, holds no formidability given the triviality of the purported motive nursed by the prosecutrix arising from the facet aforesaid vis-a-vis hers ascribing to the accused/appellant allegations unraveling his perpetrating heinous offence(s) upon her person also with hers referring to the accused/appellant throughout her testification in Court as her "Pita ji", factum whereof remains unrepulsed by the defence counsel while holding her to cross-examination, contrarily, boosts a deduction of the accused/appellant misusing the capacity in which he held the custody of the minor prosecutrix also an inference upsurges of the prosecutrix not leaning to impute allegations of a serious nature against her "Pita ji" unless the allegations held a ring of truth. Further more, she would refrain from imputing serious allegations against her "Pita ji" given hers thereupon standing rendered homeless rather when she stood driven to flee from her home enables this Court to conclude of hers standing prodded to leave her home as she was uncomfortable thereat, given hers standing subjected to penal sexual misdemeanors by the accused. On fleeing from her house she proceeded to Shimla. She was noticed by the police at ISBT, Shimla. The police had sent her to Kasturba Balika Ashram, Durgapur. After 7 days she along with her companion fled to Solan. She, on 8.4.2014 was nabbed at Solan and was brought to Police Station, Dhalli where her statement under Section 154 of the Cr.P.C. was recorded by the police, wherein she leveled allegations of hers standing subjected to forcible penal sexual misdemeanors by the accused/appellant. The mere factum of hers not disclosing to the police on 29.3.2014 the penal sexual misdemeanors which she subsequently ascribed to the accused/appellant in FIR Ex.PW6/C, would not render her creditworthy testimony to lose its creditworthiness nor would the minimal delay of 11 days as stands aroused since 29.3.2014 upto the date of her lodging an FIR against the accused/appellant at Police Station, Dhalli would belittle her credence, prominently when this Court concludes of hers taking to impute allegations against the accused/appellant, who is her "Pita ji" qua whom she would refrain to constitute serious allegations only when he had wantonly sexually abused her at her home where he held her custody.

13. The deposition of the prosecutrix acquires credence from MLC Ex.PW12/C. Also with PW-12 testifying in Court of the prosecutrix standing subjected to sexual intercourses invincibly connects the accused with the allegations constituted against him by the prosecutrix in her creditworthy testimony. Even though in the report of the FSL concerned comprised in Ex.PW 12/B, the expert concerned opines of the accused/appellant not being the biological father of the prosecutrix yet the aforesaid unfoldment occurring in Ex.PW12/B would not oust the creditworthy testimony of the prosecutrix nor also would oust the factum of hers staying in the home of the accused/appellant even when her mother had fled therefrom nor would render the accused dehors his not being the biological father of the prosecutrix, of his yet holding a symbolic relationship with her as her "Pita ji", relationship whereof of the accused with her, stands ascribed by the prosecutrix throughout in her testification, factum whereof remaining undenied by the accused, enjoined him to take care of her while he held her custody at his home as his daughter than to wantonly ravish her.

14. 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 the evidence on record, rather it has aptly appreciated the material available on record.

15. In view of the above, we find no merit in this appeal which is accordingly dismissed and the judgment impugned before this Court 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. AND HON'BLE MR.JUSTICE SANDEEP SHARMA, J.

M/s Himsun Power Pvt. Ltd. ...Petitioner.

Versus

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

CWP No.7288 of 2012.
Decided on: July 21, 2016.

Constitution of India, 1950- Article 226- Learned Counsel for the petitioner had withdrawn the petition with liberty to seek appropriate remedy and the period spent in prosecuting the writ petition ordered to be excluded in terms of Section 14 of the Limitation Act- prayer allowed and petition permitted to be withdrawn with liberty to seek appropriate remedy. (Para-1 to 3)

For the petitioner:	Mr.Naveen K. Bhardwaj, Advocate.
For the Respondents:	Mr.Shrawan Dogra, Advocate General, with Mr.Anup Rattan & Mr.Romesh Verma, Addl.A.Gs., and Mr.J.K. Verma, Dy.A.G., for respondent No.1.
	Ms.Godawari, Advocate, vice Mr.Vijay Arora, Advocate, for respondent No.2.
	Mr.Satyen Vaidya, Senior Advocate, with Mr.Vivek Sharma, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

After hearing for a while, learned counsel for the petitioner stated that he may be permitted to withdraw the writ petition with liberty to the petitioner to seek appropriate remedy and that the period spent in prosecuting the instant writ petition may be ordered to be excluded in terms of Section 14 of the Limitation Act. His statement is taken on record. Learned counsel for the respondents have no objection in case the writ petition is dismissed as withdrawn, but submitted that period spent in pursuing the instant proceedings may not be excluded.

2. We have examined the pleadings and have gone through the record and are of the considered view that it would be just to exclude the period spent by the petitioner in prosecuting the instant writ petition.

3. Accordingly, the writ petition is disposed of as withdrawn, with liberty to the petitioner to seek appropriate remedy, if any available, as per law applicable. It is made clear that in case the petitioner seeks appropriate remedy, if any available, the period spent from the date of filing of the writ petition till today shall be excluded while computing the period of limitation. Pending CMPs, if any, also stand disposed of.

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

Sanjeev Attri s/o Sh. Karam Chand & Others ……Petitioners/Non-complainants
Versus
Ruchi Attri w/o Sh. Sanjeev Attri ………Non-petitioner/Complainant

Cr.MMO No.206 of 2015
Reserved on: 20th May, 2016
Date of Order: 21st July, 2016

Protection of Women from Domestic Violence Act, 2005- Section 12- Complainant filed a complaint stating that she is legally wedded wife of the respondent- S and his family members taunted her for bringing insufficient dowry- she was asked to bring money for purchase of car- S was a government servant drawing Rs. 27,500/- as salary- complainant sought a direction to prohibit the respondent to commit the acts of domestic violence, to provide alternative accommodation and maintenance and to pay compensation **-** the complaint was allowed by the trial Court- an appeal was preferred, which was dismissed- held, that version of the complainant was supported by PW-1 and PW-2- there are no major contradictions in the testimonies of witnesses- pleas taken by the respondent were not established – a married woman has a legal right to reside in her matrimonial home or in the alternative to receive rent in lieu of residence- Court had rightly allowed the complaint- appeal dismissed. (Para-11 to 22)

Cases referred:
Raja vs. State, 1997(2) Crimes 175
State of U.P. Vs. Kishanpal & Others, JT 2008(8) SC 650
Lallu Manjhi Vs. State of Jharkhand, AIR 2003 SC 854

For petitioners/Non-complainants: Ms. Anjali Soni Verma,Advocate
For Non-petitioner/Complainant : Mr. Vivek Sharma, Advocate

The following order of the Court was delivered:

P.S. Rana, Judge

Present petition is filed under Section 482 Code of Criminal Procedure 1973 read with Article 227 of Constitution of India against the order of learned Additional Sessions Judge-II Shimla (H.P.) whereby appeal filed under Section 29 of Protection of women from domestic violence act 2005 is dismissed and protection order passed by learned Trial Court is affirmed.

Brief facts of the case:

2. Smt. Ruchi Attri wife of Sh. Sanjeev Attri filed complaint under Section 12 of Protection of women from domestic violence act 2005 alleged therein that Smt. Ruchi Attri is legally wedded wife of Sh. Sanjeev Attri and Sh. Karam Chand is father-in-law of Smt. Ruchi Attri and Smt. Satya Devi is mother-in-law of Smt. Ruchi Attri and Sh. Rajneesh is brother-in-law of Smt. Ruchi Attri and Smt. Gunjan is sister-in-law of Smt. Ruchi Attri. It is alleged that marriage of Smt. Ruchi Attri was solemnized with Sh. Sanjeev Attri on 30.11.2010 in accordance with Hindu rites and customs. It is alleged that for some time married life of Smt. Ruchi Attri remained without trouble but thereafter Sh. Sanjeev Attri and his family members taunted Smt. Ruchi Attri for bringing insufficient dowry. It is alleged that Smt. Ruchi Attri was mentally tortured in her matrimonial house. It is alleged that thereafter Smt. Ruchi Attri came to her parental house at Shimla and resided till 12.01.2011. It is alleged that husband of non-petitioner namely Sh. Sanjeev Attri came to Shimla to take her back from Shimla. It is further alleged that Sh. Sanjeev Attri inquired from Smt. Ruchi Attri regarding grant of money from parents of Smt. Ruchi Attri for purchase of car. It is further alleged that Smt. Ruchi Attri informed her husband that she could

not talk with her parents regarding grant of money for purchase of car. Thereafter Sh. Sanjeev Attri became annoyed and also rebuked Smt. Ruchi Attri. It is further alleged that Smt. Ruchi Attri was mentally tortured in her matrimonial house for not bringing sufficient dowry. It is further alleged that Sh. Sanjeev Attri and his family members forced Smt. Ruchi Attri to pay installments of car and also forced to hand over all the savings which she has collected before marriage. It is further alleged that Sh. Sanjeev Attri and his family members used to take entire amount of salary and Smt. Ruchi Attri was forced to take tuition work. It is further alleged that in matrimonial house Smt. Ruchi Attri was slapped and was also called by name 'Randi' (Prostitute). It is further alleged that in the month of August 2011 Smt. Ruchi Attri became pregnant and on coming to know about pregnancy Sh. Sanjeev Attri and his family members compelled Smt. Ruchi Attri to commit abortion on the pretext that they could not bear day to day expenses of child. It is further alleged that Sh. Sanjeev Attri and his family members also demanded lump sum money for minor children. It is further alleged that Smt. Ruchi Attri was also beaten in her matrimonial house and was badly injured and her mobile was also broken. It is further alleged that in the month of October/ November 2011 Sh. Sanjeev Attri and his family members started construction of new house and forced Smt. Ruchi Attri to bring money from her parental house. It is further alleged that Smt. Ruchi Attri was treated as domestic servant in her matrimonial house. It is further alleged that Sh. Rajneesh brother-in-law also misbehaved with Smt Ruchi Attri. It is further alleged that on 19.04.2012 Smt. Ruchi Attri was blessed with a daughter and thereafter Smt. Ruchi Attri was harassed in her matrimonial house on one pretext or the other. It is further alleged that Smt. Ruchi Attri was also beaten in her matrimonial house several times. It is further alleged that Sh. Sanjeev Attri is a Government servant and is drawing salary amounting to Rs.27,500/- (Twenty seven thousand five hundred) per month. It is further alleged that Sh. Sanjeev Attri did not provide any maintenance to Smt. Ruchi Attri and her minor children. Non-petitioner Smt. Ruchi Attri sought following protection relief(s): (1) Prohibiting Sh. Sanjeev Attri and his family members from committing any act of domestic violence to her and her minor children. (2) Prohibiting Sh. Sanjeev Attri and his family members from abetting in the commission of acts of domestic violence. (3) Smt. Ruchi Attri also sought alternative accommodation for her and her minor children as enjoyed by them in the shared household or to pay rent for the same. (4) Smt. Ruchi Attri also sought relief of maintenance to the tune of Rs.10,000/- (Ten thousand) per month for maintaining herself and her minor children. (5) Smt. Ruchi Attri also sought compensation to the tune of Rs.5 lac (Five lac) for her mental torture and domestic violence.

3. Per contra response filed on behalf of Sh. Sanjeev Attri and his family members alleged therein that Smt. Ruchi Attri has concealed material facts from the Court and did not come to the Court with clean hands. It is alleged that Smt. Ruchi Attri left her matrimonial house without any reasonable cause. It is further alleged that present petition is filed by Smt. Ruchi Attri in order to fulfill her illegal motive. It is further alleged that Smt. Ruchi Attri after the marriage insisted Sh. Sanjeev Attri to live separately from his father and mother. When Sh. Sanjeev Attri shown his inability then Smt. Ruchi Attri started misbehaving with Sh. Sanjeev Attri and his family members. It is further alleged that Sh. Sanjeev Attri and his family members did not torture Smt. Ruchi Attri in her matrimonial house at any point of time. It is further alleged that Sh. Sanjeev Attri and his family members did not demand any dowry from Smt. Ruchi Attri at any point of time. It is further alleged that salary of Sh. Sanjeev Attri is Rs.25,374/- (Twenty five thousand three hundred seventy four) per month. Prayer for dismissal of complaint filed under Protection of women from domestic violence act 2005 sought.

4. Learned Trial Court framed following points for determination: (1) Whether complainant is entitled for protection orders under Section 18 of the act as alleged? (2) Whether complainant is entitled for residence orders under Section 19 of the act as alleged? (3) Whether complainant is entitled for monetary reliefs under Section 20 of the act as alleged? (4) Whether complainant is entitled for compensation orders under Section 22 of the act as alleged? (5) Final Order. Learned Trial Court decided points No.1 to 4 in affirmative. Learned Trial Court allowed the complaint filed by complainant under Section 12 of Protection of women from domestic

violence act 2005. Learned Trial Court passed protection orders under Section 18 of the act and restrained co-respondents No.1 to 4 from advancing any type of threats in any manner and also directed that respondents would not enter the place of complainant employment and would not commit any act of domestic violence against the complainant. Learned Trial Court further passed protection orders under Section 19 of the act and directed Sh. Sanjeev Attri to either provide accommodation in the aforesaid shared house hold at his place or to pay Rs.3,000/- (Three thousand) per month as rent charges in lieu of residence to the complainant from the date of passing order i.e. w.e.f. 30.08.2014. Learned Trial Court also passed protection orders under Section 20 of the act and directed Sh. Sanjeev Attri to pay Rs.5,000/- (Five thousand) per month as maintenance allowance to complainant and Rs.5,000/- (Five thousand) per month as maintenance allowance to her minor daughter who is living with complainant and granted total sum of Rs.10,000/- (Ten thousand) per month from the date of passing order i.e. w.e.f. 30.08.2014. Learned Trial Court also passed protection orders under Section 22 of the act and directed co-respondents No.1 to 4 to pay compensation jointly and severally to the tune of Rs.50,000/- (Fifty thousand) on account of mental torture and emotional distress caused to complainant. Learned Trial Court dismissed the complaint against co-respondent No.5. Learned Trial Court further directed that copy of order be supplied to parties free of cost and learned Trial Court further directed to send copy of order to SHO Police Station West Shimla and Protection Officer for necessary action. Feeling aggrieved against the order passed by learned Trial Court Sh.Sanjeev Attri and others filed appeal under Section 29 of Protection of women from domestic violence act 2005 which was dismissed by learned Additional Sessions Judge-II Shimla (H.P.) on 01.05.2015. Feeling aggrieved against the order Sh. Sanjeev Attri and others filed present petition under Section 482 Code of Criminal Procedure 1973 read with Article 227 of Constitution of India.

5. Court heard learned Advocate appearing on behalf of petitioners/non-complainants and learned Advocate appearing on behalf of non-petitioner/complainant and Court also perused the entire records carefully.

6. Following points arise for determination:

1) Whether petition filed under Section 482 Code of Criminal Procedure 1973 read with Article 227 of Constitution of India is liable to be accepted as mentioned in memorandum of grounds of petition?

2) Final order.

Findings upon point No.1 with reasons:

7. PW-1 Smt. Ruchi Attri has stated that when daughter was born to her then non-complainants became depressed. She has stated that when she reached in her matrimonial house she was beaten. She has stated that she was taunted in her matrimonial house for bringing insufficient dowry. She has stated that non-complainants used abusive and insulting language in her matrimonial house and also demanded dowry. She has stated that non-complainants demanded Rs.2 lacs (Two lac) from her. She has stated that financial condition of her parents was not proper and her parents could not fulfill the dowry demand of non-complainants. She has stated that she narrated the incident of demand of Rs.2 lacs (Two lac) to her parents. She has stated that non-complainants also used abusive language to her parents. She has stated that her complaint be allowed and relief sought in complaint be also granted to her. She has stated that she does not know that loan was sanctioned from department for purchase of vehicle. She has denied suggestion that she could not adjust in the family atmosphere of her matrimonial house. She has denied suggestion that she forced her husband to reside separately. She has denied suggestion that she was not mentally and physically tortured in her matrimonial house. She has denied suggestion that she is earning Rs.5,000/- (Five thousand) per month by way of tuition work. She has denied suggestion that she is residing in her parental house voluntarily.

8. PW-2 Sh. Sudesh Kumar has stated that Smt.Ruchi Attri is his daughter and she was married in the month of November 2010 with Sh. Sanjeev Attri at Palampur. He has stated

that his daughter told him that non-complainants demanded dowry. He has stated that his daughter also told him that non-complainants told her that she should come to matrimonial house alongwith money only. He has stated that matter was also reported before Gram Panchayat. He has denied suggestion that Smt. Ruchi Attri was not mentally and physically tortured in her matrimonial house. He has denied suggestion that Smt. Ruchi Attri forced Sh. Sanjeev Attri to reside separately from his parents. He has denied suggestion that non-complainants did not demand any money. He has denied suggestion that he did not give any dowry in the marriage ceremony of Smt. Ruchi Attri. He has denied suggestion that Smt. Ruchi Attri is residing in her parental house without any reasonable cause.

9. RW-1 Sh. Sanjeev Attri has stated that he was married with Smt. Ruchi Attri on 30.11.2010. He has stated that behaviour of Smt. Ruchi Attri was not cordial in her matrimonial house. He has stated that he also opened RD in the name of Smt. Ruchi Attri to the tune of Rs.1,000/- (One thousand) per month. He has stated that Smt. Ruchi Attri was not beaten in her matrimonial house. He has stated that no physical or mental torture was given to Smt.Ruchi Attri in her matrimonial house. He has denied suggestion that dowry was demanded from Smt. Ruchi Attri in her matrimonial house.

10. RW-2 Smt. Gunjan has stated that Smt. Ruchi Attri is her sister-in-law. She has stated that marriage of Smt. Ruchi Attri and Sh. Sanjeev Attri was arranged by her. She has stated that she is residing separately since July 2009. She has stated that copy of ration card is Ext.RW2/A which is correct as per original. She has stated that her husband took loan from Kangra Cooperative Bank for purchase of vehicle. She has stated that documents are Ext.RW2/C. She has stated that Smt. Ruchi Attri was treated in her matrimonial house properly and no domestic violence was committed upon her in her matrimonial house in her presence. She has stated that no dowry was demanded from Smt. Ruchi Attri by non-complainants. She has stated that no physical or mental torture was given to Smt. Ruchi Attri in her matrimonial house. She has stated that non-complainants did not illtreat Smt.Ruchi Attri in her matrimonial house. She has denied suggestion that dowry was demanded from Smt. Ruchi Attri in her matrimonial house by non-complainants. She has denied suggestion that Smt. Ruchi Attri was also beaten in her matrimonial house by non-complainants.

11. Submission of learned Advocate appearing on behalf of non-complainants that there are omissions, contradictions and discrepancies in the statements of complainant and her witness and on this ground petition filed under Section 482 Code of Criminal Procedure 1973 read with Article 227 of Constitution of India be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Court has carefully perused the testimonies of PW-1 Ruchi Attri & PW-2 Sudesh Kumar father of complainant. There is no material contradiction between the testimonies of PW-1 & PW-2 which goes to root of case. Testimonies of complainant PW-1 Ruchi Attri and PW-2 Sudesh Kumar father of complainant are trustworthy, reliable and inspire confidence of Court. There is no reason to disbelieve the testimonies of PW-1 & PW-2.

12. It is well settled law that as per Section 134 of Indian Evidence Act 1872 no particular number of witnesses is required for proof of any fact. It is well settled law that reliance can be based on the solitary statement of a witness if Court comes to the conclusion that statement is true and correct. It is well settled law that Courts are concerned with the merit of the statement of a particular witness and Courts are not concerned with the number of witnesses examined. See 1997(2) Crimes 175 title **Raja vs. State**. It is well settled law that it is the quality of evidence and not quantity of evidence which is required to be judged by the Court to place credence upon the statement. See JT 2008(8) SC 650 title **State of U.P. Vs. Kishanpal & Others**. It is well settled law that law of evidence does not require any particular number of witnesses to be examined in proof of a given fact. It is well settled law that Court may classify oral testimony into three categories. (i) Wholly reliable. (ii) Wholly unreliable. (iii) Neither wholly reliable nor wholly unreliable. See AIR 2003 SC 854 title **Lallu Manjhi Vs. State of Jharkhand.** In the present case PW-1 Smt. Ruchi Attri has specifically stated in positive manner that she was mentally and physically tortured in her matrimonial house. Even the matter was reported to

Gram Panchayat but no settlement could be executed inter se parties in the Gram Panchayat. It is proved fact that Smt. Ruchi Attri is residing in her parental house for more than one year alongwith her minor daughter.

13. Submission of learned Advocate appearing on behalf of non-complainants that no reliance can be placed upon the testimony of PW-2 Sh. Sudesh Kumar because Sh. Sudesh Kumar is interested witness and is father of complainant Smt.Ruchi Attri is also rejected being devoid of any force for reasons hereinafter mentioned. It is well settled law that relatives are the best witnesses in family dispute. It is well settled law that when cruelty is committed upon woman in her matrimonial house within four walls of the house then it is not possible for aggrieved woman to obtain independent witness from the locality.

14. Submission of learned Advocate appearing on behalf of non-complainants that learned Trial Court and learned First Appellate Court have not appreciated the testimonies of RW-1 and RW-2 correctly is also rejected being devoid of any force for reasons hereinafter mentioned. It is proved fact that Smt. Ruchi Attri is residing separately from RW-1 Sh. Sanjeev Attri in her parental house since long period alongwith her minor daughter. It is proved fact that RW-2 Smt.Gunjan sister-in-law of Smt. Ruchi Attri is residing separately from Sh.Sanjeev Attri and his family members since July 2009. It is proved on record that domestic violence was committed upon Smt. Ruchi Attri within four walls of matrimonial house. Hence it is not expedient in the ends of justice to disbelieve the testimonies of PW-1 & PW-2 simply on the testimony of RW-2 because RW-2 is residing separately from other non-complainants since July 2009.

15. Submission of learned Advocate appearing on behalf of non-complainants that Smt. Ruchi Attri has voluntarily left her matrimonial house without any reasonable cause is also rejected being devoid of any force for reasons hereinafter mentioned. As per testimonies of PW-1 & PW-2 there are reasonable grounds for Smt. Ruchi Attri to live in her parental house.

16. Submission of learned Advocate appearing on behalf of non-complainants that Smt. Ruchi Attri forced her husband to reside separately from his parents and when Sh. Sanjeev Attri refused to reside separately from his parents thereafter Smt. Ruchi Attri left her matrimonial house without any reasonable cause is also rejected being devoid of any force for reasons hereinafter mentioned. Plea of the non-complainants that Smt. Ruchi Attri forced her husband to reside separately from his parents is defeated on the concept of ipse dixit (An assertion made without proof).

17. In the present case even Protection Officer Smt. Geeta Verma has also submitted domestic violence report under Protection of women from domestic violence act 2005 before learned Chief Judicial Magistrate relating to physical and mental torture. There is no positive reason to disbelieve report of Protection Officer.

18. Submission of learned Advocate appearing on behalf of non-complainants that protection order passed under Section 18 of the act is contrary to law and contrary to proved facts is also rejected being devoid of any force for reasons hereinafter mentioned. It is well settled law that a married woman has legal right to reside in her matrimonial house with dignity and honour. No one can be allowed to use any threat to a married woman in her matrimonial house. It is held that protection order passed by learned Trial Court and affirmed by learned First Appellate Court is in consonance with law and proved facts.

19. Submission of learned Advocate appearing on behalf of non-complainants that protection order passed by learned Trial Court and affirmed by learned First Appellate Court under section 19 of the act either to provide accommodation in the aforesaid shared house hold at his place or in the alternative to pay Rs.3,000/- (Three thousand) per month as rent charges in lieu of residence to the complainant is contrary to law and contrary to proved facts is also rejected being devoid of any force for reasons hereinafter mentioned. It is well settled law that a married woman has legal right to reside in shared house hold or in the alternative to receive rent in lieu of residence. Protection order relating to shared house hold and in the alternative to pay

Rs.3,000/- (Three thousand) per month as rent charges is also in accordance with law and proved facts and there is no infirmity in the order.

20. Submission of learned Advocate appearing on behalf of non-complainants that protection order under section 20 of the act relating to payment of Rs.5,000/- (Five thousand) per month as maintenance allowance to the complainant and her minor daughter each total Rs.10,000/- (Ten thousand) is excessive in nature is also rejected being devoid of any force for reasons hereinafter mentioned. In response Sh. Sanjeev Attri has admitted his monthly income as Rs.25,374/- (Twenty five thousand three hundred seventy four). Keeping in view the price index and keeping in view the fact that Smt. Ruchi Attri has also to maintain a minor daughter and keeping in view the income of Sh. Sanjeev Attri it is held that maintenance allowance is not excessive in nature. It is well settled law that facts admitted need not to be proved under section 58 of Indian evidence act 1872.

21. Submission of learned Advocate appearing on behalf of non-complainants that protection order passed by learned Trial Court and affirmed by learned First Appellate Court to pay compensation jointly and severally to the tune of Rs.50,000/- (Fifty thousand) on account of mental torture and emotional distress is also excessive in nature is also rejected being devoid of any force for reasons hereinafter mentioned. It is well settled law that no married woman can be allowed to be tortured mentally and emotionally in her matrimonial house. As per testimonies of PW-1 and PW-2 it is proved on record that Smt. Ruchi Attri was mentally and physically tortured within four walls of her matrimonial house. Hence it is held that compensation granted by learned Trial Court relating to mental torture and emotional distress is not excessive in nature. Domestic violence is undoubtedly human right issue. Domestic violence in India is increasing day by day. Domestic violence cannot be allowed to be continued in the society. In view of above stated facts it is not expedient in the ends of justice to interfere in the protection order passed by learned Trial Court and affirmed by learned First Appellate Court. Point No.1 is answered in negative.

Point No.2 (Final Order).

22. In view of findings upon point No.1 above present petition filed under Section 482 Code of Criminal Procedure 1973 read with Article 227 of Constitution of India is dismissed. Files of learned Trial Court and learned First Appellate Court be sent back forthwith alongwith certified copy of this order. Certified copy of order be supplied to parties free of cost forthwith and copy of order be also sent to concerned SHO and concerned Protection Officer for necessary action. Cr.MMO No. 206/2015 is 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 VIVEK SINGH THAKUR, J.

Shyam Prashad ……Appellant.

Versus

State of H.P. …….Respondent.

Cr. Appeal No. 521 of 2015.
Reserved on: July 20, 2016.
Decided on: July 21, 2016.

N.D.P.S. Act, 1985- Section 20- Accused was coming from Manikaran carrying a rucksack- he stopped and turned on seeing the police, he threw rucksack on a hedge and tried to run away- he was apprehended- search of the bag was conducted during which 10.496 kgs. Charas was recovered- accused was tried and convicted by the trial Court- held in appeal that accused was apprehended at an isolated and deserted place- PW-2 was sent to call independent witness but no

independent witness was available- prosecution witnesses had supported the prosecution version- recovery was effected from the bag- there was no requirement of complying with Section 50 of N.D.P.S. Act- prosecution version was proved beyond reasonable doubt- he was rightly convicted by the trial Court- appeal dismissed. (Para-13 to 16)

For the appellant: Mr. Naveen K. Bhardwaj, Advocate.
For the respondent: Mr. V.S.Chauhan, Addl. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 23.11.2015, rendered by the learned Special Judge, Kullu, H.P., in Sessions trial No. 61/2014, whereby the appellant-accused (hereinafter referred to as the accused), who was charged with and tried for offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the Act), has been convicted and sentenced to undergo rigorous imprisonment for a term of fifteen years along with fine of Rs. 1,00,000/- and in default of payment of fine, the accused was further ordered to undergo simple imprisonment for a period of one year.

2. The case of the prosecution, in a nut shell, is that on 15.5.2014, as per bus ticket Ext. PW-1/D, accused was travelling in HRTC bus enroute to Manikaran from Haridwar. He was sitting on seat No. 10. PW-3 Deepak Kumar was conductor of the bus. On 16.5.2014, at about 6:30 AM, the police team headed by SI Raj Kumar along with HHG Hukam Ram, HHC Shyam Dass and HHG Hem Raj left Police Post Manikaran for routine patrolling and traffic checking towards Shangna road and Barshaini etc. At about 9:30 AM the police party was present at Tegri-nullah, where accused was seen coming from Manikaran side. He was going towards Barshaini. The accused was having a rucksack (pithu bag). On seeing the police party, he stopped and turned back. While turning back, he threw the rucksack on a hedge towards right side of the river and then tried to run away. He was overpowered. He told that he was working with M/S Patel India Pvt. Company at Barshaini. Accused was brought to the place where pithu bag was thrown by him. SI Raj Kumar asked the accused to lift the bag having inscription "one Polar" over it. The place was isolated. PW-2 HHC Sham Dass was sent to call for independent witnesses, but no one was available. PW-10 SI Raj Kumar associated HHG Hukam Chand and HHC Shyam Dass as witnesses and pithu bag was searched. On checking the bag, charas was recovered. It weighed 10.496 kg. The I.O. packed the entire stuff in the same fashion in a cloth parcel and sealed with eight seals of letter "R". Samples of seal were also taken on a piece of cloth. IO also filled in NCB-I form in triplicate. Rukka Ext. PW-7/A was prepared and sent to the Police Station for registration of FIR. FIR Ext. PW-7/B was registered by SHO Sher Singh (PW-7). The case property was produced before SHO Neel Chand (PW-9). He resealed the same with three seals of letter "K". He also filled in relevant columns of NCB-I form and also drew sample seal of letter "K" vide Ext. PW-9/A. Thereafter, he deposited the case property with MHC Gajender Pal (PW-5) who made entry in the malkhana register vide Ext. PW-5/A at Sr. No. 149. The case property was handed over by HC Gajender Pal to Karam Dass (PW-6) who took the same to FSL Junga along with relevant documents vide RC No. 218 of 2014. 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 ten witnesses. The accused was also examined under Section 313 Cr.P.C. According to him, he was falsely implicated. The learned trial Court convicted the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. Naveen K. Bhardwaj, Advocate, has vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. V.S.Chauhan, Addl. AG, for the State, has supported the judgment of the learned trial Court dated 23.11.2015.

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 HHG Hukam Ram deposed that he along with the police officials had departed from PP Manikaran at 6:30 AM in official vehicle No. HP 34A-0049. At about 9:30 AM, they were sitting near Tegri Nallah by the side of road when one person was found coming with a pithu bag from Manikaran side. On seeing the police party, he threw the bag which he was having on a hedge. He turned towards Manikaran. He was overpowered. He disclosed his identity and told that he was working with Patel Construction Company at Barshaini. He was asked to lift the bag he had thrown and then he was told to open it. It contained charas. It weighed 10.496 kg. All the codal formalities were completed on the spot, including filling up of NCB-I form. Rukka was prepared and sent to the Police Station for registration of FIR. Thereafter, FIR was registered. In his cross-examination, he deposed that they had gone to Barshaini on that day. The distance between Manikaran and Tegri Nallah is two kms. Villages Tosh, Pulga and Tulga were towards Barshaini. He denied the suggestion that Village Shangna was at a distance of 500 meters from that place towards Manikaran. Volunteered that it was at a distance of 1 ½ kms. It took five minutes from that place in a vehicle to go to Rashkat or Shangna. They remained at the spot for 1 ½ hours. During that period 1-2 vehicles crossed that area. Vehicles were not stopped by them. HHG Sham Dass was sent in search of independent witnesses before opening the zip of pithu bag Ext. P-2. He had gone towards both sides from that place. He returned after about twenty minutes. Then he along with HHG Hem Raj was associated in the investigation and accused was asked to open the bag. It was opened. He also admitted that personal search of the accused was conducted after the recovery of the contraband.

7. PW-2 HHC Sham Dass also deposed the manner in which the accused was intercepted and charas weighing 10.496 kgs. was recovered. He was sent by SI Raj Kumar to bring independent witnesses. He had gone towards both sides of the spot and as such he along with HHG Hukam Raj was joined in the investigation. In his cross-examination, he deposed that he came back to the spot after making search of independent persons after about 10-15 minutes. The search of the bag of the accused was conducted after his arrival. The accused had thrown the bag towards his right side.

8. PW-3 Deepak Kumar, was working as Conductor with HRTC since 2006. On 15.5.2014, he was deputed in Haridwar Manikaran bus service as Conductor and he joined his duty at Nahan. In his cross-examination, he deposed that the police had got de-boarded the accused from their bus at Jainala. Their bus had reached at Jainala at 7:00 AM. The police checked the bus and got de-boarded 2-3 persons and took them away. The police checked the bus and with 2-3 persons went away along with the bag. One person was sitting with the accused. He was a Nepali. The police took away that person also. A Court question was put to him as to whether he had told these facts to the police. He replied that the police did not ask him anything.

9. PW-5 HC Gajender Pal deposed that he was posted as Addl. MHC in PS Sadar, Distt. Kullu since October, 2013. On 17.5.2014, Insp. SHO Neel Chand deposited with him one sealed parcel sealed with 8 impressions of seal “R”, resealed with three seals of “K” along with NCB form in triplicate, seizure memo, sample seals “R” & “K”. He made entry at Sr. No. 124 of the malkhana register and sent these articles through Const. Karam Dass to FSL, Junga vide RC No. 218/14 on 19.5.2014.

10. PW6 Const. Karam Dass has taken the case property vide RC No. 218/14 to FSL, Junga.

11. PW-9 Insp. Neel Chand deposed that in the year 2014, he was posted as SHO in PS Sadar, Kullu. On 17.5.2014, SI Raj Kumar produced the case property before him. He resealed the same with three seals of “K” and filled in necessary columns of NCB form. He handed over the case property to MHC of the Police Station.

12. PW-10 Insp. Raj Kumar also testified the manner in which the accused was overpowered at 9:30 AM on 16.5.2014. The contraband was recovered. He filled in NCB form Ext. PW-5/C. Rukka Ext. PW-7/A was prepared and sent to the Police Station for registration of the FIR. He prepared the site plan vide Ext. PW-10/A. He also took photographs. He conducted the personal search of the accused after arrest. He produced the case property before SHO, who resealed the same with three seals of "K". In his cross-examination, he deposed that the distance between Tegri Nallah and PP Manikaran was about 3 kms. 2-3 buses were checked before Shangna, however, at the spot, no vehicle came. They were going towards Barshaini and had stopped at Tegri Nallah when the accused came. They did not go towards Barshaini beyond Tegri Nallah. As soon as they reached the spot at 9:30 AM, the accused also came there. He denied the suggestion that Manikaran Barshaini road was busy road.

13. What emerges from the analysis of the evidence discussed hereinabove is that the accused was apprehended on 16.5.2014 at 9:30 AM carrying a rucksack. The rucksack was searched and contraband was recovered. It weighed 10.496 kg. All the codal formalities were completed on the spot, including filling up of NCB-I form. The case property was resealed by PW-9 SHO Neel Chand. He deposited the same with PW-5 HC Gajender Pal. PW-5 HC Gajender Pal sent the same to FSL Junga through PW6 Const. Karam Dass. The contraband was found to be charas as per the report of the FSL.

14. The place where the accused was apprehended was isolated and desolate. PW-1 HHG Hukam Ram, in his examination-in-chief, has deposed that HHG Sham Dass was sent in search of independent witnesses before opening the zip of pithu bag Ext. P-2. He had gone towards both sides from that place. He returned after about twenty minutes. No independent witness was available. PW-2 HHC Sham Dass has deposed that he was sent by SI Raj Kumar to bring independent witnesses. He had gone towards both sides of the spot but no independent witness was available. PW-10 Insp. Raj Kumar has also deposed, in his examination-in-chief, that no independent witnesses were available since the place was isolated and desolate. HHC Shyam Dass was sent in search of witnesses. After about 15 minutes, he returned and told that no independent person was available. The statements of the official witnesses are trustworthy. The statement of PW-1 HHG Hukam Ram has been corroborated by PW-2 HHC Sham Dass as well as by PW-10 Insp. Raj Kumar, the manner in which the accused was apprehended and contraband was recovered.

15. PW-3 Deepak Kumar, conductor of the bus has identified ticket Ext. PW-1/D. According to him, he joined his duty at Nahan when the accused was already sitting in the bus. In his cross-examination, he deposed that the police had got de-boarded the accused from their bus at Jainala. A specific Court question was put to him as to whether he had told these facts to the police. He replied that the police did not ask him anything. The accused has also not disputed the fact that on 15.5.2014, as per the ticket Ext. PW-1/D, he was travelling in the HRTC bus on seat No. 10 from Haridwar to Manikaran. The statements of PW-1 HHG Hukam Ram, PW-2 HHC Sham Dass and PW-10 Insp. Raj Kumar duly prove that the accused was apprehended when he was coming from Manikaran side and tried to flee from the spot. No independent witness was available at the spot. The case of the prosecution moreover was that the accused alighted at Manikaran and thereafter came towards Barshaini.

16. Mr. Naveen K. Bhardwaj, Advocate, has also argued that Section 50 of the Act was not complied with. Section 50 of the Act was not at all attracted in the instant case for the simple reason that the recovery was made from the rucksack of the accused and not from his person. Thus, the prosecution has proved the case against the accused beyond reasonable doubt and there is no occasion for us to interfere with the well reasoned judgment of the learned trial Court dated 23.11.2015.

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

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

Soni Gulati and Co. …Appellant.
Versus
JHS Svendgaard Laboratories Ltd. …Respondent.

Co.A.No.5 of 2015.
Reserved on: 30.06.2016
Pronounced on: 21.07.2016

Companies Act, 1956- Section 433(e)- Petitioner firm rendered services to the respondent-Company for preparation of detailed project report, conducting audit, making liaison with the banks for procuring term loan and getting the working capital limits sanctioned - a sum of Rs. 12,06,580/- was payable to the petitioner – company was also liable to pay Rs. 30,000/- as services tax and Rs. 1,50,000/- for not honouring the contract- company did not pay the outstanding amount- learned Single Judge held that the debt was disputed and there were substantial grounds to resist the same- it was not shown that company had become insolvent and was unable to pay tax, hence, petition was dismissed- held, in appeal that learned Single Judge had discussed the reply and had referred to various judgments- company was in a sound position and has not become insolvent - intricate questions of fact are involved in the instant case, which cannot be gone into in a Company Petition- company Judge had rightly applied the law- appeal dismissed. (Para- 9 to 12)

Case referred:
IBA Health (India) Private Limited vs. INFO-Drive Systems SDN. BHD. (2010) 10 SCC 553

For the appellant: Mr.K.D. Sood, Senior Advocate, with Mr.Sanjeev Sood, Advocate.
For the Respondent: Mr.Atul Jhingan, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J.

This appeal is directed against the judgment, dated 7th May, 2015, passed by the learned Single Judge of this Court, whereby Company Petition filed by the appellant/petitioner under Section 433(e) of the Companies Act, 1956, (for short, the Act), seeking winding up of the respondent-Company, came to be dismissed, (for short, the impugned judgment).

2. Facts of the case, in brief, are that the petitioner firm rendered services to the respondent-Company for preparation of detailed project report, conducting audit, making liaison with the banks for procuring term loan and getting the working capital limits sanctioned, including various other jobs, which were assigned by the respondent-Company to the petitioner-firm from time to time. On account of such services, the respondent-Company owed a sum of Rs.12,06,580/- to the petitioner-firm against Bill No.TS 5/09/06, dated 26th September, 2006. In addition to the above amount, the respondent-Company was also liable to pay Rs.30,000/- as service tax and Rs.1,50,000/- for not honouring the contract. It was further averred that when the respondent-Company did not pay the said amount despite several requests by the petitioner-firm and assurances given by the respondent-Company, the petitioner-Firm was constrained to issue a legal notice, dated 9th January, 2007, whereby the respondent-Company was asked to pay the due amount within 30 days and in default, the respondent-Company was put on caveat that a petition for winding up of the respondent-Company would be filed.

3. It is also pleaded that in February, 2008, the Managing Director of the respondent-Company made a telephone to the partner of the petitioner firm for preparing the project report, which request was turned down, for the respondent-Company had not paid the outstanding amount.

4. Thus, it was claimed that the respondent-Company was in debt and therefore, the petitioner firm sought for the winding up of the respondent-Company by filing the company petition.

5. The company petition was resisted by the respondent-Company by filing detailed reply. Preliminary objections in regard to maintainability of the petition, disputed questions of facts, suppression of material facts etc. were raised by the respondent-Company.

6. The learned Single Judge, after referring to the pleadings of the parties and the various pronouncements of the Apex Court, has held that the debt, as claimed by the petitioner, was disputed and the respondent-Company has bona fide and substantial grounds to resist the same. It has also been held that the petitioner was not in a position to show that the respondent-Company has become insolvent and therefore, was unable to pay its debt. Accordingly, the learned Single Judge dismissed the company petition.

7. Feeling aggrieved, the petitioner has approached this Court by way of instant appeal.

8. We have heard the learned counsel for the parties and have gone through the record.

9. A perusal of the reply filed by the respondent-Company shows that it has disputed the amount claimed by the petitioner and has also stated that the respondent-Company is flourishing by leaps and bounds. The learned Single Judge has discussed the reply and reproduced the relevant portion thereof in paragraphs 13 and 14 of the impugned judgment, which is not being referred to for the sake of brevity. The respondent-Company has disputed the claim made by the petitioner on bona fide grounds and not that the respondent-Company was unable to pay the claimed amount.

10. In order to determine whether the respondent-Company has a case to dispute the claim made by the petitioner and whether it had a bona fide ground to avoid the payment or the respondent-Company was unable to pay the debt as claimed by the petitioner/appellant and whether in a Company Petition, intricate disputed questions of fact can be gone into like a Civil Court, the learned Single Judge has referred to various judgments of the Apex Court and deduced certain legal principles in paragraph 30 of the impugned judgment. The said principles were rightly discerned by the learned Single Judge, are based upon the mandate of Section 433(e) of the Act, read with the mandate of the Apex Court in **IBA Health (India) Private Limited** vs. **INFO-Drive Systems SDN. BHD. (2010) 10 SCC 553,** which has been referred to by the learned Single in paragraph 29 of the impugned judgment. It is profitable to reproduce paragraphs 29 and 30 of the impugned judgment hereunder:

> *"29. The Hon'ble Supreme Court in the case of **IBA Health (India) Private Limited** vs. **INFO-Drive Systems SDN. BHD. (2010) 10 SCC 553,** has also explained that a dispute would be substantial if it is bonafide and not spurious, speculative, illusory or misconceived, the relevant extract from the decision is quoted below:*
>
> > *"20. The question that arises for consideration is that when there is a substantial dispute as to liability, can a creditor prefer an application for winding up for discharge of that liability? In such a situation, is there not a duty on the Company Court to examine whether the company has a genuine dispute to the claimed debt? A dispute would be substantial and genuine if it is bonafide and not spurious, speculative, illusory or misconceived. The Company Court, at that stage, is not expected to hold a full trial of the matter. It must decide whether the grounds*

appear to be substantial. The grounds of dispute, of course, must not consist of some ingenious mask invented to deprive a creditor of a just and honest entitlement and must not be a mere wrangle. It is settled law that if the creditor's debt is bonafide disputed on substantial grounds, the court should dismiss the petition and leave the creditor first to establish his claim in an action, lest there is danger of abuse of winding up procedure. The Company Court always retains the discretion, but a party to a dispute should not be allowed to use the threat of winding up petition as a means of forcing the company to pay a bonafide disputed debt."

30. From the aforesaid judgments, the following broad legal principles can be deduced:

1. If the debt is bonafide disputed and the defense is a substantial one, the Court will not wind up the company. Conversely, if the plea of denial of debit is moonshine or a cloak,

spurious, speculative, illusory or misconceived, the Court can exercise the discretion to order the company to be wound up. 2. A petition presented ostensibly for winding up order, but in reality to exert pressure to pay the bonafide disputed debt is liable to be dismissed.

3. Solvency is not a stand alone ground. It is relevant to test whether denial of debt is bonafide.

4. Where the debt is undisputed and the company does not choose to pay the particular debt, its defence that it has the ability to pay the debt will not be acted upon by the Court.

5. Where there is no dispute regarding the liability, but the dispute is confined only to the exact amount of the debt, the Court will make the winding up order.

6. An order to wind up a company is discretionary. Even in a case where the companys liability to pay the debt was proved, order to wind up the company is not automatic. The Court will consider the wishes of shareholders and creditors and it may attach greater weight to the views of the creditors.

7. A winding up order will not be made on a creditors petition if it would not benefit him or the companys creditors generally and the grounds furnished by the creditors opposing winding up will have an impact on the reasonableness of the case.

In the light of the settled legal principles, the endeavour of this Court must be to find out whether the debt claimed by the petitioner is a bonafide disputed debt or not and in this process this Court will not dwell into the intricate disputed questions of fact like a Civil Court exercising its jurisdiction in a suit filed for recovery of money. It is for this precise reason that the pleadings of the parties has been quoted in extenso."

11. Financially, the respondent-Company was in a sound position and has not become insolvent. Moreover, the petitioner has not placed anything on record which would indicate that the respondent-Company was commercially insolvent. After going through the pleadings of the parties and the documents on the file, one comes to an inescapable conclusion that intricate questions of fact are involved in the instant case, which cannot be gone into in a Company Petition filed under Section 433(e) of the Act.

12. The learned Single Judge has minutely examined the pleadings of the parties and has rightly applied the law governing the field. Having said so, no interference is called for in the impugned judgment and the same is upheld. Consequently, the appeal is dismissed.

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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
Bajro ....Respondent.

Cr. Appeal No. 359 of 2010.
Reserved on : 15th July, 2016.
Date of Decision: 21st July, 2016.

Indian Penal Code, 1860- Section 306- Deceased was married to the accused- accused started maltreating and beating the deceased under the influence of liquor – deceased used to disclose about the ill treatment and beatings to her brother-in-law- matter was also reported to the Gram Panchayat- compromise was effected between the parties- deceased committed suicide by jumping into the river- accused was tried and acquitted by the trial Court- held, in appeal that accused is alleged to have subjected the deceased to cruelty under the influence of liquor – matter was reported to Panchayat in the year 2005- incident had taken place in the year 2008- there was discrepancy between the incident and the report- testimonies of prosecution witnesses were contradictory to each other- prosecution case was not proved beyond reasonable doubt and the accused was rightly acquitted by the trial Court- appeal dismissed. (Para-9 to 12)

For the Appellant: Mr. M.A. Khan, Addl. A.G.
For the Respondent: Mr. Anuj Gupta, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal stands directed by the State of H.P. against the judgment of the learned Sessions Judge, Chamba Division Chamba, Himachal Pradesh, rendered on 2.3.2010 in Sessions Trial No. 22 of 2009, whereby, the latter Court acquitted the accused/respondent for the offence punishable under Section 306 of the IPC.

2. The facts relevant to decide the instant case are that marriage inter se the accused and the deceased stood solemnized eight years prior to the ill-fated occurrence. After the marriage, the accused started maltreating and beating the deceased under the influence of liquor. The deceased used to disclose about the ill-treatment and beatings given to her by the accused to Jai Singh, brother-in-law of the deceased and the matter was also reported to the Gram Panchayat wherein a compromise Ex.PW6/A was effected inter se the accused and the deceased. On 28.7.2008 at about 1.00 p.m., the deceased committed suicide by jumping into Ravi river. The matter was reported to the police by Lojan, PW-1. The police started the investigation. Thereafter, other codal formalities were completed and the accused was arrested. Postmortem report of the deceased was procured. Statements of the witnesses were recorded.

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

4. The accused was charged by the learned trial Court for his committing offence punishable under Section 306 of the IPC. In proof of the prosecution case, the prosecution examined 7 witnesses. On conclusion of recording of the prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded by the trial Court, in which the accused claimed innocence and pleaded false implication. However , he did not lead any defence evidence.

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

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

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

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

9. The marriage inter se the accused and the deceased stood solemnized about eight years prior to the ill-fated occurrence. The accused is alleged to immediately on his contracting marriage with the deceased subjecting her to belabourings under the influence of liquor. The incidents of ill-treatment or belabourings meted qua the deceased by the accused stood reported to the Gram Panchayat concerned whereat a compromise embodied in Ex.PW6/A stood effected inter se both. However, Ex.PW6/A embodies an incident of 21.6.2005 whereat belabourings stood meted to the deceased by the accused, whereas the ill-fated occurrence took place on 28.7.2008. The visible improximity inter se the incident aforesaid vis-a-vis the ill-fated occurrence cannot make it fall within the principle of law of immediate proximity standing enjoined to occur inter se the incidents of ill-treatment or maltreatment perpetrated upon the deceased by the accused vis-a-vis the ill-fated occurrence for theirs hence constituting the actuatory besides instigatory factor for the deceased to commit suicide whereupon an inculpatory role of the accused would stand aroused. Contrarily hence with the aforesaid incident of 26.6.2005 embodied in Ex.PW6/A holding no proximity vis-a-vis the ill-fated incident, it cannot be construed to be an instigatory factor for the deceased to commit suicide. However, for firmly nailing a conclusion of the accused abetting the suicide of his deceased wife, it is imperative to cull out from the testimonies of the prosecution witnesses, the prime factum of theirs purveying forthright evidence with specificity in timing qua the incidents of maltreatment or ill-treatment perpetrated by the accused upon the deceased holding an apparent proximity vis-a-vis the ill-fated occurrence. PW-1 Lojan in his testification on oath though embodies therein a version in tandem with the one enunciated in FIR, nonetheless, he has neither with specificity nor with precision in timing echoed therein qua the belabourings perpetrated upon the deceased by the accused, belabourings whereof actuated the deceased by jumping into Ravi river to commit suicide on 28.7.2008. Given the approximation in timing occurring in the deposition aforesaid of PW-1 qua the afore referred penal misdemeanors ascribed to the accused, renders his testimony to be both nebulous and vague for timing therefrom the proximity inter se the belabourings perpetrated by the accused upon the deceased vis-a-vis the ill-fated occurrence. Since this Court stands deterred to fix proximity inter se the belabourings perpetrated by the accused upon the deceased vis-a-vis the ill-fated occurrence, as a corollary the purported belabourings perpetrated by the accused upon the deceased cannot be construed to occur in immediate proximity to the ill-fated occurrence, nor can this Court firmly render a conclusion of the accused thereby abetting the suicide of his deceased wife. Further more, the alleged incidents of belabourings perpetrated by the accused upon the deceased though stand testified by PW-1 yet the testimony of PW-1 stands ingrained with an omnibus falsity engendered by PW-2 unraveling in his deposition qua his reporting the incident of perpetration of belabourings by the accused upon the deceased to the Police Station concerned, whereas, PW-7 ASI Diwan Chand contradicts the aforesaid fact. For reiteration, the deposition of PW-1 wherein he ascribes to the accused a role of his belabouring his wife is bereft

of any truth. Furthermore, a cloud of falsity also engulfs his testimony, given his conceding in his cross-examination of his deposition in his examination-in-chief wherein he imputes an inculpatory role to the accused standing reared by hearsay hence ascription by him of an inculpatory role tot he accused is construable to be invented besides contrived. Likewise, the deposition of PW-3 Jai Singh, who is the brother-in-law of the deceased suffers emasculation. Even though he has timed the belabouring of the deceased by the accused to occur 2-3 months prior to the ill-fated incident, communication whereof in his testification on oath stands erected on the deceased purveying during her life time the aforesaid information to him, nonetheless, the factum aforesaid acquires falsity on account of omission on his part to either report the matter to the police station concerned or to apprise PW-1, the brother of the deceased also it holds no veracity for building a conclusion of it constituting a firm inculpatory piece of evidence against the accused given the visible improximity inter se the aforesaid purported incidents of ill-treatment perpetrated upon the deceased by the accused vis-a-vis the ill-fated occurrence.

10. The summom bonum of the above discussion is of the prosecution abysmally failing to adduce cogent precise evidence in consonance with the principle of law mandating of proximity occurring inter se the purported maltreatment and ill-treatment perpetrated by the accused upon the person of the deceased vis-a-vis the ill-fated occurrence, thereupon this Court is led to conclude of the findings of the acquittal recorded by the learned trial court meriting no interference.

11. Even otherwise, it is apparent on a reading of the postmortem report comprised in Ex.PW5/B of no antemortem injury standing detected on the person of the deceased at the time she stood subjected to postmortem examination by PW-5. The effect of non existence of, immediately prior to the ill-fated incident, antemortem injuries on the person of the deceased , pronounces with amplifying vigour of the accused not immediately prior to the incident subjecting the deceased to any beatings also thereupon this Court holds of the accused not abetting the suicide of his deceased wife.

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

13. Consequently, there is no merit in the instant appeal and it is accordingly dismissed. 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

Dharam Chand ….Respondent.

Cr. Appeal No. 476 of 2009.
Reserved on : 14th July, 2016.
Date of Decision: 21st July, 2016.

N.D.P.S. Act, 1985- Section 20- Information was received that one person wearing blue coloured sweater and having thin beard was coming on foot towards Ramshila- information was reduced into writing and was given to superior officer- accused was apprehended and his search was conducted during which 1.10 kg charas was recovered- accused was tried and acquitted by the

trial Court – held, in appeal that independent witness has not supported the prosecution version, however, he had admitted his signatures on the seizure memo – hence, he is estopped by the provisions of Sections 91 and 92 of Indian Evidence Act from deposing in variance to the contents of the seizure memo- further, an option was given to the accused to be searched before the police, Gazetted Officer or Executive Magistrate, which is not in accordance with Section 50 of N.D.P.S. Act- there are contradictions relating to date, time and place of seizure in the column No. 3 of NCB Form, which makes the prosecution version doubtful - the accused was rightly acquitted by the trial Court- appeal dismissed. (Para- 9 to 15)

For the Appellant: Mr. M.A. Khan, Additional A.G.
For the Respondents: Mr. Atul Jhingan, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal stands directed by the State of H.P. against the judgment of the learned Special Judge, Fast Track Court, Kullu, Himachal Pradesh, rendered on 22.01.2009 in Sessions Trial No.49 of 2007, whereby, the latter Court acquitted the accused/respondent of an offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as the "NDPS Act").

2. The facts relevant to decide the instant case are that on 2.4.2007, HC Roshan Lal along with C. Chand Mishra, C. Tarsem Lal and C. Pritam Singh had proceeded towards Ramshila from Police Station on patrol duty. At about 4.15 p.m., patrol party was present near Gammon bridge. A secret information was revived by HC Roshan Lal to the effect that one person wearing blue coloured sweater and having thin beard has been coming on foot towards Ramshila and that said person had been carrying charas. This information was reduced into writing and necessary intimation was given to the Superior Officer under Section 42(2) of the NDPS Act. One Guru Dutt was associated as witness in the patrol party. Thereafter, they went towards Bhekhali road. One person was found coming from opposite direction. He was stopped and inquired. He disclosed his name as Dharam Chand. After complying with the provisions of Section 50 of the NDPS Act, the police conducted his personal search. On his personal search being conducted by the Investigating Officer, he was found in possession of charas weighing 1Kg and 10 grams. Thereafter, other codal formalities were completed and the accused was arrested. Report of the FSL was procured. Statements of the witnesses were recorded.

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

4. The accused was charged by the learned trial Court for his committing offence punishable under Section 20 of the NDPS Act. In proof of the prosecution case, the prosecution examined 8 witnesses. On conclusion of recording of the prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded by the trial Court, in which the accused claimed innocence and pleaded false implication. However, he did not lead any defence evidence.

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

6. The State of H.P. stands aggrieved by the judgment of acquittal recorded by the learned trial Court. The learned Additional Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of acquittal being

reversed by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction.

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

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

9. The depositions of the official witnesses comprised in their respective examinations-in-chief qua effectuation of recovery of charas, under memo Ex.PD by the Investigating Officer at the site of occurrence from the purported exclusive and conscious possession of the accused, are manifestly shorn off any vice of inter se contradictions vis-a-vis their respective cross-examinations. Also their respective depositions qua effectuation of recovery of charas, under memo Ex.PD by the Investigating Officer at the site of occurrence from the exclusive and conscious possession of the accused are bereft of any vice of any intra se contradictions. Consequently, when the respective depositions of the prosecution witnesses when remained unstained with any vice of any inter se contradictions or any blemish of any intra se contradictions hence coax an inference from this Court of their respective versions qua effectuation of recovery of charas under memo Ex.PD by the Investigating Officer at the site of occurrence from the purported exclusive and conscious possession of the accused being truthful as well as credible. Even when the testimonies of the official witnesses qua effectuation of recovery of charas under memo Ex.PD by the Investigating Officer at the site of occurrence from the purported exclusive and conscious possession of the accused, depositions whereof when for reasons aforestated, remained unblemished with any stain of any intra se or inter se contradictions whereupon hence sanctity is imputable to their respective depositions, the learned trial Court yet rendered findings of acquittal in favour of the accused/respondent on the score of PW-5 Shri Guru Dutt, an independent witness, associated by the Investigating Officer in the apposite proceedings not lending any succor to the factum of its standing recovered in his presence by the Investigating Officer from the purported conscious and exclusive possession of the accused. Consequently, with factum of PW-5, an independent witness associated by the Investigating Officer in the apposite proceedings which occurred at the site of occurrence hence belittling the credible unstained testimonies of the official witnesses, constrained the learned trial Court to on the score aforesaid, disimpute credence to the testimonies of official witnesses. The learned trial Court in disimputing credence to the unblemished testimonies of official witnesses appears to have overlooked the factum of with PW-5 admitting his signatures on the apposite memos Ex.PA to Ex.PD whereupon he as mandated by the provisions of Section 91 and 92 of the Indian Evidence Act which stand extracted hereinafter stood interdicted besides forbidden to depose in variance therefrom rather his with the statutory mandate engrafted in the afore-referred apposite provisions of the Indian Evidence Act imputing credence also his imputing conclusive proof qua the recitals occurring therein on unflinching evidence emanating qua despite his orally digressing from its recorded recitals of yet his signatures existing thereon irrefragable evidence whereof stands evinced by his admitting the prime factum of the apposite memos holding his signatures, hence when his apposite admission sequelly statutorily belittles the effect of his deposing orally in variance or in detraction thereto naturally when he rather emphatically proves the recitals comprised in the apposite memos, it was neither appropriate nor tenable for the learned trial Court to conclude of the recorded recitals borne on Ex. PA to Ex.PD hold no evidentiary clout nor it was legally apt for it to outweigh the creditworthiness of the testimonies of the official witnesses qua the effectuation of recovery of charas under recovery memo Ex.PD by the Investigating Officer at the site of occurrence from the purported exclusive and conscious possession of the accused. The provisions of Sections 91 and 92 of Indian Evidence Act read as under:-

"91. Evidence of terms of contracts, grants and other dispositions of property reduced to form of documents.- When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

92. Exclusion of evidence of oral agreement.:- When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:-

Proviso (1).- Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, [want of failure] of consideration, or mistake in fact or law;

Proviso (2).- The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document:

Proviso (3).- The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved:

Proviso(4).- The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property,may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents:

Proviso (5). Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved:

provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of contract:

Proviso(6).- Any fact may be proved which shows in what manner the language of a document is related to existing facts."

10. Be that as it may, with the aforesaid inference drawn by this Court whereupon, rather findings of conviction against the accused/appellant are warranted, nonetheless, the nerve center of the case is qua the consent memo comprised in Ex.PA standing drawn in conformity with the provisions of Section 50 of the NDPS Act. Since the recovery of contraband under memo Ex.PD stood effectuated from one polythene envelope red and white in colour which was held by the accused inside the sweater and shirt worn by him, rendered its effectuation therefrom to occur on his personal search standing held by the Investigating Officer concerned whereupon hence the play of Section 50 of the NDPS Act stood galvanized besides strict compliance by the Investigating Officer concerned qua its mandatory statutory provisions stood enjoined to be accomplished by him. The contents of consent memo Ex.PA would render the recovery of charas under memo Ex.PD from the exclusive and conscious possession of the accused being construable to be efficaciously recovered thereunder only when Ex. PA held reflections of the Investigating Officer intimating the accused of his holding a vested legal right of his personal search standing carried before a Gazetted Officer or before an executive Magistrate, on waiver whereof by him, he also stood apprised therein of his holding an alternative right to opt for his

personal search standing carried by the Investigating Officer. However, on an incisive scanning of the recitals embodied in Ex.PA disclose of the Investigating Officer not incongruity with the statutory requirements contemplated in Section 50 of the NDPS Act intimating the accused/respondent of his holding a vested primary statutory right qua his personal search initially being opted by him to be carried or conducted by an Executive Magistrate or a Gazetted Officer. Since, the Investigating Officer while scribing Ex.PA departed from the apposite statutory mandate, of the accused holding a vested primary legal right for his personal search initially standing opted by him to be held by an Executive Magistrate or a Gazetted Officer nor also it holds recitals of in the event of his waiving the aforesaid right his holding a right to opt for the alternative mode for his personal search being conducted by the Investigating Officer, renders the consent, if any, of the accused qua his personal search standing held by the Investigating Officer to infract the statutory mandate of Section 50 of the NDPS Act. The departure from the aforesaid statutory requirements by the Investigating Officer though enjoined to be strictly complied by him, appear to stand germinated from hence his adopting a contrivance for beguiling the accused to opt for his personal search being held by him also it appears of the Investigating Officer withholding the occurrence of apposite statutory recitals in Ex.PA for forestalling the accused in his not purveying his consent to his holding his personal search. Consequently, the contrived consent obtained from the accused by the Investigating Officer qua his holding his personal search cannot stand clothed with any tinge of its holding any statutory validation. The solemn principle engrafted in the mandatory statutory provisions engrafted in Section 50 of the NDPS Act, whereupon the Investigating Officer stands fastened with a statutory duty to purvey in the apposite consent memo to the accused qua his holding a vested statutory right for his personal search standing held by an Executive Magistrate or a Gazetted Officer is of its sequeling awakenings in the accused qua an indefeasible statutory right inhering him, right whereof unless stands foregone by the accused would dis-empower the Investigating Officer to hold his personal search. The unequivocal communications in the apposite consent memo qua the apposite statutory right vesting in the accused is also a safe deterrent for him to refrain from opting for his personal search standing held by the Investigating Officer. It is also to inspire confidence in the accused to withhold his consent to his personal search standing carried by the Investigating Officer which may otherwise stand stained with an aura of false implication besides concoction. Since the recitals embodied in Ex.PA flagrantly depart from the solemn salutary principle engrafted in Section 50 of the NDPS Act, the invincible conclusion therefrom is of an uncreditworhty legally frail personal search of the accused standing held by the Investigating Officer. Furthermore, amplifying vigour to the aforesaid inference is lent by the fact of the salutary principle underlying Section 50 of the NDPS Act standing blunted by the Investigating Officer by his mis-phrasing the recitals of consent memo Ex.PA. Also, with the Investigating Officer intentionally blunting the play of Section 50 of the NDPS Act, reiteratedly his conducting the personal search of the accused in the guise of a vitiated consent memo cannot hold any formidability.

11. Moreover, there occurs a dichotomy inter se FIR Ex.PX vis-a-vis the deposition of H.C. Roshan Lal qua the factum of time of seizure of contraband from the purported exclusive and conscious possession of the accused. Rife contradiction qua the facet aforesaid is palpable on column No.3 of NCB form, Ex.PQ relating to date, time and place of its seizure as enjoined to be filled by the Investigating Officer at the site of occurrence holding no recitals, though PW Roshan Lal deposes of his making reflections therein of his seizing the contraband at 9.00 p.m. Since, the best evidence in communication of the aforesaid factum is comprised in Ex.PX hence, the oral deposition of H.C. Roshan Lal in variation thereto is insignificant. Contrarily, with the legally tenacious documentary evidence qua the facet aforesaid stands constituted in FIR Ex. PX and rukka Ex. PR, both whereon hold revelations of 4.15 p.m., constituting the time of seizure of charas, renders uncreditworhty the testimony of PW Roshan Lal qua the effectuation of its seizure from the purported exclusive and conscious possession of the accused occurring at 9.00 p.m. The contradiction aforesaid inter se the deposition of H.C. Roshan Lal vis-a-vis FIR, Ex. PX as well as rukka, Ex.PR contrarily also lends an impetus to a firm conclusion of the Investigating

Officer ante timing in Ex.PX & Ex.PR, the factum probandum of his subjecting the accused to personal search also spurs a deduction of his holding the personal search of the accused on a date, time and place other than the one as enunciated in his deposition also an inference stands erected of hence the effectuation of recovery of charas under memo Ex.PD in sequel to his holding the personal search of the accused being at a place distinct from the one reflected in Ex.PD whereupon this Court holds of the Investigating Officer holding a partisan taint ridden investigation qua the offence ascribed to the accused.

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

13. Consequently, there is no merit in the instant appeal and it is accordingly dismissed. Records be sent back forthwith.

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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

Shashi Bhushan Mankotia ….Respondent.

Cr.A No. : 377 of 2010

Reserved on: 20.7.2016

Decided on: 21.7.2016

Indian Penal Code, 1860- Section 306 and 498-A- Deceased was married to the accused - accused picked up quarrels with the deceased under the influence of liquor- he started torturing the deceased physically as well as mentally- deceased committed suicide by hanging herself – accused was acquitted by the trial Court- held, in appeal that PW-1 stated that accused used to consume liquor- brother of the deceased had made inquiry from the accused on which accused told him that quarrel had taken place- blue marks were found on the face and leg of the deceased- mother of the deceased stated that accused had taken a sum of Rs. 50,000/- - she had also noticed injuries on the person of the deceased- Medical Officer found 40 injuries on the person of the deceased- trial Court had given perverse findings that prosecution was required to prove that deceased did not have any injury prior to arrival of accused - it was wrongly observed that deceased might be aggressor and accused would not be liable- deceased was severely beaten up and thereafter she had committed suicide- prosecution case was proved beyond reasonable doubt and the accused was wrongly acquitted by the trial Court- appeal accepted- accused convicted of the commission of offences punishable under Section 306 and 498-A of I.P.C.

(Para- 14 to 17)

For the appellant: Mr. V.S. Chauhan, Addl. A.G.

For the Respondent: Mr. Rajesh Mandhotra, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

State has come in appeal against the judgment dated 20.4.2010 rendered by the Additional Sessions Judge, Fast Track Court, Kangra at Dharmashala in Sessions Trial No. 16/2010 whereby the respondent-accused (hereinafter referred to as the "accused"), 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 one Reema sister of Sanjay Guleria was married to accused in the year 2003. Initially, accused and Reema resided at village Lahru, but subsequently, shifted to rented accommodation at Narwana. After one year of marriage, accused started picking up quarrels with Reema under the influence of liquor. Accused continued torturing Reema physically as well as mentally. On 18.11.2008 at about 5.30 A.M., Sanjay received telephonic information from the accused that Reema has become unconscious. When he went to the house of accused, Reema was found dead. Accused told him that there was a fight between him and Reema at about 11.30 P.M. Thereafter, accused found that Reema has committed suicide by hanging herself. The report was lodged. Post-mortem was conducted. Medical examination of accused was also got conducted and his blood sample was also taken. 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 13 witnesses in all to prove its case against the accused. Statement of accused under Section 313 Cr.P.C. was recorded. He pleaded his innocence. Accused was acquitted by the trial court vide judgment dated 24.4.2010. Hence, the present appeal.

4. Mr. V.S. Chauhan, learned Addl. A.G. has vehemently argued that the prosecution has proved its case against the accused.

5. Mr. Rajesh Mandhotra, Advocate has supported the judgment dated 24.4.2010.

6. We have heard the learned counsel for the parties and have gone through the judgment and record meticulously.

7. PW-1 Sanjay Guleria is the brother of deceased Reema. He has deposed that Reema was married with the accused in the year 2003. They initially resided at village Lahru. Thereafter, they shifted to Narwana in rented accommodation. One son was born out of the wedlock. The son was 4½ years old. The cause of fight between accused and Reema was drinking habit of accused. About 2-3 months prior to her death, he had taken his sister to Chandigarh to avoid bickering in the family. His sister stayed at Chandigarh for two days. He made her understand. Thereafter, he brought her back and left in the house of accused. Accused was also asked to maintain peace. On 18.11.2008 at about 5.30 A.M., brother of accused telephoned him and told that accused was crying and he has asked him to go and find out what has happened. He went to the house of accused. He saw his sister was lying on the bed. Accused was giving her water. The body of his sister had become cool. He inquired from the accused. He told that on the previous night there was fight between him and Reema and during night hours when he woke up to have a cigarette, he found Reema has committed suicide by hanging herself. Accused had cut the Dupatta with knife and brought down the body. He noticed blue marks over the face and leg of Reema. He also noticed Dupatta hanging from the hook of fan. His sister committed suicide due to beatings administered to her by the accused. His statement was recorded by the police vide Ex.PW-1/A. Police took into possession the case property. Before the incident, his mother had demanded Rs. 50,000/- from him. His mother had told that she wanted to construct one room at Haridwar in the memory of his father. He had paid the money to his mother. Later on, his mother told him that she has paid the money to his sister Reema. This was disclosed to him by his mother after the death of Reema. In his cross-examination, he has deposed that his sister did not like consumption of liquor by the accused. His sister had been visiting Chandigarh from her in-laws house as well as from Narwana.

8. PW-2 Desh Raj has deposed that he was resident of village Narwana. In the month of November, 2008, accused was residing as a tenant in the house of his brother. He has seen Shashi Bhushan coming to house in normal condition and he never heard that accused consumed liquor. He was declared hostile and was cross-examined by the learned Public

Prosecutor. In his cross-examination, he has admitted that he did not know whether in the night of 17.11.2008, Reema Devi has committed suicide after hanging herself. He came to know about her death in the next morning at 7.00 A.M. when people had assembled.

9. PW-3 Nirmala Devi is the mother of deceased. She has deposed that her daughter had told her that accused was demanding money, upon which she gave Rs. 50,000/-. She had taken the money from her son. Accused did not mend his ways even after receiving Rs. 50,000/-. On 18.11.2008, in the morning, her son telephoned her and told that Reema has met with an accident. When she went to the spot, she saw the dead body of her daughter. She noticed the injury marks on her body. In her cross-examination, she has admitted that her daughter did not like consumption of liquor by the accused. She has denied the suggestion that she had not paid Rs. 50,000/- to the accused.

10. PW-4 Dr. Naresh Gupta has conducted the post mortem of the deceased. He noticed the following injuries on her body:

1. **The right eye brows were swollen and bluish in colour. There was a single small laceration on the right upper eye-brow.**
2. **There was soft tissue swelling on the right side of upper aspect of face.**
3. **There was soft tissue swelling in the right temporal region. On further examination no hemorrhage outside the skull or in the dura was found. No bleeding from right ear was present.**
4. **Some blood mixed with mucus was observed flowing out of the right nostril.**
5. **There was a reddish bruise 2cmx1/2 cm in size on the junction of the neck with the submandibular part of the face on the right side about 2cm from the midline.**
6. **There was a bruise reddish in colour transversely placed in the midline at the junction of the neck and the submandibular part of the face. It was about 4 ½ cm in length and ½ cm in breadth.**
7. **There was a small laceration 1 and ½ cms outside the outer angle of right eye.**
8. **There was a bluish red bruise irregular in outline and 4cm x 3 cm in size on the lower 1/3rd of left side of neck. There were two small lacerations on the middle of it.**
9. **There were three small lacerations on the outer aspect of back of right wrist.**
10. **The palms of both the hands were tinged bluish.**
11. **There was a small contusion dull reddish in colour on the lower lateral portion of left leg just above knee level.**
12. **There was a vertical laceration 4 cm long on the lower 1/3rd of left leg behind the left lateral malleolus.**
13. **There was a bruise dull red in colour 3cm x ½ cm in size on front of moddle of left leg.**
14. **There were multiple extremely small lacerations on the feet and hands.**

11. PW-5 Rajesh Rana has deposed that he had gone to the house of accused alongwith his family on 14.11.2008. They stayed in the house of accused and came back in the next morning. He was declared hostile and was cross-examined by the learned Public Prosecutor.

12. PW-6 Dr. Rajesh Kumar has examined the accused. He issued MLC Ex.PW-6/B. The injury received by him was simple in nature. Weapon used was blunt. Duration was within 12 to 48 hours.

13. PW-11 Inspector Rajeev Attri has deposed that on 18.11.2008, he received telephonic information from Police Post, Yol that one lady was found dead nearby Yol. Report was lodged. He went to Narwana Khas alongwith police party. He recorded statement of complainant Sanjay Guleria Ex.PW-1/A under section 154 Cr.P.C. The case property was taken into possession.

14. The marriage between the accused and deceased was solemnized in the year 2003. It has come in the statement of PW-1 Sanjay Guleria that accused used to consume liquor. He had also taken his sister to Chandigarh to avoid bickering in her house. His sister stayed at Chandigarh for two days. He made her understand. Thereafter, he brought her back and left in the house of accused. He also inquired from the accused. Accused told him that a quarrel had taken place between him and Reema during night. He has categorically deposed that his mother had given a sum of Rs. 50,000/- to the accused. He had also noticed blue marks over the face and leg of Reema. Statement of PW-1 Sanjay Guleria has been corroborated by PW-3 Nirmala Devi. She has also deposed that the accused had demanded a sum of Rs. 50,000/-. The amount was paid by her to the accused by borrowing the same from her son. She had also noticed injuries on her body. It has come on record that the accused used to pick up quarrel with Reema after consuming liquor. PW-4 Dr. Naresh Gupta has noticed as many as 14 injuries on the body of deceased. The post-mortem report is Ex.PW-4/B. The probable time between injury and death was within 5 minutes and between death and post-mortem 12 to 24 hours. She died due to asphyxia. Accused was also medically examined at Zonal Hospital, Dharamshala as per MLC Ex.PW-6/B. The prosecution has proved beyond reasonable doubt that accused has abetted/incited deceased Reema to commit suicide. The severe beatings given to Reema Devi are evident from MLC Ex.PW-4/B. She had received as many as 14 injuries on her person. These injuries cannot be self inflicted. She hanged herself and died due to asphyxia. Accused had demanded a sum of Rs. 50,000/- from Reema. Rs. 50,000/- were given to the accused by the mother of deceased. PW-3 Nirmala Devi had borrowed the money from her son. Accused has treated the deceased with cruelty within the ambit of section 498-A of the Indian Penal Code. Accused himself has told PW-1 Sanjay Guleria that there was a fight and thereafter he went out to sleep and later on found that his wife has committed suicide.

15. Learned trial court has given perverse findings that the prosecution was required to produce evidence to establish that prior to coming of accused to his house in the night of 17.11.2008; deceased Reema was having no injuries on her person. The factum of injury on the person of accused proves that a scuffle had taken place between husband and wife. Learned trial court has further erred by observing that deceased herself might be aggressor and in that event the accused would not be held liable. Accused has abetted Reema to commit suicide. He has subjected deceased to criminal cruelty. Multiple injuries have been inflicted on the person of Reema by the accused. The deceased was severely beaten up and thereafter she committed suicide. The accused has subjected the deceased to cruelty with a view to coerce her to meet unlawful demand of Rs. 50,000/-.

16. Consequently, in view of analysis and discussion made hereinabove, the prosecution has proved its case beyond reasonable doubt against the accused for offences punishable under sections 306 and 498-A of the Indian Penal Code.

16. Accordingly, the appeal is allowed. Judgment dated 24.4.2010 rendered by the Additional Sessions Judge, Fast Track Court, Kangra at Dharamshala in Sessions Trial No. 16/2010 is set aside. The accused is convicted for offences punishable under sections 306 and 498-A of the Indian Penal Code. Accused be produced in the Court to be heard on the quantum of sentence on 28.7.2016. The bail bonds are cancelled.

17. The Registry is directed to prepare the production warrants.

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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

Roop Singh ……Respondent

Cr. Appeal No. 335/2012
Reserved on: July 20, 2016
Decided on: July 21, 2016

N.D.P.S. Act, 1985- Section 20- Police party was present near Garagushaini to Khauli road - accused came from Khauli on foot - he was carrying a backpack - he tried to run away on seeing the police- he was apprehended – bag was searched and was found to be containing 15 kgs. charas- accused was tried and acquitted by the trial Court- held, in appeal that trial Court had discarded the site plan on flimsy grounds – I.O. had shown general directions of the road- independent witnesses were not available- statements of official witnesses inspire confidence and are trustworthy- minor contradictions about the place from where accused was apprehended and whether buildings were existing and shops were at a short distance were not sufficient to acquit the accused- it was not necessary to produce the logbook – prosecution case was proved beyond reasonable doubt- appeal accepted and accused convicted of the commission of offence punishable under Section 20b) (ii)((C) of N.D.P.S. Act. (Para- 16 to 19)

For the appellant	:	Mr. Vikram Thakur, Deputy Advocate General.
For the respondent	:	Mr. Devender K. Sharma, Advocate.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

The State has come in appeal against Judgment dated 21.1.2012 rendered by the learned Sessions Judge (II) Mandi, HP in Sessions Trial No. 21 of 2011, whereby respondent-accused (hereinafter referred to as 'accused' for convenience sake), who was charged with and tried for offence under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'Act' for convenience sake), has been acquitted by the learned trial Court.

2. Prosecution case, in a nutshell, is that ASI Ram Lal (PW-11), LHC Narpat (PW-1), Dhameshwar (PW-10) and Constable Jatinder Kumar were present near Garagushaini to Khauli road on 8.12.2010 in the official vehicle bearing registration No. HP-07-A-0282. Accused came from Khauli at about 8 AM on foot. He was carrying a backpack (Ext. P2). He tried to flee. He was overpowered. Place was lonely and deserted. No person crossed the road. Hence, LHC Narpat and Constable Jatinder Kumar were associated as witnesses. Backpack was searched. It contained stick like substance (Ext. P4). It was found to be *Charas*. It weighed 15 kg. *Charas* was put back in the same polythene and polythene was put in the backpack. Backpack was sealed with 24 impressions of seal 'R'. Seal impression was taken on separate pieces of cloths. NCB-1 form in triplicate was filled on the spot. Seal impression was taken on form NCB-1 and seal was handed over to Narpat after use. Contraband was seized vide seizure memo Ext. PW-1/C. *Rukka* Ext. PW-11/A was prepared and was handed over to Constable Dhameshwar with the direction to carry it to Police Station, Aut. Constable Dhameshwar handed over *Rukka* to MHC Khem Chand (PW-4), who recorded FIR Ext. PW-4/A. ASI Ram Lal prepared site plan Ext. PW-11/B. Case property was produced before HC Khem Chand, who resealed the parcel with six impressions of seal 'A'. He deposited the case property with the Malkhana and made entry in the register of Malkhana at Sr. No. 545, copy of which is Ext. PW-4/E. Case property was sent to FSL Junga on 9.12.2010 vide

RC No. 95/2010 (Ext. PW-4/F) through Uday Chand. Investigation was completed. Challan was put in the Court after completing all the codal formalities.

3. Prosecution has examined as many as twelve witnesses to prove its case against the accused. Accused was also examined under Section 313 CrPC. Five witnesses were also examined by the accused in his defence. He pleaded innocence. Accused was acquitted as noticed above. Hence, this appeal by the State.

4. Mr. Vikram Thakur, Deputy Advocate General, has vehemently argued that the prosecution has proved its case against the accused.

5. Mr. Devender K. Sharma, Advocate, has supported Judgment dated 21.1.2012.

6. We have heard the learned counsel for the parties and also gone through the Judgment and record carefully.

7. LHC Narpat Ram (PW-1) testified that he alongwith ASI Ram Lal, Constable Jatinder Kumar and Constable Dhameshwar Singh was present at Garagushaini to Khauli road on 8.12.2010 in official vehicle No. HP-07-282. Accused came from Khauli at 8 AM. He was carrying a backpack. He tried to flee. He was overpowered. Place was lonely and deserted. No independent person or vehicle crossed them. He and Constable Jatinder Kumar were associated as witnesses. Backpack was searched. It contained stick like substance. It was found to be *Charas*. It weighed 15 kg. *Charas* was put in the bag. Bag was put in the backpack and backpack was wrapped in a piece of cloth. Cloth parcel was sealed with 24 impressions of seal 'R'. Seal impression was taken on separate pieces of cloths. In his cross-examination, he has deposed that they went to Karsog from PP Pandoh. They did not visit Police Station, Karsog on that day. He did not remember where they stayed during the night but they stayed in a private guest house. He did not remember whether they stayed near bus stand or in the main bazaar. He did not remember the time of their departure from Karsog but they went in the morning. They had set up *Naka* on the way to Banjar. They reached at Bali Chowki at 1 AM in the intervening night of 7th and 8th. He admitted that there were 50-70 houses and shops at Garagushaini. They had set up *Naka* at a distance of 500 metres towards Khauli. Rest house was on the other side of bridge in District Kullu. Road from Jhibi goes uphill towards Khauli via Garagushaini Bazaar. He did not remember if any person or vehicle crossed them. He did not know whether there was a Senior Secondary School at Garagushaini. *Rukka* was written by Constable Jatinder.

8. HC Khem Chand (PW-4) deposed that he was posted as MHC in Police Station Aut since May 2010. Constable Dhameshwar brought one *Rukka* mark A to the Police Station on 8.12.2010 at 1 PM. He recorded the FIR Ext. PW-4/A. He was discharging duties of SHO on that day since SHO was on leave and ASI Shri Ram had gone to attend crime meeting. ASI Ram Lal handed over one parcel Ext. P1 which was sealed with 24 impressions of seal 'R', NCB-1 form in triplicate, on the same day at 4 PM. He resealed the parcel with six impressions of seal 'A'. Sample seal was taken on separate pieces of cloth. One such impression was Ext. PW-4/B. He prepared resealing certificate Ext. PW-4/C. He filled in relevant columns of NCB-1 form Ext. PW-4/D and deposited all these articles in the Malkhana. He made entry in the Malkhana register at Sr. No. 545. He sent all the articles to FSL Junga on 9.12.2010 through HHC Uday Chand vide RC No. 95/10. He handed over receipt to him on his return.

9. Constable Rajnish Kumar has brought case property Ext. P-1 and result of analysis from FSL Junga and handed over to MHC Khem Chand.

10. Constable Dhameshwar (PW-10) deposed the manner in which accused was apprehended, search, seizure and sampling proceedings were completed on the spot. *Rukka* mark A was prepared, which was handed over to him with the direction to carry it to the Police Station. He handed over the *Rukka* to MHC Khem Chand. He admitted in his cross-examination there were houses at Garagushaini but he could not tell the number of shops or houses. *Naka* was set up at a distance of 500 metres from Garagushaini towards Khauli road. He did not remember

that there was PHC and one Khadi Bhawan located at a distance of 500 metres from Garagushaini. *Rukka* was handed over to him at 9.45 AM. He was coming on foot. He took lift in a jeep to Bali Chowki. He went in bus thereafter.

11. ASI Ram Lal (PW-11) deposed the manner in which accused was intercepted. Search, seizure and sampling proceedings were completed at the spot. he filled in NCB-1 form and seizure memo. He prepared *Rukka*. It was sent to the Police Station. In his cross-examination, he denied that there were 70-80 shops and houses at Garagushaini. He denied the suggestion that description of road has been wrongly given in the site plan. Banjar was towards North side. Volunteered that he had indicated Banjar by an arrow. There were no houses or shops on the Khauli road. They started from the spot at 12.30 PM. No person crossed them. He did not know that there were large villages at a distance of about 2 kms from the spot. *Rukka* was in the handwriting of Jatinder Kumar. ASI Ram Lal was also recalled for further examination on 24.11.2011.

12. Durga Singh (DW-2) deposed that the road to Garagushaini started from Jhibi. It diverts from Banjar Ani road. It leads upto Khauli. Khauli was at a distance of 5 kms from Garagushaini. Khauli was towards the Western side and Jhibi was towards Eastern side from Garagushaini. There was a *Khud* separating two districts. Road from Garagushaini to Khauli was straight and adjacent to the *Khud*. There were buildings of PHC and Khadi Gramodyog Bhawan at a distance of 500 metres from Garagushaini. There was a 10+2 school in Garagushaini. There were many houses on Khauli road. Garagushaini was business centre. In his cross-examination, he has admitted that accused belonged to his Panchayat. He also admitted in his cross-examination that it was a hilly terrain and road was carved out of the hill. He has not made inquiry from the police why accused was being taken.

13. Rajinder Kumar (DW-3) deposed that he was posted as a Supervisor in Garagushaini road. Road from Garagushaini to Khauli was straight and adjacent to *Khud*. Distance between Garagushaini and Khauli was 5 kms. There were 80-90 houses on both sides of road on Garagushaini starting from bridge extending to a distance of 500-600 metres. There were buildings of PHC and Khadi Gramodyog Bhawan after that. He further admitted in his cross-examination that there was a jungle adjacent to the road. Road was alongwith *Nallah*. It was at a distance of 20 feet from *Nallah*. He admitted that road was in hilly terrain but there was plain area after the *Nallah*.

14. Roop Chand (DW-4) deposed that he was posted as a Chowkidar in HPPWD rest house for 2-3 years. He was present in the rest house on 7.12.2010 at 7 PM. Two vehicles came to rest house. There were 8 persons in the vehicles. They demanded room. He allotted room No. 2. Some were police officials. Some left and some remained in the rest house. They returned at 9 PM. Accused was in the vehicle. He got the entry recorded regarding their arrival and when they were leaving. In his cross-examination, he has admitted that there was no facility of providing food in the rest house. He admitted there were double beds in every room and there was facility of staying for two persons in one room. He admitted that entry was not made by him. He also admitted that entry regarding arrival and departure is made in the register at the time of arrival. One person was also appointed as Chowkidar in the rest house besides him. He admitted that entries are verified by the Assistant Engineer. He has not pointed out absence of entry regarding departure. He has also admitted that the person staying in the rest house makes entry regarding his stay.

15. Megh Singh (DW-5) deposed that rest house was situate about 600 metres from Garagushaini rest house. He was at his home at about 8.30-8.45 PM on 7.12.2010. His son was with him. One person came and told his son that he had some work with him and called him outside. When his son went outside, he did not return. There was some noise. There was one person in Khaki uniform and three were in civil uniform. Person in uniform had a pistol. They forcibly put his son in the vehicle. They took his son towards Banjar. He ran after them. He went to Durga Singh, Pradhan Garagushaini. He narrated the incident to him.

16. Case of the prosecution, precisely, is that accused was apprehended on 8.12.2010 at 8 AM. He was carrying a backpack. Backpack was searched. It contained *Charas*. It weighed 15 kg. *Charas* was produced before MHC Khem Chand. He deposited the same in Malkhana. It was sent to FSL Junga on 9.12.2010 through HHC Uday Chand. Learned trial Court has discarded the site plan on a very flimsy ground. Site plan has not been prepared by an expert. PW-11 Ram Lal has only shown general directions of the road. Accused was apprehended while carrying a huge quantity of contraband. It has come on the record that the independent witnesses were not available. Statements of official witnesses inspire confidence and are trustworthy. There was no reason for the learned trial Court to discard the statements of the official witnesses about the manner in which accused was found carrying contraband. Witnesses are not supposed to narrate the facts in a parrot-like manner. Minor contradictions about the place from where accused was apprehended and whether buildings were existing and shops were at a short distance, were not sufficient to acquit the accused.

17. Statement of DW-4 Roop Chand does not inspire confidence. According to him, two vehicles had come. Eight persons had come in the vehicle. They should have booked at least four room and not one room. He has not made entry in his handwriting. There is no entry regarding the departure. Similarly, DW-2 Durga Singh in his cross-examination admitted that accused belonged to his Panchayat. He did not remember the registration number of the vehicle. Other ground taken by the learned trial Court for acquitting the accused is that official log book of the vehicle was not produced. It was not necessary for the police to prove the log book. Accused could also get the same produced by moving appropriate application before the learned trial Court. Statement of DW-4 Roop Chand that the accused was in the vehicle on 7.12.2010 does not inspire confidence, if his statement is analyzed critically.

18. Prosecution has proved its case against the accused beyond all reasonable doubt.

19. Accordingly, the appeal is allowed. Judgment dated 21.1.2012 rendered by the learned Sessions Judge (II) Mandi, HP in Sessions Trial No. 21 of 2011 is set aside. The accused is convicted for the commission of offence punishable under Section 20b) (ii)((C) of the Act. Accused be produced to be heard on quantum of sentence on 28.7.2016. Bail bonds of the accused are cancelled.

20. Registry is directed to prepare and send the production warrant to the quarter concerned.

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28.7.2016: Present: Mr. M.A. Khan, Addl. A.G. with Mr. P.M. Negi and Mr. Vikram Thakur, Dy. A.Gs. for the appellant.

Mr. Devinder K. Sharma, Advocate, for the convict.

In sequel to judgment dated 21.7.2016, the convict is produced before the Court in the custody of ASI Mohar Singh, HHC Balwant Singh, Police Post Bali Chowki and Constable Parma Ram, Police Station Aut, District Mandi, H.P.

2. Heard on the quantum of sentence.

3. Mr. Devender K. Sharma, learned counsel appearing on behalf of the convict, submits that lenient view may be taken since the convict is only 41 years of age. He has school going children. However, taking into consideration the fact that huge quantity of 15 kgs charas is involved in the case, no lenient view can be taken and the convict is sentenced to undergo rigorous imprisonment for a period of 20 years and to pay a fine of Rs. 3 lac for the offence punishable under Section 20(b)(ii)(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985. In default of payment of fine, he shall further undergo simple imprisonment for a period of two years. The period of detention, if any, undergone by the convict during the investigation,

inquiry or trial of the case and before the date of conviction, is ordered to be set off against the period of imprisonment imposed upon him.

4. The copy of this order/judgment be supplied to the convict forthwith free of costs. The Registry is directed to prepare the warrants of committal.

5. The Central Government has also enacted the Prevention of Money Laundering Act, 2002 (hereinafter referred to as "the Act" for short) to prevent money laundering and to provide for confiscation of property derived from, or involved in, money laundering and for matters connected therewith.

6. Money laundering has the meaning assigned to it in Section 3 of the Act. The scheduled offences are defined in section 2 (y) of the Act as under:

(i) the offences specified under part A of the Schedule; or

(ii) the offences specified under Part B of the Schedule if the total value involved in such offences is thirty lakh rupees or more; or

(iii) the offences specified under Part C of the Schedule.

Section 3 provides that whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of offence of money-laundering. Punishment has been provided under Section 4 of the Act. Section 5 provides for attachment of the property involved in money-laundering. The Director or any other officer not below the rank of Deputy Director authorized by the Director for the purpose of this Section, if has reason to believe to be recorded in writing on the basis of material in his possession that any person is in possession of any proceeds of crime, and such proceeds of crime are likely be concealed, transferred or dealt with in any manner which may reason in frustrating any proceedings relating to confiscation of such proceeds of crime under Chapter III, he may by order in writing, provisionally attach such property for a period not exceeding 180 days from the date of order, in such manner as may be prescribed. The composition of adjudicating authority is provided under Section 6 of the Act and adjudication is provided under Section 8 of the Act. Section 17 provides for search and seizure. The search of persons is provided under Section 18. The retention of the property is provided under Section 20.

7. Paragraph 2 of Part A of the Schedule of the Narcotic Drugs and Psychotropic Substances Act, 1985 prescribes offences for contravention in relation to poppy straw, coca plant and coca leaves, prepared opium, opium poppy and opium, opium by cultivator, cannabis plant and cannabis, manufactured drugs and preparation and psychotropic substances etc. Since the accused has been convicted under Section 20(b)(ii)(c) of the ND&PS Act for contravention in relation to cannabis, the Director, Directorate of Enforcement is directed to register a case against the convict under section 3 and 4 of the Act. The Director, Directorate of Enforcement/ Additional/ Joint/Deputy or its delegates are directed to register cases against all the convicts, who are convicted under section(s) 15, 16, 17, 19, 20, 21, 22, 23, 24, 25-A, 27-A and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 throughout the State of Himachal Pradesh within a period of three months from today to curb the illegal transportation of narcotic drugs and psychotropic substances and also to prevent money laundering. The Principal Secretary (Home) to the Government of Himachal Pradesh is also directed to issue directions to all the Investigating Officers throughout the State of Himachal Pradesh to register cases against the person(s) under section 27-A of the Narcotic Drugs and Psychotropic Substances Act, 1985, who are involved in financing, directly or indirectly in any of the activities specified under the Act or harbours any person engaged in any of the activities as per the Act, to reduce the menace of drug abuse in the society, immediately. The Registry is directed to supply the copy of this order to Sh. Ashok Sharma, learned Assistant Solicitor General of India for its due compliance.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C. J. AND HON'BLE MR. JUSTICE P.S. RANA, J.

The Executive Engineer HPSEB and another …..Appellants
Versus
Surinder Singh …Respondent.

LPA No. 4014 of 2013
Date of decision: 21st July, 2016.

Constitution of India, 1950- Article 226- Writ Court concluded that Labour Court had not appreciated the evidence in right perspective- learned Counsel for the appellant conceded that Writ Court had rightly made appreciation of evidence- appeal dismissed. (Para-3 and 4)

For the appellants: Mr. Satyen Vaidya Sr. Advocate with Mr. Vivek Sharma Advocate.
For the respondent: Nemo.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

This Letters Patent Appeal is directed against the judgment and order dated 27.2.2013, made by the learned Single Judge of this Court in CWP No. 1965 of 2009 titled *Surinder Singh versus The Executive Engineer HPSEB and another,* whereby the writ petition filed by the writ petitioner came to be allowed and the award made by the learned Presiding Judge, Industrial Tribunal-cum-Labour Court, Shimla came to be set aside, for short "the impugned judgment", on the grounds taken in the memo of appeal.

2. We have examined the writ record and have gone through the impugned judgment.

3. It appears that the Writ Court has scanned the record and came to the conclusion that the learned Labour Court has not appreciated the evidence in its right perspective. Thus, has fallen in an error in scanning the evidence. The learned Writ court has made the discussion in paras 6 to 8, as per the record.

4. The learned counsel for the appellant was asked to assist whether the Writ Court has rightly made the appreciation or the learned Labour Court? He frankly conceded that the learned Writ Court has rightly made the appreciation.

5. Having said so, the impugned judgment is upheld and the appeal is dismissed along with pending applications, if any.

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

Ankur Gulati and another …..Petitioners.
Versus
State of H.P. and others …..Respondents.

Cr. MMO No. 240 of 2015
Date of decision : 22nd July, 2016.

Code of Criminal Procedure, 1973- Section 482- Complaint was filed against the petitioner stating that 8 bags containing 3307 tubes of drug 'Freeze Gel' were found during inspection -

respondent No. 2 and the petitioners did not have permission to manufacture the drug- it was contended that petitioners are not in-charge and responsible to the Company- however, record shows that error was found in the printing and respondent was requested to return the drug- respondent No. 2 could not have retained the drug- petitioners are Directors of the Company and responsible for conducing its business – conduct of the petitioners is not fair – petition dismissed. (Para-2 to 7)

Case referred:
Ashok Kumar Tyagi vs. State of H.P. and others, I.L.R. 2015 (II) H.P. page 937

For the Petitioners : Mr. Anand Sharma, Advocate.
For the Respondents : Ms. Meenakshi Sharma, Additional Advocate General, with Mr. J.S. Guleria, Assistant Advocate General, for respondent No.1.
Mr. R.K.Gautam, Senior Advocate, with Mr. Gaurav Gautam, Advocate, for respondent No.2.
Mr. Jagan Nath, Advocate, for respondent No.3.
Mr. Inderdeep Singh and Mr. Sanjeev Sood, Advocates, for respondents No. 4, 5 and 7.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral).

This petition under Section 482 of the Code of Criminal Procedure read with Article 227 of the Constitution of India seeks quashing of the prosecution launched against the petitioners under Section 32(2) of the Drugs and Cosmetics Act, 1940 and Rules 1945 under Section 18 (a) (i) read with Section 17 & 18 (c) punishable under Section 27 (d) and 27(b) (ii) of the Drugs and Cosmetics Act, 1940 (for short 'Act').

2. Brief facts of the case are that the prosecution has been launched against the petitioners on the basis of the complaint filed by respondent No.1, on the allegation that he inspected the premises of the firm M/s Elnova Pharma on 03.01.2012 and during the inspection found eight boxes containing 3307 tubes of drug 'Freeze Gel' B. No. 275', manufactured for respondent No.2, M/s Elnova Pharma. It was found that no manufacturer address was mentioned on the said drug and the licence No. S-MNB/09/61 and S-MB/09/62 was printed on the said drug, but the same did not relate to respondent No.2. That apart, after checking the licence of respondent No.2 it was noticed that the firm had not been granted permission to manufacture the said category of drug and when the proforma respondent No.3, who was present at the spot was asked to disclose about the licence, even the accused-respondent No.3 had failed to produce the copy thereof.

3. The quashing of the complaint has been sought on the following three grounds:

"(A) As to whether the drug namely 'Freeze Gel' B. No. 275, Mft. Date-07/2011, Exp. Date -06/2013, quality the criteria to come in the purview of not of Standard Quality, Misbranded Drugs, Adulterated Drug, Spurious Drug as defined U/S 16, 17, 17-A and 17-B respectively of the Drugs and Cosmetics Act.

(B) As to whether the prosecution has been able to make out a prima-facie case against the Accused No.1 to 4, in accordance with the provisions contained in Sec. 34(1) of Drugs and Cosmetic Act and whether the complainant has not conducted investigation properly to established that the Accused No. 2 and 3 as person in-charge of and were responsible persons to the company for the conduct of the business of the Company.

(C) As to whether the Accused No. 1 to 4 are not being the manufacture or the agent for the distribution of the drug in question of the manufacturer, as thus are entitled for the benefits of Section 19 (3) of Drugs and Cosmetics Act, 1940."

4. The allegations in so far as grounds (A) and (C) are concerned, undoubtedly, the question raised therein is essentially a matter of trial and, therefore, the complaint cannot be quashed on those grounds.

5. As regards, the ground No. (B), it is the specific case of the petitioners that the drug in question was purchased by them from proforma respondent No.7, whereas the proforma respondent No.7 has clearly stated that it had a valid drug and approval licence for the manufacture of the 'Freeze Gel' in question and had supplied the same to respondent No.2 in terms of the order placed to this effect vide purchase order dated 2.7.2011. After noticing the printing error, the respondent No.2 and its partners were requested to re-call the stock of 'Freeze Gel' drug in question and the said letter was duly acknowledged by the petitioners. The respondent No.2 in its letter dated 4.8.2011 had stated "*we acknowledge the receipt of the same and as per your guidelines we are recalling whatever the stocks sold in the market and will return the stocks for replacement on full receipt of the stocks"*. However, the respondent No.2 i.e. M/s Elnova Pharma never returned back the goods and after one year when the Drug Inspector inquired about the product 'Freeze Gel' of batch No.275, manufactured by respondents No. 4, 5, and 7, which was replied by these respondents vide letter dated 24.7.2012 clearly specifying that they had already made a request to Elnova Pharma for recalling of the product 'Freeze Gel', but till date they had not sent back any stock of 'Freeze Gel' for collective action. However, it was clearly mentioned that "*due to the printing mistake the carton and tube has been printed without manufacturer's name but drug manufacturing licence number is clearly mentioned on both tube and carton. This mistake is done unknowingly".* The respondent No.2 i.e. M/s Elnova Pharma never returned the recall 'Freeze Gel' and kept the entire supply with them for the reasons best known to them.

6. In such scenario, the question arises as to whether the respondent No.2 of which the petitioners are the Directors could have retained the drug i.e. 'Freeze Gel'. Once the specific case of the petitioners is that they have not manufactured the drug in question, then the further question as to whether they are the person in-charge or were responsible persons to the Company for conducting the business of the Company, is hardly of any consequence. Being the Directors of the Company, they were obviously responsible for the conduct of its business.

7. The learned counsel for the petitioners would then argue that in view of the affidavits of petitioners No. 1 and 2, they cannot be prosecuted in the instant case. Much reliance is placed upon the contents contained in paras 3 to 5 of the affidavits given by petitioner No.1 which reads as under:

"3. That the said firm is technically managed by the qualified employees who are responsible for the day to day conduct and control of the business activities and I am not responsible for the routine working and other government concerning activities of the department.

4. That Sh. Rohit Kumar son of Sh. Ram Ootar aged 27 years permanent resident of Janderpur, P.O. Gairowala (Shiv) Teh- Bijnour, Distt. Bijnour (U.P.) is full time appointed competent person of the above said firm responsible for manufacturing of drugs for the sale and/or distribution who possesses qualification as prescribed under Rule 71 (1) (a) or 71 (1) (b) and 76(1) (a) or 76(1) (b) of the Drugs and Cosmetics Rules 1945 and he is not engaged anywhere else in any kind of service or business to the best of my knowledge.

5. That Sh. A.K. Saxena son of Sh. O.P. Saxena, aged 47 years permanent resident of Kaushal Puri, P.O. R.K. Nagar, Teh-Kanpur, Distt. Kanpur (U.P.) is full time appointed competent person of the above said firm responsible for testing of all substances to be used for or incorporated in the drugs for sale and/or

> *distribution who possesses qualification as prescribed under Rule 71(4-A) and/or 76(4-A) of the Drugs and Cosmetics Rules, 1945 and he is not engaged anywhere else in any kind of service or business to the best of my knowledge".*

The aforesaid portion is extracted from the affidavit filed by petitioner No.1 and verbatim similar contents appear in the affidavit of petitioner No.2.

8. On the strength of these affidavits, the petitioners would claim that if at all anybody was the person in-charge and responsible to the Company for conducting of its business, it was either Sh. Rohit Kumar or Sh. A.K. Saxena of both of them, but in no manner could the petitioners be prosecuted as they were neither the person in-charge nor were responsible persons to the Company for the conduct of the business of the Company.

9. Strength is further sought to be drawn from the affidavits alleged to have been executed by Rajiv Tiwari and Arun Kumar Saxena, which have been placed on record as Annexures P-2/C and P-2/D, respectively, more particularly, the following contents of para-2 of Rajiv Tiwari which reads as under:

> *"2. That I shall also be working as over all Incharge-cum-sole person responsible for day to day conduct and control of business activities and the partner of the firm will not be responsible for day to day activity and control of the business and all Govt. concerning activities of the department."*

And para-3 of the affidavit of Arun Kumar Saxena, which reads as under:

> *"3. That I am the competent person responsible for testing of the drugs for sale and/or distribution of the above said firm and possesses qualification as prescribed under 71 (1) (a) or 71(1) (b) and 76(1) (a) or 76(1)(b)/Rule 71 (4-A) and/or 76(4-A) of the Drugs and Cosmetics Rules, 1945 i.e. B. Pharmacy/M.Sc. Chemistry/B.Sc./Other. The said qualification is done from D.A.V. College Kanpur (name of College) under Kanpur (name of University) in the year 1991".*

10. In addition thereto, strength is also sought to be drawn from the affidavit executed by one Diwakar Shukla wherein in para-3, it has been mentioned as under:

> "3. *That I am the competent person responsible for testing of the drugs for sale and/or distribution of the above said firm and possesses qualification as prescribed under 71 (1) (a) or 71(1) (b) and 76(1) (a) or 76(1)(b)/Rule 71 (4-A) and/or 76(4-A) of the Drugs and Cosmetics Rules, 1945 i.e. B. Pharmacy/M.Sc.Chemistry /B.Sc. ./Other. The said qualification is done from R.G.C. Bhopal (name of College) Under Barkatullah (name of University) in the year 2004".*

11. Learned counsel for the petitioners would vehemently argue that under Section 34 of the Act, it is only the person in-charge and who were responsible persons to the Company for conducting of its business that can be prosecuted and at the relevant time it was either Rohit Kumar and Arun Kumar Saxena and Diwakar Shukla, who were responsible for the conduct of business and, therefore, all of them ought to have been prosecuted and under no circumstance, could the prosecution have been launched against the petitioners.

12. I have considered the submissions of the petitioners and find that there can be no quarrel with the proposition that it is only the person, who at the time of complaint were the person in-charge and were the responsible persons to the Company for conducting of the business of the Company, who alone can be prosecuted and this was so held by this Court vide detailed judgment rendered in the case of ***Ashok Kumar Tyagi vs. State of H.P. and others, I.L.R. 2015 (II) H.P. page 937*** and SLP (Criminal) No.85 of 2015 filed by the State of H.P. against this decision also stands dismissed by the Hon'ble Supreme Court on 24.9.2015.

13. But the moot question is as to whether any benefit can be derived by the petitioners on the basis of the affidavits or judgment rendered by this Court. To say the least, the

conduct of the petitioners is not at all fair. It would be noticed that the premises of the petitioners were admittedly raided on 3.1.2012, while not only the affidavits of the petitioners but even those of Rajiv Tiwari, Arun Kumar Saxena and Diwakar Shukla have been executed much later on 14.4.2013.

14. That apart, the affidavits have been executed on stamp papers which have been purchased nearly two years back on 11.5.2011.Thus, the conduct of the petitioners in executing their affidavits and obtaining affidavits of three other persons namely Rajiv Tiwari, Arun Kumar Saxena and Diwakar Shukla is not definitely above board, because admittedly none of the aforesaid three persons are accused in this case and are probably sought to be made scape-goats in this case.

15. As a last ditch effort, learned counsel for the petitioners would argue that the petitioners were not at all aware of the drug lying in the godown and therefore, on this ground alone, no prosecution could have been launched against them.

16. Even this submission is equally without any substance and against the provisions as contained in Section 19(1) of the Act which reads as under:

> *"**19.Pleas**. – (1) Save as hereinafter provided in this section, it shall be no defence in a prosecution under this Chapter to prove merely that the accused was ignorant of the nature, substance or quality of the drug [or cosmetic] in respect of which the offence has been committed or of the circumstances of its manufacture or import, or that a purchaser, having bought only for the purpose of test or analysis, has not been prejudiced by the sale."*

17. The cumulative effect of the observation and discussion made hereinabove is that there is no merit in this petition and the same is accordingly dismissed alongwith pending application(s) if any. Interim order granted on 7.8.2015 is vacated.

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

State of H.P. …..Appellant.

Versus

Aman Dhama …..Respondent.

Cr. Appeal No. 631 of 2015.
Decided on : 22/07/2016

N.D.P.S. Act, 1985- Section 20- Accused was carrying a rucksack on his left shoulder – he became perplexed on seeing the police party- he was apprehended and his search was conducted during which 222 grams charas was recovered- accused was tried and acquitted by the trial Court- held, in appeal that an option to be searched before Magistrate, Gazetted Officer or police was given to the accused- only option to be searched before Magistrate or Gazetted Officer is to be given - consent memo was not in accordance with law- there are contradictions in the testimonies of officials witnesses- prosecution case was not proved beyond reasonable doubt- accused was rightly acquitted by the trial Court. (Para-8 to 11)

For the Appellant: Mr. R.S.Thakur and Mr. Pramod Thakur, Additional Advocate Generals.
For the Respondent: Nemo.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge:

The instant appeal is directed by the State of Himachal Pradesh against the impugned judgment rendered on 08.05.2015 by the learned Special Judge-II (Additional Sessions Judge), Kullu Himachal Pradesh, in Sessions trial No. 38 of 2014 (2012), whereby the learned trial Court acquitted the respondent (for short 'accused') for the offences charged.

2. The brief facts of the case are that on 13.4.2012 around 12.25 p.m when a police party headed by the then Sub Inspector Megh Singh, In-charge Police Post Manikaran and consisting of HHC Ved Ram, Constable Nitin Thakur was on patrolling duty at Kasol bridge and were present near Challal village path, accused coming from Chhalal village was noticed by the police party, when the accused was crossing the bridge at that time accused was carrying one rucksack on his left shoulder and behind the accused another person with empty hands was also coming. The accused on seeing the police party got perplexed and was nabbed by the police party and on asking the accused disclosed his name Aman Dhama whereas the person behind the accused had disclosed his name Nishant, who was friend of the accused. On having suspicion that accused might had been carrying some contraband with him PW-8 the then Sub Inspector Megh Singh had given option to accused if he wanted to give search of his rucksack to the police party or before the Gazetted Officer but the accused had consented to be searched by the police party regarding which memo was prepared and thereafter he and other police officials had given their personal search to the accused but nothing incriminating was found in possession of the police officials. Thereafter the rucksack which the accused was found carrying at that time was opened and inside the big packet of the rucksack, one plastic transparent packet was found in torn condition and when the said transparent packet was opened black colour substance five numbers in Chapati and rectangular shape were found and the said black colour substance was smelled and checked, it was found charas/cannabis and when the said charas was weighed with electronic scale, its weight was found 222 grams. Thereafter the codal formalities for sealing and seizure of the case property were done on the spot and was taken into possession vide memo Ext.PW-6/A and the seal after its use was handed over to PW-6 Constable Nitin Kumar. On completion of the investigation and on receipt of SFSL report the Investigating Officer handed over the case file to the then Station House Officer who after completing all codal formalities and on conclusion of the investigation into the offence, allegedly committed by the accused prepared challan and filed in the Court.

3. Charges stood put to the accused by the learned trial Court for his committing offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985, to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 9 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 did not choose to lead any evidence in defence.

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

6. The learned Additional Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of evidence on record, rather, theirs standing sequelled by gross mis-appreciation 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. We have heard the learned Additional Advocate General and have also gone through the entire record.

8. Charas Ext.P-3 stood recovered under memo Ext.PW-6/C by the Investigating Officer at the site of occurrence from the purported conscious and exclusive possession of the accused. When the testimonies of the official witnesses qua the ill-fated occurrence comprised in their respective examination in chief remain unblemished with any occurrence of any vice of contradictions vis-à-vis their respective cross-examinations besides when their respective depositions are free from any stain of any intra se contradictions hence would prod this Court to impute an aura of sanctity to their respective testifications qua the occurrence. However when their respective depositions suffer from any taint of any intra se contradictions, contrarily this Court would rear an inference qua the testimonies of the official witnesses acquiring a taint or a blemish whereupon any imputation of sanctity to them would be unwarranted. For unearthing the factum qua their respective depositions holding no taint of any intra se contradictions, an allusion to the testimony of PW-8 is imperative. However, before making an allusion thereto an advertence to the factum of charas standing recovered from a rucksack purportedly carried by the accused in his bag hung on his back is imperative. Even though, its recovery therefrom stood purportedly not effectuated on his personal search, given the rucksack not standing inextricably tethered to his body whereupon hence there was no enjoined legal obligation cast upon the Investigating Officer to preceding his holding its search either prepare consent memo comprised in Ext.PW-6/A nor it was incumbent upon him, to, elicit on his waiving his option qua his inherent primary legal right qua search of rucksack hung on his shoulder standing held before an Executive Magistrate or a Gazetted Officer his leaning for its search standing held by the Investigating Officer. However, with consent memo Ext.PW-6/A yet standing prepared by the Investigating Officer besides in pursuance to the accused meteing his consent to the Investigating Officer holding search of his rucksack his holding its search per se renders it vulnerable to suspicion also it breeds a deduction of its preparation besides its search in sequel to the accused meteing his apposite consent to the Investigating Officer standing prodded by the Investigating Officer concerting to smother the truth qua the manner of effectuation of recovery of charas. An inference of a vice of pervasive suspicion imbuing the manner of effectuation of charas under memo Ext.PW-6/C from rucksack hung by the accused on his shoulder gets momentum from the dire unnecessity of the Investigating Officer preparing consent memo Ext.PW-6/A besides with the Investigating Officer in his cross-examination deposing of his not preparing an apposite memo qua his holding personal search of the accused, factum whereof when stands contradicted by Ext.PW-8/D also garners an amplifying inference of the aforesaid variant stand of PW-8, the Investigating Officer, qua its preparation vis-à-vis reflections in Ext.PW-8/D constituting the consent memo of the accused to the Investigating Officer for empowering the latter holding his personal search not being a fortuitous variation rather appears to stand fostered by the Investigating Officer proactively hiding the factum of his holding a personal search of the accused also his proactively smothering recoveries if any effectuated in pursuance thereof begetting therefrom an ensuing sequel of his effectuating recovery of charas in a manner digressive from the one propagated by the prosecution. In aftermath, with the manner of effectuation of charas embodied in memo Ext.PW-6/C suffering an inherent discrepancy renders its recovery thereunder to be holding no legal solemnity.

9. Furthermore, prior to the purported effectuation of recovery of charas from the alleged conscious and exclusive possession of the accused from the rucksack hung by him on his shoulder, effectuation whereof stands embodied under memo Ext.PW-6/C, yet as unraveled by PW-6 in his deposition of the accused holding the personal search of the Investigating Officer in contradiction whereof the Investigating Officer deposes of the accused subjecting all the police officials to personal search prior to effectuation of recovery of charas from his conscious and exclusive possession under memo Ext.PW-6/C. The rife/pervasive contradictions qua the facet aforesaid as emanate on a scanning of the testimonies of PW-6 and PW-8 spurs an inference qua the testimonies of both holding no veracity qua the facet aforesaid wherefrom the ensuing sequel in entwinement with the aforestated inherent falsity engulfing the manner of effectuation of charas under memo Ext.PW-6/C by the Investigating Officer from the purported conscious and exclusive possession of the accused, is, of the Investigating Officer, given the minimal quantity of

charas weighing 222 grams allegedly recovered by him from the conscious and exclusive possession of the accused under memo Ext.PW-6/C, planting it on the person of the accused.

10. 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.

11. 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 SANJAY KAROL, J. AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

State of H.P. .....Appellant.

Versus

Suresh Pratap .....Respondent.

Cr. Appeal No.4233 of 2013.
Decided on : 22.07.2016

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 450 grams charas, resin content wherein was 136 grams- sentence of two years was imposed by the trial Court- State filed an appeal for enhancing the sentence- held, that accused was found in possession of less than commercial quantity – maximum sentence has been prescribed but it is open for the Court to award lesser sentence- accused was merely a carrier, Investigating Officer had not unearthed the source of the charas seized from the accused- there are no reasons to enhance the sentence- directions issued to Investigating Officers to trace the source of contraband. (Para-3 to 5)

For the Appellant: Mr. R.S.Thakur and Mr. Pramod Thakur, Additional Advocate Generals.
For the Respondents: Nemo

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge :

Through the instant appeal the State of Himachal Pradesh concerts before this Court qua the sentence imposed upon the convict/accused holding no commensuration vis-à-vis the gravity of the offence for which he stood convicted. Consequently, in the instant appeal a prayer stands canvassed qua the minimal sentence imposed upon the convict/accused for his committing an offence punishable under Section 20(b)(ii)(B) of the Act warranting its standing enhanced.

2. Given the limited prayer aforesaid urged in the instant appeal preferred herebefore by the State of Himachal Pradesh enjoins this Court to, from the relevant incriminatory circumstances relied upon by the learned trial Court for recording an order of conviction against the accused, cull out therefrom besides from the attending material qua the consequent sentence imposed upon the accused/convict warranting interference.

3. Dehors the sustainable incriminatory evidence vis-à-vis the accused/convict, the predominant fact of his holding conscious and exclusive possession of a minimal quantity of 450 grams of charas, resin content wherein was 136 grams, per se renders the sentence of

imprisonment of two years imposed upon him by the learned trial Court to not suffer from any vice of legal invalidation. Even if a sentence higher than the sentence of imprisonment aforesaid imposed upon the convict/accused by the learned trial Court is legally imposable upon the accused/convict also any laxity in imposition upon him of the highest quantum of a term of imprisonment for the charge qua which he stood convicted would depart from the solemn duty of this Court to keep society free from the menace of proliferation of contraband. However, when the prescription by the legislature qua the imposition of a maximum sentence of 10 years imprisonment upon a convict/accused on his found to be holding possession of charas in a quantum less than commercial quantity is not a peremptory prescription rather is discretionary especially when the prescription therein of a sentence of imprisonment of 10 years on facet aforesaid being imposable upon the convict/accused stands preceded by the word 'may', coinage whereof holds a parlance of a maximum sentence of imprisonment of 10 years warranting relaxation, if the attendant circumstances permit relaxation of its rigor to a term lesser than 10 years. In sequel with the legislature not holding a peremptory mandate upon courts of law qua imposition of sentence of imprisonment of 10 years upon convict/accused found guilty of committing an offence arising from his holding a quantum less than a commercial quantity of contraband, as, is the quantum borne by the contraband seized from the accused/convict, leans this Court to hold a view of the sentence of imprisonment of two years imposed upon the accused/convict by the learned trial Court not warranting any interference. Also when the preponderant attending circumstance qua the source of the minimal quantity of 450 grams charas held by the accused/convict stands uninvestigated by the Investigating Officer coaxes an inference of the accused/convict holding it merely as a carrier deployed by drug warlords operating in the area concerned who rather stood enjoined to be nabbed by the Investigating Officer for hence efficaciously curbing the menace of proliferation of contraband in society. Omission of the Investigating Officer to unearth the source of the minimal quantity of charas seized from the accused does fillip an inference of the convict/accused not warranting imposition upon him the sentence of imprisonment higher than the one imposed upon him. Prominently it constitutes a vigorous relevant attending circumstance for relaxing the rigour of the mandate of the apposite provisions of law prescribing the maximum sentence of imprisonment imposable upon the accused/convict. Consequently, the relevant omission aforesaid of the Investigating Officer forestalls the State to earn a conclusion from this Court of the sentence of imprisonment imposed upon him warranting enhancement.

4. This Court deprecates omissions on the part of the Investigating Officer to investigate the source of the item of contraband recovered from the possession of its carrier i.e. the accused/convict. The Director General of Police is directed to ensure of all Investigating Officers concerned whensoever seize any item of contraband from the conscious and exclusive possession of its holder theirs proceeding to uncover evidence qua the source wherefrom it emanated.

5. In view of the above, we find no merit in this appeal which is accordingly dismissed. In sequel, the sentence of imprisonment imposed upon the accused/convict by the learned trial Court is affirmed and maintained. Record of the learned trial Court be sent back forthwith.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Tilak Raj Dogra …..Petitioner.

Vs.

Shri Bachitter Kumar …..Respondents.

Cr. R. No.: 201 of 2016

Date of Decision: 22.07.2016

Code of Criminal Procedure, 1973- Section 384 and 386- appeal was listed for hearing and was dismissed in default- held, that Appellate Court is bound to adjudicate the appeal on merit and cannot dismiss the same in default- a jurisdictional error was committed by the Appellate Court- appeal allowed and the case remanded to Appellate Court to decide the appeal on merit. (Para-2 to 8)

Cases referred:

L. Laxmikanta Vs. State (2015) 4 Supreme Court Cases 222
Surya Baksh Singh Vs. State of Uttar Pradesh (2014) 14 Supreme Court Cases 222

For the petitioner: Mr. N.S. Chandel, Advocate.
For the respondents: Mr. Rajneesh K. Lal, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. *(Oral)***:**

On a complaint filed by the present respondent under the provisions of the Negotiable Instruments Act, 1881, learned trial Court vide its judgment dated 16.01.2014 allowed the same and convicted the petitioner/accused to undergo simple imprisonment for six months and also awarded compensation of Rs.2,00,000/-.

2. Feeling aggrieved by the said judgment passed by the learned trial Court, the accused preferred an appeal, which was dismissed by the learned Appellate Court vide order dated 06.03.2014 by passing the following order:

"06.03.2014 Present: None.

Case called, but none appeared on behalf of appellant. It is 11:30 a.m. Put up after lunch.

Sd/-
Additional Sessions Judge-II,
Kangra at Dharamshala

06.03.2014 Present: None.

Taken up after lunch, called thrice, but none appeared on behalf of appellant. It is already 2:30 p.m. Hence, present appeal u/s 374(3) Cr. P.C. is dismissed in default. File after its due completion be consigned to record room.

Sd/-
Additional Sessions Judge-II,
Kangra at Dharamshala"

3. Feeling aggrieved by the said order vide which the appeal filed by the accused has been dismissed in default, the accused/petitioner has filed the present revision petition.

4. I have heard the learned counsel for the parties.

5. In my considered view, the order passed by the learned appellate Court vide which it has dismissed the appeal of the present petitioner in default is perverse. A jurisdictional error has been committed by the learned appellate Court by not adjudicating the said appeal on merit and dismissing the same in default. Learned Appellate Court has not taken into consideration the statutory provisions of Sections 384 and 386 of the Code of Criminal Procedure, 1973, as per which, learned appellate Court was duty bound to have had adjudicated the appeal on merit.

6. The Hon'ble Supreme Court in **L. Laxmikanta** Vs. **State** (2015) 4 Supreme Court Cases 222 has held that in a criminal case, if no one has put in appearance on behalf of the appellant, then the Court should appoint any lawyer as amicus curiae on behalf of the appellant to argue the appellant's case instead of proceeding to decide the appeal ex parte on merits. It has further held that the appropriate course for the Court should be to decide the appeal finally on merits to meet such eventuality.

7. The Hon'ble Supreme Court in **Surya Baksh Singh** Vs. **State of Uttar Pradesh** (2014) 14 Supreme Court Cases 222 has held

> *"6. Section 386 of the CrPC is of importance for the purposes before us. It requires the Appellate Court to peruse the records, and hear the Appellant or his pleader if he appears; thereafter it may dismiss the appeal if it considers that there is insufficient ground for interference. In the case of an appeal from an order of acquittal (State Appeals in curial parlance) it may reverse the order and direct that further inquiry be carried out or that the accused be retried or committed for trial. Even in the case of an appeal from an order of acquittal the Appellate Court is competent to find him guilty and pass sentence on him according to law. The proviso to this Section prescribes that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such a proposal, thereby mandating that an accused must be present and must be heard if an order of acquittal is to be upturned and reversed. It is thus significant, and so we reiterate, that the Legislature has cast an obligation on the Appellate Court to decide an appeal on its merits only in the case of Death References, regardless of whether or not an appeal has been preferred by the convict.*
>
> *7. Last, but not least in our appreciation of the law, Section 482 of the CrPC stands in solitary splendour. It preserves the inherent power of the High Court. It enunciates that nothing in theCrPC shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary, firstly, to 'give effect to any order under the CrPC', words which are not to be found in the Code of Civil Procedure, 1908 (hereafter referred to as 'CPC'). Ergo, the High Court can, while exercising inherent powers in its criminal jurisdiction, take all necessary steps for enforcing compliance of its orders. For salutary reason Section 482 makes the criminal Court much more effective and all pervasive than the civil Court insofar as ensuring obedience of its orders is concerned. Secondly, Section 482 clarifies that the CrPC does not circumscribe the actions available to the High Court to prevent abuse of its process, from the inception of proceedings till their culmination. Judicial process includes compelling a respondent to appear before it. When the Court encounters a recalcitrant Appellant/convict who shows negligible interest in prosecuting his appeal, none of the Sections in Chapter XXIX of the CrPC dealing with appeals, precludes or dissuades it from dismissing the appeals. It seems to us that passing such orders would eventually make it clear to all that intentional and repeated failure to prosecute the appeal would inexorably lead not merely to incarceration but more importantly to the confirmation of the conviction and sentence consequent on the dismissal of the appeal. Thirdly, none of the provisions of the CrPC can possibly limit the power of the High Court to otherwise secure the ends of justice. While it is not possible to define the concept of 'justice', suffice it to say that it encompasses not just the rights of the convict, but also of victims of crime as well as of the law abiding section of society who look towards the Courts as vital instruments for preservation of peace and the curtailment or containment of crime by punishing those who transgress the law. If convicts can circumvent the consequence of their conviction, peace, tranquility and harmony in society will be reduced to a chimera. Section 482 emblazons the difference between preventing the abuse of the jural process on the one hand and securing of the ends of justice on the other. It appears to us that Section 482 of*

the CrPC has not been given due importance in combating the rampant malpractice of filing appeals only for scotching sentences imposed by criminal Courts.

8. This Court was called upon to construe Section 423 of the old CrPC (which corresponds toSection 386 of the current CrPC) in the wake of the dismissal by the High Court of an Appeal on the very next date of hearing after the issuance of notice. In Shyam Deo Pandey v. State of Bihar, (1971) 1 SCC 855 : AIR 1971 SC 1606, the High Court had recorded

"8….. 'No one appears to press the appeal. On perusal of the judgment under appeal, I find no merit in the case. It is accordingly dismissed.'"

An application for restoration of the appeal filed on the same day was also rejected for not disclosing sufficient grounds for recalling the dismissal orders. The ratio decidendi of this decision is that the records of the lower Court must be available with the Appellate Court if the condition of 'perusal' is to stand complied with, and therefore the High Court was found to have erred."

8. Accordingly, the present revision petition is allowed and order dated 06.03.2014 passed by learned Additional Sessions Judge-II, Kangra at Dharamshala is set aside and the case is remanded back to learned appellate Court with a direction that the appeal filed by the accused be decided on merit on or before ***30th September, 2016.*** Parties are directed through their learned counsel to put in appearance before the learned appellate Court on ***1st August, 2016.***

Petition stands disposed of. Copy *dasti.*

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE, AJAY MOHAN GOEL, J.

Darshan Singh …Appellant
Versus
State of Himachal Pradesh …Respondent

Criminal Appeal No. 290 of 2015
Judgment reserved on : 11.7.2016
Date of Decision : July 25 , 2016

N.D.P.S. Act, 1985- Section 20- Accused was carrying a pithu bag on his shoulder- he was apprehended on suspicion – his search was conducted during which 2.6 kgs. charas was recovered- he was tried and convicted by the trial court- held, in appeal that police officials consistently stated that accused was stopped and searched - contraband was re-sealed and deposited with MHC who sent it to FSL for analysis- seals were found intact in the laboratory- prosecution version was proved beyond reasonable doubt and the accused was rightly convicted by the trial Court- appeal dismissed. (Para-7 to 16)

For the appellant : Ms. Salochna Kaundal, Advocate, as Legal Aid Counsel, for the appellant.
For the respondent : Mr. V. S. Chauhan, Addl. Advocate General with Mr. Vikram Thakur and Mr. Puneet Rajta, Dy.A.Gs. for the respondent-State.

The following judgment of the Court was delivered:

Sanjay Karol, J.

Assailing the judgment dated 21.2.2014, passed by learned Special Judge, Chamba Division, Chamba, H.P., in Sessions Trial No. 15 of 2013 (56/2013), titled as *State of Himachal Pradesh vs. Darshan Singh,* whereby accused stands convicted of the offence

punishable under the provisions of Section 20 of the of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the Act) and sentenced to undergo rigorous imprisonment for a period of 10 years and pay fine of `1,00,000/- and in default of payment of fine to undergo rigorous imprisonment for a period of one year, he has filed the present appeal under the provisions of Section 374 of the Code of Criminal Procedure, 1973.

2. It is the case of prosecution that on 9.3.2013 ASI Madan Lal had laid naaka near Toll Tax Barrier, Banikhet. Other police officials including Const. Amit Sharma (PW-1) and LC Tulsi Devi were present with him. While vehicles were being checked, police party saw the accused carrying a *pithoo* bag on his shoulder. On suspicion, in the presence of independent witnesses Raj Gill (PW-3) and Suresh Kumar (not examined), accused was apprehended and informed of his right of being searched in accordance with law. The accused consented to be searched before a Gazetted Officer vide consent memo (Ext. PW-1/A) and, as such, on the request so made, Dy.S.P. Raman Sharma (PW-8) arrived on the spot and conducted search of the accused. From the *pithoo* bag so carried by the accused, contraband substance i.e. charas, which upon weighment was found to be 2k.g. and 600 grams was recovered. The recovered contraband substance was put in the same carry bag and sealed in a parcel with seal impression-A. NCB form (Ext. PW-13/D) was filled on the spot and the contraband substance taken into possession vide recovery memo (Ext. PW-1/D). Ruka (Ext. PW-10/A) was sent for registration of case through LC Tulsi Devi (PW-2). Resultantly F.I.R. No. 19/2013, dated 9.3.2013 (Ext. PW-10/B) was registered against the accused under the provisions of Section 20 of the Act by HC Arun Kumar (PW-10), at Police Station Dalhousie, Distt. Chamba. Accused was arrested. Necessary investigation was conducted on the spot and the case property reproduced before SHO Sher Singh (PW-12) who resealed the same with his seal impression-S where after the case property along with NCB form was handed over to MHC Arun Kumar (PW-10) who through Constable Sandeep Kumar (PW-11) sent the same to the State Forensic Science Laboratory, Junga and report (Ext. PX) taken on record. Special report (Ext. PW-9/B was sent through HHC Pritam Singh (PW-6) to the superior officer. Investigation revealed complicity of the accused in the alleged crime. Hence, 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 prove its case, in all, prosecution examined thirteen witnesses and statement of the accused under Section 313 Cr. P.C. was also recorded, in which he took plea of innocence and false implication. No evidence in defence was led by the accused.

5. Appreciating the material on record, including the testimonies of the witnesses, trial Court convicted the accused of the charged offence and sentenced as aforesaid. Hence, the present appeal.

6. We have heard Ms. Salochna Kaundal, learned legal aid counsel, on behalf of the appellant as also Mr. V. S. Chauhan, learned Addl. Advocate General assisted by Mr. Vikram Thakur and Mr. Puneet Rajta, learned Dy. A.Gs. Asstt. A.G., on behalf of the respondent-State. 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 the findings returned by the trial Court to be 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. Prosecution has been able to prove its case, beyond reasonable doubt.

7. Prosecution case of recovery of alleged contraband substance stands established beyond reasonable doubt by Const. Amit Sharma (PW-1), Raj Gill (PW-3), Dy.SP Raman Sharma (PW-8) and ASI Madan Lal (PW-13). The onus, statutory in nature, in our considered view cannot be said to have been discharged by the accused.

8. That ASI Madan Lal left the police station Dalhousie with the police party on traffic checking duty is evidently clear from the testimony of HHC Chaman Singh (PW-4) and HC Suraksha (PW-5) who effected entries in the police station with regard thereto.

9. ASI Madan Lal and Const. Amit Sharma are also categorical that they had set up a naaka at Banikhet near the toll tax barrier and checking vehicles. Independent witness Raj Gill (PW-3) is the scooterist whose vehicle was also checked by the police. Testimony of these witnesses on this issue remains unshattered.

10. Now ASI Madan Lal categorically states that he saw the accused carrying a *pithoo* on his shoulder. Seeing the police party, accused became perplexed and as such on suspicion apprehended, more so, when he tried to flee away. Accused, who was informed of his statutory right vide memo (Ext. PW-1/A), desired to be searched by a Gazetted Officer belonging to the police force. Consequently Dy.SP Raman Sharma (PW-8) was requested, on telephone, to visit the spot. In the presence of Raj Gill, on arrival, Dy.SP Raman Sharma searched the accused and from the bag *(pithoo)* so carried by him, charas recovered. Raj Gill was asked to bring the scales and the contraband substance on weighment was found to be 2.6 k.g. The recovered contraband substance was packed in the bag and sealed with seal impression-A, seals whereof were handed over to witness Suresh Kumar. NCB form (Ext. PW-13/D) was filled on the spot where after ruka (Ext. PW-10/A) sent through LC Tulsi Devi which led to the registration of F.I.R. (Ext. PW-10/B). The accused was arrested and with the completion of the proceedings on the spot, contraband substance reproduced before SHO Sher Singh (PW-12) who re-sealed the same.

11. Now on the question of recovery of the contraband substance from the possession of the accused, we find the version of this witness to be fully corroborated by Dy.S.P. Raman Sharma (PW-8), independent witness Raj Gill (PW-3) and the other member of the police party Const. Amit Sharma (PW-1). Undisputedly, conjoint reading of the testimonies of these witnesses establishes their version to be consistent, credible and convincing. Not only they have been able to corroborate but establish the version so stated by ASI Madan Lal.

12. With the contraband substance having been recovered from the conscious possession of the accused, the burden shifted upon the accused, which in the instant case, remains undischarged. Defence of innocence and false implication cannot be said to have been probablized even through the cross examination part of the testimonies of the prosecution witnesses. Of course, one cannot ignore the fact that no independent evidence was led by him.

13. Be that as it may, prosecution has also strengthened its case by leading corroborative evidence and that being the testimony of Inspector Sher Singh (PW-12) who categorically states that the contraband substance when produced before him was resealed, where after he deposited it with MHC Arun Kumar (PW-10) who further states that the contraband substance was sent for chemical analysis through Const. Sandeep Kumar (PW-11) which fact is also testified by this witness. Conjoint reading of the testimony of MHC Arun Kumar and Const. Sandeep Kumar establishes that so long as the case property remained with them, it was kept safe and not tampered with. Report of the State Forensic Science Laboratory (Ext. PX) also establishes the parcel bearing four seals of seal impression 'A' and two seals of seal impression 'S' containing the contraband substance to have been received in the laboratory through Const. Sandeep Kumar (PW-11). Original seal stands proved on record.

14. Hence in our considered view, prosecution has been able to discharge burden of proving the recovery of the contraband substance from the conscious possession of the accused, beyond reasonable doubt. It cannot be said that the trial Court erred in correctly and completely appreciating the testimonies of the prosecution witnesses.

15. From the material placed on record, it stands established by the prosecution, beyond reasonable doubt, by leading clear, cogent, convincing and reliable piece of evidence, that accused was carrying contraband substance i.e. charas weighing 2.6 kilograms.

16. For all the aforesaid reasons, we find no reason to interfere with a well reasoned 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. Findings of conviction cannot be said to be erroneous or perverse. Hence, the appeal is dismissed.

Appeal stands disposed of, so also pending application(s), if any.

Records of the Court below be immediately sent back.

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

Cr. Appeal Nos. 25/2015 & 59/2015
Reserved on: July, 21, 2016.
Decided on: July 25, 2016.

1. Cr. Appeal No. 25 of 2015.
O.P. Chopra ......Appellant.
Versus
State of Himachal Pradesh ....Respondent.

2. Cr. Appeal No. 59 of 2015.
Vijay Kumar ......Appellant.
Versus
State of Himachal Pradesh ....Respondent.

Indian Penal Code, 1860- Section 354 and 506- **Protection of Children from Sexual Offences Act, 2012-** Sections 10 and 21(2)- Prosecutrix was attending lecture of English- her teacher started coughing- prosecutrix brought glass of water from the room of the accused- when she went to return the glass, accused caught hold of her, forcibly kissed her and pressed her breasts- matter was reported the police- accused was tried and convicted by the trial Court- held, in appeal that prosecutrix had supported the prosecution version - PW-2 and PW-4 corroborated the prosecution version- PW-11 proved the birth certificate of the prosecutrix- delay in lodging FIR was properly explained- statement of DW-1 was not satisfactory – prosecution version was duly proved against the accused- however, it was not proved that principal of the School had asked the prosecutrix to patch up the matter or had threatened her - appeal preferred by the accused dismissed and appeal preferred by the Principal allowed. (Para-15 to 23)

For the appellants: Mr. Satyen Vaidya Sr. Advocate, with Mr. Vivek Sharma, Advocate for appellant in Cr. Appeal No. 25/2015.
Mr. Anoop Chitkara, Advocate with Mr. Sat Parkash, Advocate for appellant in Cr. Appeal No. 59/2015.

For the respondent: Mr. Parmod Thakur, Addl. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

Since both these appeals are instituted against the same judgment dated 3.1.2015, the same were taken up together and are being disposed of by a common judgment.

2. Cr. Appeal No. 25 of 2015 and Cr. Appeal No. 59 of 2015 have been instituted against the judgment dated 3.1.2015, rendered by the learned Sessions Judge, Chamba, H.P. in

Sessions Trial No. 73 of 2013, whereby appellants Vijay Kumar and O.P. Chopra were convicted and sentenced as under:

> "Convict Vijay Kumar is sentenced to undergo simple imprisonment for five years and to pay fine of Rs. 20,000/- and in default thereof to further undergo simple imprisonment for three months, under section 10 of Protection of Children from Sexual Offences Act, 2012;
>
> Convict Vijay Kumar is also sentenced to undergo simple imprisonment for one year and to pay fine of Rs. 5,000/- and in default thereof to further undergo simple imprisonment for one month, under Section 354 IPC;
>
> Convict Vijay Kumar is also sentenced to undergo simple imprisonment for six months and to pay fine of Rs. 1000/- and in default thereof to further undergo simple imprisonment for 15 days, under section 506 IPC."
>
> All the sentences were ordered to run concurrently.
>
> "Convict O.P. Chopra is sentenced to undergo simple imprisonment for three months and to pay fine of Rs. 5,000/- and in default thereof to further undergo simple imprisonment for one month, under section 21(2) of Protection of Children from Sexual Offences Act, 2012;""

3. The case of the prosecution, in a nut shell, is that on 3.10.2013 at about 1:20 PM, victim (name withheld) along with her mother and Pradhan visited PP Bakloh and made report that on 1.10.2013 at about 11:30 AM, she along with her class mates was attending the lecture of English being delivered by her teacher Shruti. Her teacher Shruti started coughing and she brought water from the room of accused Vijay Kumar in a glass. Shruti told her to leave the glass in the room from where it was brought. The victim went to leave the glass in the room of accused Vijay Kumar. As soon as she kept the glass, accused Vijay Kumar got up and closed the door. He caught hold of her from arms and put her lips in his mouth and started sucking. He also started moving his hands on her cheeks and pressed her breasts. She got scared and got herself released from the clutches of accused with great difficulty and ran towards her class and disclosed the incident to her teacher Shruti, who advised her to disclose the incident to her parents. She went to her house and disclosed the incident to her mother. On the same day, at about 8:00 PM, accused Vijay Kumar along with accused O.P. Chopra came to her house and threatened her not to disclose this incident to anyone in presence of Davinder Basnet who was present in her house at that time. It is, in these circumstances, she could not lodge the report on 1st and 2nd October, 2013. FIR was registered and the statements of the witnesses were recorded. The birth certificate of the prosecutrix was obtained. She was minor. She was student of 10+1 class. Accused Vijay Kumar has confined her wrongly and outraged her modesty. Accused O.P. Chopra did not inform the parents about the occurrence. On completion of the investigation, challan was put up after completing all the codal formalities.

4. 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. They have denied the prosecution case and pleaded innocence. The learned trial Court convicted both the accused, as noticed hereinabove.

5. Mr. Satyen Vaidya, Sr. Advocate with Mr. Vivek Sharma Advocate and Mr. Anoop Chitkara Advocate with Mr. Sat Prakash, Advocate for the respective accused have vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. Parmod Thakur, learned Addl. Advocate General, for the State has supported the judgment of the learned trial Court dated 3.1.2015.

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

7. PW-1, prosecutrix (name withheld) deposed that she was studying in 10+1 class in Govt. Sr. Secondary School, Kakira. On 1.10.2013 at about 11:30 AM their English period was

running and Shruti madam was delivering lecture. In the meantime, Shruti madam started coughing and she went to bring water for her from the room of accused Vijay Kumar, who was Superintendent of the school. When she was bringing water for her teacher, she was seen by the peon of the school, namely, Sumitra. She gave water to her teacher and went inside the room to keep empty glass. Accused Vijay Kumar, all of a sudden, got up and closed the door of the room and caught her and started sucking her lips. He also started moving hands on her cheek. He also pressed her breasts. With great difficulty, she got herself released from the clutches of the accused. She went to Shruti madam and disclosed the incident to her parents. After leaving the school, she went to her home and disclosed the incident to her mother. At about 8:00 PM, accused Vijay Kumar and accused O.P. Chopra, Principal came to her house. Accused Vijay Kumar told her to patch up the matter. Principal O. P. Chopra did not say anything nor he threatened her to patch up the matter. She was declared hostile and cross-examined by the learned Public Prosecutor. In her cross-examination by the learned Public Prosecutor, she deposed that accused Vijay Kumar had threatened her and her family not to disclose the incident to anybody. Her statement was recorded under Section 164 Cr.P.C. They were terrorized, thus they could not lodge the FIR immediately and it was lodged on 3.10.2013. In her cross-examination by the learned defence counsel, she deposed that the school building was two storied. There were four Peons in the school, namely, Sumitra, Nanak, Jaiwanti and Dumnu Ram. In her class room, more than hundred students were studying. She was student of Arts. She has also narrated the incident to her class-mates. Her house was situated 2-3 kms. from the school. Police Post was 2-3 kms from her house. She narrated the incident to her mother at 3:30 or 3:45 PM. All the family members were present in the house at that time.

8. PW-2 Suman Rani testified that the prosecutrix was her daughter. She was studying in 10+1 class in Govt. Sr. Secondary School, Kakira. On 1.10.2013, her daughter had gone to the school and she returned home at 3:30 PM. On reaching home, she started weeping and told that when her teacher started coughing, she went to bring water from the room of accused Vijay Kumar. When she again went to put empty glass in his room, he caught hold of her from arms and put her lips in his mouth and started sucking. He also started moving his hands on her cheeks and pressed her breasts. On that day, in the evening, accused Vijay Kumar and accused O.P. Chopra came to their house and requested to patch up the matter. Accused O.P. Chopra had not threatened not to disclose this incident to anyone. She was declared hostile and cross-examined by the learned Public Prosecutor. In her cross-examination by the learned Public Prosecutor, she denied that accused O.P. Chopra had threatened them with dire consequences. In her cross-examination by the learned defence counsel, she deposed that when the incident was narrated to her by her daughter, aunt of her daughter also came to their house. She also narrated the incident to her husband. Police Post was at a distance of 2 kms. from their house. They went to PP Bakloh at 1:30 PM on 3.10.2013. Her statement was recorded on the same day.

9. PW-3 Saroj Bala deposed that she was posted as lecturer in Govt. Sr. Secondary School, Kakira. She was associated by the police in the investigation. On 17.10.2013, the police moved an application Ext. PW-3/A for obtaining the certificate of prosecutrix whether she was student of 10+ 1 class or not. Accordingly, she issued certificate Ext. PW-3/B. She also issued attested copy of office staff attendance register Ext. PW-3/D.

10. PW-4 Shruti is a material witness. She deposed that at 10:00 AM on 1.10.2013, she was delivering lecture of English to 10+1 class. She started coughing and the prosecutrix brought water. After drinking water, she put the glass on the table and then she completed her lecture and went to NSS room situated in the ground floor. While she was preparing the lecture of next class, the prosecutrix came to her and at that time she was perplexed. On asking, she disclosed to her that she had gone to the office of Superintendent Grade-II to put the empty glass back. When she was putting the glass in the room, accused Vijay Kumar tried to kiss her. She was declared hostile and cross-examined by the learned Public Prosecutor. In her cross-examination by the learned Public Prosecutor, she denied that the prosecutrix disclosed to the

police that when she went to put the glass in the room, accused Vijay Kumar closed the door and caught hold of her from her arms and touched her cheeks and thereafter kissed on her lips. She also denied that the prosecutrix also disclosed that the accused had pressed her breasts. In her cross-examination by the learned defence counsel, she deposed that she did not personally complain to the Principal or some higher officer about the incident.

11. PW-5 Davinder Singh deposed that on 1.10.2013 at around 7-8 PM, he was present in the house of Suman, wife of Ganesh. At that time, both the accused came there and accused Vijay Kumar threatened the prosecutrix and her mother that prosecutrix should not come to the school. The prosecutrix also disclosed to him that accused Vijay Kumar had bolted the room from inside when she went to his room and kissed her. He was declared hostile and cross-examined by the learned Public Prosecutor. In his cross-examination by the learned Public Prosecutor, he deposed that accused O.P. Chopra had not threatened the prosecutrix and her family members in his presence. In his cross-examination by the learned defence counsel, he deposed that both the accused remained in the house of the prosecutrix for about 45 minutes. One Kuldeep was also present.

12. PW-10 HC Raj Pal deposed that on 3.10.2013 at about 1:20 PM, prosecutrix along with her mother and Sandeepa Gurang came to the Police Post and complained against the accused. On the basis of the statement given by the prosecutrix, report Ext. PW-1/A was registered. He sent this report to PS Chowari through LC Sapna for registration of the case. He recorded the statements of prosecutrix, her mother and Sandeepa Gurang, Pradhan as per their version. In his cross-examination, he deposed that he has not recorded the statement of Sumitra, who met him in the school on that date. Sumitra remained with him for about half an hour. Sumitra had shown the rooms of Superintendent and Principal. The table of Superintendent was at a distance of 5-6 feet from the main entrance.

13. PW-11 Aman Dogra, had issued birth certificate Ext. PW-11/B. He also issued copy of pariwar register Ext. PW-11/C.

14. PW-12 Sandeepa Gurang deposed that she was Pradhan of Gram Panchayat Chalama. On 2.10.2013, meeting of Gram Sabha was going on in the Panchayat at about 2:00 PM, mother of prosecutrix came to her and told that on 1.10.2013, accused Vijay Kumar, who was Superintendent in Govt. Sr. Secondary School, Kakira has tried to outrage the modesty of her daughter. She was giving information about it and in case the accused apologized, the matter would be settled and if not the matter would be reported o the police. The mother of the prosecutrix again came to her on 3.10.2013 and told that she wanted to lodge report in the Police Station and she accompanied her along with her daughter to PP Bakloh.

15. PW-13 SI Hoshiar Singh deposed that he has taken over the investigation from HC Raj Pal. He collected the date of birth certificate and copy of pariwar register of the prosecutrix. He also collected posting orders of accused Vijay Kumar Ext. PW-3/C. Attendance certificate of school teachers Ext. PW-3/D was collected. In his cross-examination, he deposed that he has moved an application before the learned JMIC Dalhousie for recording the statement of prosecutrix under Section 164 Cr.P.C. He also admitted that no statement of any other teacher apart from Shruti was recorded. He visited the house of the prosecutrix.

16. The statement of PW-1 prosecutrix is most material. She has categorically deposed that on 1.10.2013, at about 11:30 AM their English period was running and Shruti madam was delivering lecture. In the meantime, Shruti madam started coughing and she went to bring water for her from the room of accused Vijay Kumar, who was Superintendent of the school. She gave water to her teacher and went inside the room of accused Vijay Kumar to keep empty glass. Accused Vijay Kumar, all of a sudden, got up and closed the door of the room and caught her and started sucking her lips. He also started moving hands on her cheek. He also pressed her breasts. She got herself released from the clutches of the accused with great difficulty. She went to Shruti madam and disclosed the incident to her. She went to her house and disclosed the incident to her mother. At about 8:00 PM, in the evening, accused Vijay Kumar

and accused O.P. Chopra, Principal came to her house. PW-2 Suman Rani is the mother of the prosecutrix. She has corroborated the statement of PW-1. She specifically deposed that on 1.10.2013, her daughter had gone to the school and she returned home at 3:30 PM and narrated the incident to her. PW-4 Shruti has also deposed that she started coughing on 1.10.2013 at about 10:00 AM while delivering lecture. The prosecutrix brought a glass of water for her. After drinking water, she put the same on the table. While she was preparing the lecture of next class, the prosecutrix came to her and at that time she was perplexed. On asking, she disclosed to her that she had gone to the office of Superintendent Grade-II to put the glass back. When she was putting the glass in the room, accused Vijay Kumar tried to kiss her.

17. PW-11 Aman Dogra, has proved birth certificate of the prosecutrix vide Ext. PW-11/B and copy of pariwar register PW-11/C. PW-3 Saroj Bala has issued certificate Ext. PW-3/B to the effect that the prosecutrix was student of 10+1 class of Govt. Sr. Secondary School, Kakira. She also issued attested copy of attendance certificate of the staff vide Ext. PW-3/D.

18. The incident was disclosed by the mother of the prosecutrix to Pradhan PW-12 Sandeepa Gurang. She also advised the prosecutrix and her mother to lodge the FIR. Though, incident has taken place on 1.10.2013 but the FIR was lodged on 3.10.2013. The prosecutrix has categorically deposed that accused Vijay Kumar had visited her house and threatened not to disclose or report the matter. PW-2 Suman Rani, mother of the prosecutrix had also visited PW-12 Sandeepa Gurang, Pradhan and apprised her about the incident. Thus, the delay in lodging the FIR has been duly explained.

19. Mr. Satyen Vaidya, Sr. Advocate and Mr. Anoop Chitkara, Advocate have drawn the attention of the Court to the statement of DW-1 Sumitra Devi. According to her, she remained sitting outside the room of the Superintendent from 9:00 AM to 5:00 PM on 1.10.2013. Two lady peons and two gents peons were present on duty to attend other staff. On 1.10.2013, from 9:00 AM to 5:00 PM, no student of their school came in the room of the Superintendent nor she allowed any student to go inside the room of the Superintendent. In her cross-examination, she admitted that in the room of Superintendent, water filter was kept on the table adjoining to almirah. She also admitted that on 1.10.2013, only Superintendent was sitting in his room. She also admitted that if the door of the room of the Superintendent is closed from inner side, one cannot tell what was happening inside the room.

20. DW-1 Sumitra has deposed under the sway of Superintendent. She has admitted in her cross-examination that she came under the administrative control of the Superintendent. Accused Vijay Kumar after bolting the door from inside has outraged the modesty of the prosecutrix by kissing and pressing her breasts. He has done these acts with sexual intent resulting in outraging the modesty of the prosecutrix. The contradictions pointed out by the learned Advocates in the statements are minor in nature. The delay in lodging the FIR has been duly explained. The presence of accused Vijay Kumar in the school has been duly proved. Moreover, the accused has not denied his presence in the school. His own witness DW-1 Sumitra Devi has proved his presence in the school.

21. The prosecutrix was born on 17.1.1998. The birth certificate of the prosecutrix has been issued from birth and death register. The date of birth was also incorporated in copy of pariwar register Ext. PW-11/C. These entries were made by the public servants in accordance with provisions of H.P. Panchayati Raj Act, 1994 and rules framed thereunder. The prosecution has proved all the charges against accused Vijay Kumar, however, the prosecution has failed to prove charges against accused O.P. Chopra under Section 21 of the Protection of Children from Sexual Offences Act, 2012. Since the prosecutrix has not brought the matter to the notice of O.P. Chopra, Principal, the Court has already noticed that she has reported the matter to her class mates, PW-4 Shruti and her mother.

22. The prosecution has duly proved that the prosecutrix has visited the room of accused Vijay Kumar and he has outraged her modesty by confining her to the room.

23. Now, as far as the role of accused O.P. Chopra, Principal of the School is concerned, PW-1 prosecutrix has categorically deposed that accused O.P. Chopra had not stated anything to her nor threatened her to patch up the matter. PW-2 Suman Rani, has deposed that accused O.P. Chopra has not threatened them not to disclose the incident to anyone. PW-5 Davinder Singh has also deposed that the Principal has not threatened the prosecutrix and her family members in his presence. The prosecutrix has not brought the incident to the notice of Principal O.P. Chopra. She has only narrated the incident to PW-4 Shruti madam, class mates and her mother finally at 3:30 PM. PW-4 Shruti has categorically deposed that she has not personally filed complaint to the Principal or some higher authority about the incident.

24. Accordingly, Cr. Appeal No. 25 of 2015 is allowed. Accused O.P.Chopra is acquitted of the charge framed against him. Bail bonds in respect of O.P. Chopra are discharged. Cr. Appeal No. 59 of 2015 preferred by accused Vijay Kumar is dismissed. His conviction and sentence are upheld.

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

Rameshwar …Petitioner.
Versus
State of H.P. and others …Respondents.

CWP No. 641 of 2016
Decided on: 25.07.2016

Constitution of India, 1950- Article 226- Proceedings were drawn against the petitioner which resulted in an eviction order- an appeal was preferred, which was disposed by a non-speaking order- direction issued to the Appellate Authority to decide the appeal afresh after hearing the parties. (Para- 3 and 4)

For the petitioner:	Mr. Digvijay Singh, Advocate.
For the respondents:	Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General.

The following judgment of the Court was delivered:

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

De-linked.

2. The writ petitioner has called in question order, dated 20th June, 2015 (Annexure P-4) and 9th October, 2015 (Annexure P-5), on the grounds taken in the memo of the writ petition.

3. It appears that the eviction proceedings were drawn against the writ petitioner, which culminated into eviction order, dated 20th June, 2015, constraining the writ petitioner to file appeal before the appellate authority-respondent No. 2, came to be decided on 9th October, 2015 vide Annexure P-5, which, on the face of it, is a non-speaking order.

4. Accordingly, we deem it proper to set aside order, dated 9th October, 2015 (Annexure P-5) and relegate the parties to the appellate authority-respondent No. 2 with a direction to the appellate authority-respondent No. 2 to decide the appeal afresh after hearing the parties within four weeks with effect from 1st August, 2016.

5. Parties are directed to cause appearance before the appellate authority-respondent No. 2 on 1st August, 2016.

6. The writ petition is disposed of accordingly alongwith all pending applications.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Sardar Singh Kapoor …….Petitioner.

Versus

Smt. Chander Kanta & anr. ……Respondents.

Cr. Revision No.14 of 2012
Reserved on : 20.7.2016
Decided on: 25th July, 2016

Negotiable Instruments Act, 1881- Section 138- Accused had issued a cheque of Rs. 50,000/- for discharging his existing debt/liability- cheque was dishonoured with the endorsment "Insufficient funds" - amount was not paid despite the receipt of valid notice of demand- accused was tried and convicted by the trial Court- an appeal was preferred, which was dismissed- held, that it is duly proved that accused had borrowed Rs. 50,000/- from the complainant - accused had issued a cheque, which was dishonoured- accused had failed to make the payment, even after the receipt of the legal notice- accused was rightly convicted by the trial Court - appeal dismissed. (Para-5 and 6)

For the petitioner : Mr. Jeevesh Sharma, Advocate.
For the respondents : Mr. Neel Kamal Sood, Advocate with Mr. Vasu Sood, Advocate, for respondent No.1.
Mr. Virender Kumar Verma, Addl. Advocate General, for respondent No.2/State.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present Criminal Revision Petition under Section 397 read with section 401 of the Code of Criminal Procedure, against the judgment dated 17.9.2010, passed by learned Sessions Judge, Shimla, in Criminal Appeal No.112-S/10 of 2009, titled Sardar Singh Kapoor vs. Smt. Chander Kanta & anr. dismissing the appeal of the petitioner and confirming the judgment of conviction and sentence passed by learned Judicial Magistrate 1st Class, Court No.III, Shimla, District Shimla, in Case No.353-3 of 2006, whereby the petitioner was convicted and sentenced to suffer simple imprisonment for a period of six months for the offence punishable under Section 138 of the Negotiable Instruments Act and to pay compensation to the tune of Rs.60,000/-, to the complainant.

2. The brief facts giving rise to the present petition are that the complainant/respondent (hereinafter referred to as the 'complainant') maintained the complaint under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as 'Act') against the accused/petitioner (hereinafter referred to as the 'accused') and learned trial Court sentenced the accused, as stated hereinabove, which judgment was affirmed by the learned lower Appellate Court. As per the complainant, on 29.7.2005 accused issued a cheque bearing No.354726, drawn at Syndicate Bank, The Mall, Shimla, to the sum of Rs.50,000/-, on account of

discharge of payment of existing debt/liability payable to the complainant with the assurance at the time of issuance of the said cheque that the same on presentation would be honoured. However, when the complainant presented the said cheque on 18.8.2005, within a period of six months from the date of cheque, the same was bounced and dishonoured for the reasons '*Insufficient funds'*. The intimation regarding the dishonour of said cheque was received by the complainant on 18.8.2005, as a result of which the complainant was compelled to issue a notice through his learned counsel on 24.8.2005 notifying the fact of dishonour of the cheque to the accused, which was duly received by the accused on 25.8.2005, but the accused deliberately and intentionally failed to make payment of the said cheque amount to the complainant.

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

4. The complainant has examined herself as CW-1. CW-1 has deposed that the accused borrowed Rs.50,000/- from her and issued cheque, Ex.CW1/A, on 29.7.2005. The said cheque was presented by her with her Banker which in turn sent the same for clearance to the Banker of the accused, but the same was dishonoured for the reason '*Insufficient funds'*. She received the intimation regarding dishonour of cheque, vide memo Ex.CW1/B, on 18.8.2008 upon which she got issued notice on 24.8.2005, Ex.CW1/C, through registered post to the accused. She has proved on record postal receipt, Ex.CW1/D. She has testified the said notice was served upon the accused on 25.8.2005. She has also proved on record acknowledgment, Ex.CW1/E. She has further testified that the loan was given to the accused through cheque on 21.7.2004, regarding which entry was made in the statement of account shown in red ink in the copy Ex.CW1/F, which has been proved by her on the basis of original. She has further testified that even after the service of the legal notice, the accused failed to make the payment of the cheque amount. In cross-examination, she denied that the cheque Ex.CW1/A, was never presented by her for encashment and dishonoured vide memo, Ex.CW1/B. She has refuted the notice Ex.CW1/C, was not served upon the accused. She has further refuted that the accused had no necessity to take loan from her. Further, in her cross examination, the accused has not disputed the fact deposed by her that he had taken a loan of Rs.50,000/- from her. In his statement under Section 313 of the Code of Criminal Procedure, he has simply shown ignorance about the incriminating circumstances and has stated that he has been falsely implicated. No probable explanation has been rendered on the basis of which he has been falsely implicated by the complainant. He has not disputed that the cheque, Ex.CW1/A, bears his signature or the fact that the cheque bears his handwriting and the same was issued on 29.7.2005. The fact that the legal notice was duly served upon him could not be successfully assailed on behalf of the accused.

5. From the record, it is clear that the accused borrowed Rs.50,000/ from the complainant and in lieu of that the accused issued a cheque to her. It also stands proved that the cheque, Ex.CW1/A, was issued by the accused for repayment of the said loan amount and as such, the accused was under legal liability to discharge the debt and when the said cheque was presented for encashment, the same was dishonoured, vide memo Ex.CW1/B and the accused failed to make the payment of cheque amount even after the receipt of the legal notice issued by the complainant.

6. Keeping in view the above facts and circumstances of the case, learned Courts below properly appreciated the evidence on record and rightly came to the conclusion that the accused had committed the breach of Section 138 of the Negotiable Instruments Act, making himself liable for conviction and sentence. Since there is no illegality, impropriety or incorrectness in the impugned judgments, therefore, the revision petition is dismissed being devoid of any merit. Pending application (s), if any, shall also stand (s) 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.

Arjun Singh …Petitioner
Versus
State of H.P. and others . …Respondents.

CWP No. 500 of 2016
Judgment reserved on: 19.07.2016
Date of Decision : July 26, 2016.

Constitution of India, 1950- Article 226- Gram panchayat had challenged the notification, whereby the areas of Tahliwal were declared as Nagar Panchayat, Tahliwal – writ petition was dismissed on 24.8.2015- SLP was filed, which was dismissed as withdrawn- another writ petition was filed- held, that matter is covered by previous litigation and the present petition is barred by principle of res-judicata- re-litigation is an example of abuse of process of Court- petition dismissed with cost of Rs. 20,000/-. (Para-3 to 8)

Cases referred:
K.K.Modi vs. K.N. Modi and others (1998) 3 SCC 573

For the Petitioner :Mr. Ajay Sharma, Advocate.
For the respondents :Mr. Shrawan Dogra, Advocate General, Mr. Anup Rattan and Mr. Romesh Verma, Additional Advocate Generals, Mr. J.K. Verma and Mr. Kush Sharma, Deputy Advocate Generals.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The instant case is a glaring and shocking example of abuse of process of Court whereby the petitioner has virtually called in question the judgment rendered earlier by this Court in CWP No. 2978 of 2015, titled Gram Panchayat, Nangal Kalan vs. State of H.P. and others decided on 24.8.2015 and the SLP (C) No. 28601 of 2015 against which decision was dismissed by the Hon'ble Supreme Court on 12.10.2015.

2. The undisputed facts are that the Gram Panchayat, Nangal Kalan, the petitioner in CWP No. 2978 of 2015 had challenged the notification dated 27.04.2015 whereby the areas of Tahliwal, specified in the Schedule, had been declared as Nagar Panchayat, Tahliwal and the said writ petition vide a detailed judgment running into 38 pages and containing 41 paragraphs, was dismissed on 24.8.2015.

3. Aggrieved by the judgment passed by this Court, the Gram Panchayat, Nangal Kalan approached the Hon'ble Supreme Court by filing SLP(C) No. 28601 of 2015, however, the same was dismissed vide order dated 12.10.2015, which reads thus:

> *"Learned counsel for the petitioner would like to withdraw the petition and move the High Court by way of a writ petition. The special leave petition is dismissed as withdrawn with liberty to approach this Court again, if necessary. "*

4. The petitioner herein would claim a right to file the instant writ petition assailing that very notification which has already been upheld by this Court in CWP No. 2978 of 2015 on the ground that liberty had been reserved to him to approach this Court by filing writ petition.

5. To say the least, the contention raised by the petitioner is fallacious to his very knowledge. Admittedly, the petitioner herein was not the petitioner before the Hon'ble Supreme

Court to whom the liberty had been reserved to approach this Court again. Even if it is assumed that such liberty was granted to the present petitioner, even then the present writ petition is totally misconceived and amounts to re-litigation which not only is impermissible but is also abuse of process of the Court and against the principle of finality of litigation. It is more than settled that re-agitation may or may not be barred by res judicata, but if the same issue is sought to be re-agitated, it would amount to abuse of process of the Court. Where there is clear abuse of process of the Court, the Court has to view such conduct seriously and the same is to be halted to save precious time of the Court being wasted.

6. The Hon'ble Supreme Court in ***K.K.Modi vs. K.N. Modi and others (1998) 3 SCC 573***, while elaborately considering the abuse of process of the Court, held that re-litigation is one of the examples of abuse of process of Court and such litigation should be summarily dismissed in order to prevent the time of the public and the Court from being wasted, it was observed:

> *"42. Under Order 6 Rule 16, the Court may, at any stage of the proceeding, order to be struck out, inter alia, any matter in any pleading which is otherwise an abuse of the process of the court. Mulla in his treatise on the Code of Civil Procedure. (15th Edition, Volume II, page 1179 note 7) has stated that power under clause (c) of Order 6 Rule 16 of the Code is confined to cases where the abuse of he process of the Court is manifest from the pleadings; and that this power is unlike the power under Section 151 whereunder Courts have inherent power to strike out pleadings or to stay or dismiss proceedings which are an abuse of their process. In the present case the High Court has held the suit to be an abuse of he process of Court on the basis of what is stated in the plaint.*
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> *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:*
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>> *"This term 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."*
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> *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 h as 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 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.*
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> *45. In the case of Greenhalgh v. Mallard [19147 (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 vexation and an abuse of the process of court.

46. In Mcllkenny v. Chief Constable of West Midlands Police Force and another [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 estoppel."

7. The dictum laid down in the aforesaid judgment is squarely applicable to the case in hand and it is, therefore, absolutely clear that the petitioner has tried to overreach the orders already passed by this Court and this attempt to re-argue the case, which has finally decided, is clear abuse of process of the Court.

8. In view of the aforesaid discussion, not only is the writ petition not maintainable, but the same is gross abuse of process of the Court and consequently, the same is dismissed with costs of Rs.20,000/- to be paid by the petitioner to the H.P. High Court Advocates' Welfare Association.

The petition is disposed of in the aforesaid terms alongwith all pending application(s), if any.

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

Capt. Ram Singh ……Petitioner.

Versus

State of Himachal Pradesh & Others …… Respondents.

Cr. Revision No: 36 of 2009
Judgment Reserved on :28.6.2016
Date of Decision : 26nd July, 2016.

Code of Criminal Procedure, 1973- Section 321- Criminal case was pending before the Court for the commission of offences punishable under Sections 418, 420, 465, 468, 471, 472 read with Section 120-B of Indian Penal Code and Section 13 (2) of Prevention of Corruption Act- application for withdrawal was filed, which was allowed- a revision petition was preferred, which was allowed- petitioner now claimed that notice was issued to him- he should be joined as party- held, that foremost guiding factors for moving an application for withdrawal is in the interest of justice- public prosecutor can seek withdrawal in furtherance of the cause of public justice- it is incumbent upon the prosecutor to show that he may not be able to produce sufficient evidence to sustain the charge – it was not mentioned in what manner withdrawal would serve public interest- permission was also granted in a cursory manner- accused No. 1 misused his official position by purchasing land of his son at an exorbitant cost- order granting permission to withdraw the case set aside and the Court directed to proceed further in the matter in accordance with law. (Para-18 to 45)

Cases referred:
Sheonandan Paswan versus State of Bihar and others (1987) 1 Supreme Court Cases 288
Bairam Muralidhar versus State of Andhra Pradesh (2014) 10 Supreme Court Cases 380
State of Bihar versus Ram Naresh Pandey AIR 1957 SC 389 M & 1957 Cri.L.J.567

For the Petitioner	:	Mr. N.S.Chandel, Advocate.
For the Respondent	:	Mr. Rupinder Singh Thakur, Additional Advocate General, 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:

Sandeep Sharma, Judge (Oral)

Present Criminal Revision Petition filed under Sections 397, 401 read with Section 482 of the Code of Criminal Procedure is directed against the order dated 22nd December,2008, passed by learned Special Judge, Bilaspur, District Bilaspur in Corruption Case No.2 of 2005, whereby he allowed the application filed by the Public Prosecutor under Section 321 Cr.P.C. for permission to withdraw case from the prosecution in case arising out of FIR No. 59/2002, dated 3.4.2002 under Sections 420, 120-B IPC & 13(2) of Prevention of Corruption Act, police Station, Barmana, District Bilaspur, HP.

2. Briefly stated facts as emerge from the record are that the petitioner filed a complaint under Section 13(2)of the Prevention of Corruption Act and under Sections 418, 420,465, 468, 471, 472 read with Section 120-B of Indian Penal Code (in short “IPC”) in the Court of learned Special Judge, Bilaspur praying therein for referring the investigation to the police under Section 156(3) of the Code of Criminal Procedure(in short “Cr.P.C.”).

3. Careful perusal of the complaint suggest that respondent No.2 was functioning as Chairman-Cum- Managing Director (in short “CMD”) of H.P. Ex-servicemen Corporation, Hamirpur since 1998 (in short “Corporation”). Respondent No.3, Pawan Kumar is the son of respondent No.2, who as per complainant was unemployed and was not having independent source of income. The corporation owned a Diesel Pump set up by Hindustan Petroleum at Barmana, H.P. Since diesel pump as referred above, was causing obstruction in the free flow of traffic, it was decided to shift the same to some other location and in that regard Deputy Commissioner, Bilaspur was requested by the corporation to arrange some alternate site. However, Deputy Commissioner informed the corporation that no land for the purpose of setting up diesel pump is available with the government and, as such, corporation may itself locate some piece of land for setting up of diesel pump. Accordingly, respondent No.2 alongwith his son respondent No.3 purchased a piece of land measuring 2 bighas from one Sh. Krishnu, R/o village Bhater for consideration of Rs.4 lacs. Aforesaid amount of consideration was paid by respondent No.2 to the owner of the land i.e. Sh.Krishnu, R/o village Bhater. It is also alleged in the complaint that respondent No.2 falsely represented to the Government that the land in question, which was purposed to be purchased for setting up a diesel pump was located alongwith the National Highway, whereas same was far away from the National Highway. Complainant also alleged that respondent No.2 never disclosed his relationship with respondent No.3 to any of the members of the Board of Directors and got the said land measuring 2 bighas comprising khasra No.244/70 and 71, purchased by the corporation for total consideration of Rs. 8,22,800/- plus Rs. 98760/- i.e. expenditure on the stamp duty, registration charges, from respondent No.3, who happened to be his son. It is also alleged that aforesaid amount was not paid through cheque, rather same was paid in cash at the residence of respondents No.2 and 3. Complainant specifically averred in the complaint that at the time of purchase of aforesaid piece of land, respondent No.2 was fully aware that this piece of land belongs to respondent No.3, who

happened to be his son but despite this he never disclosed this fact to any of the members of the Board and by concealing this material fact from the government as well as members of Board, obtained permission to purchase the land for shifting of diesel pump.

4. Apart from above, complainant also alleged that from day one respondent No.2 had been representing to the government that the land purposed to be purchased for setting up diesel pump is located alongwith National Highway but as a matter of fact, land purchased is/was not abutting to the National Highway, rather other pieces of land owned by other person exists between the National Highway and the land purchased by corporation from respondent No.3. Complainant in support of averments contained in the application also made available copy of two sale deeds, whereby the land was purchased by respondent No.3 Sh. Pawan Kumar and further sold to Corporation. Complainant in his complaint specifically averred that at first instance land in question was purchased by Sh. Pawan Kumar, respondent No.3 at Barmana, which was further sold to the corporation headed by his father. Complainant further alleged that within a period about 14 months from the purchase of the land from respondent No.3, Sh. Pawan Kumar, further sold the same to corporation misusing influence/position of respondent No.2 at exorbitant rates. By placing on record two sale deeds as referred above, complainant also attempted to demonstrate that the land was purchased by respondent No.3 against the total consideration of Rs. 4 lacs, whereas same was further sold to corporation for total consideration of Rs.8,22,800/-, causing huge financial loss to the complainant. Complainant prayed in the complaint that since aforesaid act of cheating was done by respondent No.2 misusing his official position in connivance with accused No.1 and 3, they are liable to be punished under section 13(2) of Prevention of Corruption Act and Sections 418, 420, 465, 468, 471, 472 read with Section 120-B of IPC.

5. Subsequent to the aforesaid complaint filed by the complainant, learned Special Judge vide communication dated 30.3.2002 forwarded the complaint to the SHO Police Station Barmana, for investigation under Section 156(3)Cr.P.C in accordance with law. Documents available on record further reveals that police after necessary investigation, presented the challan before the competent Court of law in the year, 2005.

6. Careful perusal of the record of the Court below suggest that during the investigation police collected material evidence on record suggestive of the fact that a prima facie case exists against the accused. Police during investigation besides collecting relevant records also recorded the statements of the member of the Board of Directors of corporation, which are available on record. However, on 22.12.2008 learned public prosecutor moved an application under Section 321 Cr. P.C for withdrawal from the prosecution in the Court of learned Special Judge, Bilaspur, H.P.

7. Learned Special Judge, Bilaspur taking cognizance of the averments contained in the application filed under section 321 Cr.P.C for granting permission to withdraw the case from prosecution in case FIR No. 59/2002, dated 3.4.2002, allowed the application and granted the permission to learned public prosecutor to withdraw the case from the prosecution.

8. Feeling aggrieved and dissatisfied with the impugned order dated 22.12.2008 passed by learned Special Judge, Bilaspur, present petitioner preferred the instant revision petition before this Court praying therein for quashing of impugned order and remand the case back to the learned Special Judge, Bilaspur for further proceedings in accordance with law.

9. Petitioner by way of instant criminal revision petition further contended that since the case was registered at his instance, he being an interested party was required to be joined as party in the application for withdrawal moved by the learned public prosecutor so that he could have effectively assisted the learned special Judge in the proceedings of the withdrawal of prosecution under Section 321 Cr.P.C. Petitioner has also contended that it was incumbent upon the learned Special Judge while deciding the application for withdrawal filed by the learned public prosecutor to issue notices to the petitioner in the interest of justice because he being the complainant would have been the best person to assist the Court. Since no notice, whatsoever,

was issued to the complaint, on whose behest matter was investigated and FIR was lodged, great prejudice has been caused to him. Petitioner has also stated that bare perusal of the application filed by the learned public prosecutor discloses no grounds whatsoever, which could compel the learned Special Judge to permit the public prosecutor to withdraw the case from the prosecution.

10. Petitioner in the revision petition specifically stated that since there is/was ample evidence collected on record by the investigating Agency, which was enough to connect the accused with the offences allegedly having been committed by them, there was no occasion, whatsoever, for the learned Special Judge to allow the application filed under Section 321 Cr.P.C.

11. Mr. N.S.Chandel, learned counsel duly assisted by Mr. Dinesh Thakur, advocate representing the petitioner vehemently argued that the impugned order dated 22.12.2008, passed by learned Special Judge, Bilaspur on the application filed under section 321 Cr.P.C by learned public prosecutor is unsustainable in the eye of law as the same is not based upon the correct appreciation of the evidence available on record. He vehemently argued that the learned Court below should not have proceeded ahead with the matter without issuing notice to the complainant because he was an interested party in the matter. He contended that the complainant-petitioner was required to be heard by learned Special Judge before rendering decision on the application moved by learned public prosecutor under Section 321 Cr.P.C.

12. During arguments made by him, he invited the attention of the Court to the application filed under Section 321 Cr.P.C for granting permission to withdraw the case from the prosecution to demonstrate that no material worth the name was placed on record by the learned public prosecutor in support of the contention made in the application. Mr. Chandel, learned counsel forcibly contended that the learned Special Judge while allowing the application filed by the public prosecutor failed to acknowledge the fact that relevant material which was sufficient to prove the guilt of the accused was withheld from Court by the prosecution and learned Special Judge solely on the basis of the averments contained in the application, passed order dated 22.12.2008 without realizing that great prejudice would be caused to the complainant as well as public at large. Mr. Chandel, learned counsel during proceeding of the case made this Court to travel through the averments contained in the application to demonstrate that averments contained in the application were not sufficient to conclude that withdrawal of the case, if any, would be in the interest of public and exchequer of the government. Mr. Chandel while making his arguments also made this Court to travel through various documents available on the file of Court below suggestive of the fact that respondent No. 2 never informed/disclosed to the Government as well as and Managing Committee of the Corporation that the seller of the land is his son and land is being sold to the corporation for double the price. He also invited the attention of the Court to the sale deeds pertaining to the piece of land, which was ultimately purchased by the corporation for setting up the diesel pump to show that how great financial loss was caused to the public exchequer by the action of respondents No. 2 and 3.

13. Mr. Chandel, learned counsel also invited the attention of the Court to the revenue documents available on record to establish that the land actually purchased by the respondent No.2 for setting up the diesel pump from his son namely Pawan Kumar respondent No.3 is /was far away from the National Highway. He further contended that there is private land owned by some other person exists in between the National Highway and the land got purchased by respondent No.2 from respondent No.3 for shifting of petrol pump. However, aforesaid information was deliberately concealed from Govt. and by misrepresenting the facts, respondent No.2 procured approval from the State Government to purchase that particular piece of land, which was owned by his son respondent No.3. Mr. Chandel, while referring to the documents available on record strenuously argued that the averments contained in para-5 of the application moved by learned public prosecutor that 'all documents annexed with the case file are in favour of accused persons is totally contrary to the records and clearly indicates that the learned Special Judge while passing impugned order solely relied upon the averments contained in the application and did not bother at all to refer to the documents collected on record by the Investigating Agency. It is also contended on behalf of the petitioner that all the documents

attached with the police challan clearly supports/corroborates the oral evidence collected by the investigating agency while investigating the matter in terms of Section 156(3) Cr.P.C. Documents available on record suggest that respondent No.2 concealed the material facts from the government and procured approval on the basis of the wrong information deceitfully. Had he disclosed factual position to the government that the land proposed to be purchased belongs to respondent No.3 and same is not abutting to the National Highway, government would have never accorded any sanction for purchase of that piece of land. Moreover, perusal of the statements recorded by the police of members of the Board clearly suggest that they all were kept in dark and at no point of time they were informed that the land proposed to be purchased for setting up diesel pump belongs to son respondent No.2. Mr. Chandel, learned counsel, strenuously argued that in view of the aforesaid facts, it is ample clear that the public prosecutor did not present the true picture before the Court while moving application under Section 321 Cr.P.C, rather he made wrong statement/submission in the application intentionally and deliberately to mislead the learned Special Judge solely with a motive to procure relief, which would have been not granted otherwise. It is further contended that respondent No.2 by purchasing particular piece of land, which was admittedly not abutting the National Highway that too from his son respondent No.3, caused huge pecuniary loss to the corporation because admittedly till date petrol pump could not be installed on that piece of land.

14. Learned counsel representing the petitioner also contended that non participation of respondent No.2 in the alleged meetings held on 4th August, 1999 for the sale of land is immaterial as the proposal to sell the land of his son to corporation was moved by him at first instance that too without informing other Board members, which itself is sufficient to conclude that his intention was to defraud the corporation. Had respondent No.2 disclosed the Board members that land proposed to be purchased for setting up diesel pump belongs to his son, there was every possibility of objection being raised by the members of the Board. But respondent No.2 purposely concealed the material facts from the government as well as Board of members and as such, caused wrongful loss to the corporation and public at large. It is also contended that respondent No.2 also concealed from the members of Board with regard to distance of suitable land, which was very much in his knowledge, which fact clearly points towards his dishonest intention to defraud the corporation. At last, learned counsel representing the petitioner stated that the impugned order passed by learned Special Judge Bilaspur is not based on correct appreciation of material evidence available on record, rather same has been passed merely taking into consideration the averments contained in the application and as such, same deserves to be quashed and set-aside.

15. Mr. Rupinder Singh Thakur, learned Additional Advocate General duly assisted by Mr. Rajat Chauhan, Law Officer, representing the respondent-State duly supported the impugned order passed by learned Special Judge, Bilaspur, and submitted that there is no illegality and infirmity in the impugned order and same deserves to be upheld. Mr. Thakur, learned Additional Advocate General vehemently argued that as per Section 321 Cr.P.C, public prosecutor was well within its right to move an application for withdrawing the prosecution since there was no evidence whatsoever, available on record which could be sufficient to hold the accused guilty of having committed the offence under Sections 13(2) of Prevention of Corruption Act and under sections 418 ,420, 465, 468, 471, 472 read with Section 120-B of IPC. Mr. Thakur, learned Additional Advocate General also contended that bare perusal of impugned order passed by learned Special Judge suggest that learned special Judge before passing the order satisfied himself that there is no evidence on record suggestive of participation of the accused, in any, of the proceedings related to selection of the alternative site and hence it cannot be said that the learned special Judge passed the impugned order in hot haste manner without due application of mind. He specifically invited the attention of this Court to impugned order, whereby learned Special Judge concluded that "***I have also scanned the evidence on record and I, too, am of the considered and circumspect view that, the, offences as alleged against the accused, in the police challan presented before this Court may not stand vindication, as the documentary evidence is overwhelmingly in favour of the accused and it throws over***

Board the value if any of oral evidence.". Lastly while concluding its arguments, Mr.Rupinder Singh Thakur, forcibly contended that Section 321 Cr.P.C fully empowers the learned PP to move application for withdrawal of prosecution and accordingly in the present case, when it appeared to learned PP that there is no evidence of involvement of respondent No.2, he moved application and as such present petition deserve to be dismissed being devoid of any merits.

16. Mr. Satyen Vaidya, learned Senior Advocate duly assisted by Mr. Vivek Sharma, Advocate representing the respondents No. 2 and 3 also supported the impugned order dated 22.12.2008 passed by learned Special Judge, Bilaspur. Mr. Vaidya, learned Senior Counsel forcibly contended that the impugned order dated 22.12.2008 has been passed by the learned Special Judge after due application of mind and as such, same deserves to be upheld. Mr. Vaidya, forcibly contended that Section 321 of Cr.P.C empowers public prosecutor to withdraw the case from prosecution before the judgment is pronounced and as per Section 321 Cr.P.C, it is his sole prerogative to do so. In case learned public prosecutor is satisfied that there is no evidence on record of the participation of the accused, in any of the proceedings, he can move an application under section 321 Cr.P.C for withdrawal from prosecution. During arguments having been made by him, he while referring to the documents available on record forcibly contended that there is no document available on record to connect respondents No. 2 and 3 with the alleged offence. As per Mr. Vaidya, there is no evidence on record of participation of the accused in any proceedings relating to selection of the alternative site as has been alleged by the complainant. He prayed that since the order dated 22.12.2008 has been passed by learned Special Judge after due application of mind, there is no scope, whatsoever, for the interference of this Court and prayed for dismissal of the petition. Mr. Vaidya, learned senior counsel also submitted that scope of interference of this Court is very limited while examining the correctness and validity of order, if any, passed under Section 321Cr.P.C. In this regard, he placed reliance on the judgment passed by Constitution Bench of Hon'ble Apex Court in ***Sheonandan Paswan versus State of Bihar and others (1987)* 1 Supreme Court Cases 288.**

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

18. Before proceeding to decide the controversy, it would be profitable to reproduce the provision of Section 321 Cr.P.C:-

> **321. Withdrawal from prosecution**. ***The Public Prosecutor or Assistant Public Prosecutor in charge of a case may, with the consent of the Court, at any time before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried; and, upon such withdrawal,-***
>
> ***(a) if it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences;***
>
> ***(b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted in respect of such offence or offences: Provided that where such offence-***
>
> ***(i) was against any law relating to a matter to which the executive power of the Union extends, or***
>
> ***(ii) was investigated by the Delhi Special Police Establishment under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or***
>
> ***(iii) involved the misappropriation or destruction of, or damage to, any property belonging to the Central Government, or***
>
> ***(iv) was committed by a person in the service of the Central Government while acting or purporting to act in the discharge of his official duty, and the Prosecutor in charge of the case has not***

> ***been appointed by the Central Government, he shall not, unless he has been permitted by the Central Government to do so, move the Court for its consent to withdraw from the prosecution and the Court shall, before according consent, direct the Prosecutor to produce before it the permission granted by the Central Government to withdraw from the prosecution."***

19. Bare reading of Section 321 Cr.P.C reproduced hereinabove, nowhere spells out any guiding factors grounds, which may be available to public prosecutor for making an application for withdrawal and as such, this Court with a sole view to ascertain the guiding factors available to public prosecutor while moving an application under Section 321 Cr.P.C as well as to learned Court while deciding the same, deemed it fit to refer to the latest judgment passed by Hon'ble Apex Court in ***Bairam Muralidhar versus State of Andhra Pradesh*** **(2014) 10 Supreme Court Cases 380** .

20. In the case referred above, the Hon'ble Apex Court while dealing with the scope of Section 321 Cr.P.C has taken into consideration the law laid down by Hon'ble Apex Court in ***Sheonandan Paswan versus State of Bihar and others*** *(*1987)1 Supreme Court Cases 288; wherein their lordship's while deliberating upon the power of the public prosecutor seeking withdrawal from prosecution under section 321 Cr.P.C as well as power of trial Court to grant permission to withdraw has dealt with each and every aspect of the matter. Constitutional Bench while laying down the guidelines/guiding factors for moving an application under Section 321 Cr.P.C as well as for deciding the same by the Court specifically referred to the basic decision of Apex Court i.e. ***State of Bihar versus Ram Naresh Pandey*** AIR 1957 SC 389 M & 1957 Cri.L.J.567. In ***State of Bihar versus Ram Naresh Pandey***, which was the first case dealing with the interpretation and application of Section 321 Cr.P.C this Court while deliberating on the role of a Public Prosecutor said:-

> ".....it is right to remember that the Public Prosecutor(though an executive officer as stated by the Privy Council in ***Bawa Faqir Singh v. King Emperor 1938 LR 65 IA 388,395*** is, in a larger sense, also an officer of the court and that he is bound to assist the court with his fairly considered view and the court is entitled to have the benefit of the fair exercise of his function. It has also to be appreciated that in this country the scheme of the administration of criminal justice is that the primary responsibility of prosecuting serious offences(which are classified as cognizable offences) is on the executive authorities. Once information of the commission of any such offence reaches the constitute d authorities, the investigation, including collection of the requisite evidence, and the prosecution for the offence with reference to such evidence, are the functions of the executive. But the Magistrate also has his allotted function in the course of these stages. In all these matters he exercises discretionary functions in respect of which the initiative is that of the executive but the responsibility is his."

(P.325&326)

21. The Hon'ble Apex Court in case titled as ***Bairam Muralidhar v. State of Andhra Pradesh(*** supra) while examining the scope of applicability under section 321 Cr.P.C held that it is the obligation of the Public Prosecutor to state what material he has considered which compelled him to move an application under Section 321 Cr.P.C seeking withdrawal of the prosecution. The Hon'ble Apex Court has categorically observed that Public Prosecutor cannot act like the post office on behalf of the State Government, rather he is required to act in good faith, peruse materials on record and form an independent opinion that withdrawal of the case would really sub-serve public interest.

22. Similarly, the Hon'ble Apex Court has observed that while giving consent under Section 321 of the Code, Court is required to exercise its judicial discretion, which is not to be exercised in mechanical manner, rather it is incumbent upon the Court to consider the material

on record to see that the application had been filed in good faith and it is in the interest of public and justice.

23. Before analyzing the material available on record in terms of the law laid down by the Hon'ble Apex Court in the case referred above, it would be profitable to reproduce relevant para No.12 to 22 as under:-

> 12. In the said case, the larger Bench referred the decisions in Bansi Lal v. Chandan Lal(1976) 1 SCC 421), Balwant Singh v. State of Bihar(1977)4 SCC 448), Subhash Chander v. State(Chandigarh Admn) (1980) 2SCC 155, Rajender Kumar Jain v. State(1980) 3 SCC 435, and the principles stated in State of Bihar v. Ram Naresh Pandey (1957 Cri.LJ 567) and eventually came to hold as follows:-
>
>> "99.All the above decisions have followed the reasoning of Ram Naresh Pandey's case and the principles settled in that decision were not doubted.
>>
>> 100.It is in the light of these decisions that the case on hand has to be considered. I find the application for withdrawal by the Public Prosecutor has been made in good faith after careful consideration of the materials placed before him and the order of consent given by the Magistrate was also after due consideration of various details, as indicated above. It would be improper for this Court, keeping in view the scheme of S. 321, to embark upon a detailed enquiry into the facts and evidence of the case or to direct retrial for that would be destructive of the object and intent of the Section. "
>
> 13. In R.M. Tewari, Advocate v. State (NCT of Delhi) (1996)2 SCC 610, this Court while dealing with justifiability of withdrawal from the prosecution the Court referred to Section 321 of the Code and the principle that has been stated in Sheonandan Paswan (Supra) and opined that:-
>
>> "7. It is, therefore, clear that the Designated Court was right in taking the view that withdrawal from prosecution is not to be permitted mechanically by the court on an application for that purpose made by the public prosecutor. It is equally clear that the public prosecutor also has not to act mechanically in the discharge of his statutory function under Section 321 CrPC on such a recommendation being made by the Review Committee; and that it is the duty of the public prosecutor to satisfy himself that it is a fit case for withdrawal from prosecution before he seeks the consent of the court for that purpose.
>>
>> 8. It appears that in these matters, the public prosecutor did not fully appreciate the requirements of Section 321 CrPC and made the applications for withdrawal from prosecution only on the basis of the recommendations of the Review Committee. It was necessary for the public prosecutor to satisfy himself in each case that the case is fit for withdrawal from prosecution in accordance with the settled principles indicated in the decisions of this Court and then to satisfy the Designated Court of the existence of a ground which permits withdrawal from prosecution under Section 321 CrPC."
>
> 14. A three-Judge Bench in Abdul Karim v. State of Karnataka(2000)8 SCC 710 referred to the Constitution Bench judgment in Sheonandan Paswan case (1987) 1 SCC 288) and Bharucha, J (as His Lordship then was) speaking for himself and D.P. Mohapatra, J. observed thus: (Abdul Karim case (2000) 8 SCC 710, SCC p.729, paras 19-20)
>
>> "19. The law, therefore, is that though the Government may have ordered, directed or asked a Public Prosecutor to withdraw from a

prosecution, it is for the Public Prosecutor to apply his mind to all the relevant material and, in good faith, to be satisfied thereon that the public interest will be served by his withdrawal from the prosecution. In turn, the court has to be satisfied, after considering all that material, that the Public Prosecutor has applied his mind independently thereto, that the Public Prosecutor, acting in good faith, is of the opinion that his withdrawal from the prosecution is in the public interest, and that such withdrawal will not stifle or thwart the process of law or cause manifest injustice.

20. It must follow that the application under Section 321 must aver that the Public Prosecutor is, in good faith, satisfied, on consideration of all relevant material, that his withdrawal from the prosecution is in the public interest and it will not stifle or thwart the process of law or cause injustice. The material that the Public Prosecutor has considered must be set out, briefly but concisely, in the application or in an affidavit annexed to the application or, in a given case, placed before the court, with its permission, in a sealed envelope. The court has to give an informed consent. It must be satisfied that this material can reasonably lead to the conclusion that the withdrawal of the Public Prosecutor from the prosecution will serve the public interest; but it is not for the court to weigh the material. The court must be satisfied that the Public Prosecutor has considered the material and, in good faith, reached the conclusion that his withdrawal from the prosecution will serve the public interest. The court must also consider whether the grant of consent may thwart or stifle the course of law or result in manifest injustice. If, upon such consideration, the court accords consent, it must make such order on the application as will indicate to a higher court that it has done all that the law requires it to do before granting consent."

15. Y.K. Sabharwal, J (as His Lordship then was) in his concurring opinion elaborating further on fundamental parameters which are to be the laser beam for exercise of power under Section 321 of the Code opined that: (Abdul Karim case (2000) 8SCC 710, SCC p.739, paras 42-43)

"42. The satisfaction for moving an application under Section 321 CrPC has to be of the Public Prosecutor which in the nature of the case in hand has to be based on the material provided by the State. The nature of the power to be exercised by the Court while deciding application under Section 321 is delineated by the decision of this Court in Sheonandan Paswan v. State of Bihar. This decision holds that grant of consent by the court is not a matter of course and when such an application is filed by the Public Prosecutor after taking into consideration the material before him, the court exercises its judicial discretion by considering such material and on such consideration either gives consent or declines consent. It also lays down that the court has to see that the application is made in good faith, in the interest of public policy and justice and not to thwart or stifle the process of law or suffers from such improprieties or illegalities as to cause manifest injustice if consent is given.

43. True, the power of the court under Section 321 is supervisory but that does not mean that while exercising that power, the consent has to be granted on mere asking. The court has to examine that all relevant aspects have been taken into consideration by the Public Prosecutor and/or by the Government in exercise of its executive function."

16. In Rahul Agarwal v. Rakesh Jain (2005) 2 SCC 379) the Court was dealing with what should be the lawful consideration while dealing with an application for withdrawal under Section 321 of the Code. The Court referred to the decisions in Ram Naresh Pandey (supra), State of Orissa v. Chandrika Mohapatra, Balwant Singh v. State of Bihar (supra) and the authority in Abdul Karim (supra) wherein the earlier decision of the Constitution Bench in Sheonandan Paswan was appreciated and after reproducing few passages from Abdul Karim (supra) ruled that:-

> "10. From these decisions as well as other decisions on the same question, the law is very clear that the withdrawal of prosecution can be allowed only in the interest of justice. Even if the Government directs the Public Prosecutor to withdraw the prosecution and an application is filed to that effect, the court must consider all relevant circumstances and find out whether the withdrawal of prosecution would advance the cause of justice. If the case is likely to end in an acquittal and the continuance of the case is only causing severe harassment to the accused, the court may permit withdrawal of the prosecution. If the withdrawal of prosecution is likely to bury the dispute and bring about harmony between the parties and it would be in the best interest of justice, the court may allow the withdrawal of prosecution. The discretion under Section 321, Code of Criminal Procedure is to be [pic]carefully exercised by the court having due regard to all the relevant facts and shall not be exercised to stifle the prosecution which is being done at the instance of the aggrieved parties or the State for redressing their grievance. Every crime is an offence against the society and if the accused committed an offence, society demands that he should be punished. Punishing the person who perpetrated the crime is an essential requirement for the maintenance of law and order and peace in the society. Therefore, the withdrawal of the prosecution shall be permitted only when valid reasons are made out for the same." (Emphasis added]

17. The obtaining fact situation has to be tested on the anvil of aforesaid enunciation of law. As is demonstrable, the State Government vide GOMs. No. 268 dated 23rd May, 2009 enumerated certain aspects which are reproduced hereinbefore. The reproduction part requires slight clarification. In the order passed by the State Government, the third reference refers to the representation of Shri B. Muralidhar, Sub-Inspector of Police, Kamareddy Town P.S. dated 5.8.2007 and the fourth reference refers to the communication from the Director General, Anti Corruption Bureau, Andhra Pradesh, Hyderabad dated 12.10.2007. Thereafter, the State Government has given its opinion why the case required to be withdrawn. The learned public prosecutor in his application for withdrawal of the prosecution has referred to the Government order and sought permission of the Court. What the public prosecutor has stated is that he has perused the Government order, the material evidences available on record and has applied his mind independently and satisfied that it was a fit case for withdrawal.

18. The central question is whether the Public Prosecutor has really applied his mind to all the relevant materials on record and satisfied himself that the withdrawal from the prosecution would subserve the cause of public interest or not. Be it stated, it is the obligation of the public prosecutor to state what material he has considered. It has to be set out in brief. The Court as has been held in Abdul Karim's case, is required to give an informed consent. It is obligatory on the part of the Court to satisfy itself that from the material it can reasonably be held that the withdrawal of the prosecution would serve the public interest. It is not within the domain of the Court to weigh the material. However,

it is necessary on the part of the Court to see whether the grant of consent would thwart or stifle the course of law or cause manifest injustice. A Court while giving consent under Section 321 of the Code is required to exercise its judicial discretion, and judicial discretion, as settled in law, is not to be exercised in a mechanical manner. The Court cannot give such consent on a mere asking. It is expected of the Court to consider the material on record to see that the application had been filed in good faith and it is in the interest of public interest and justice. Another aspect the Court is obliged to see whether such withdrawal would advance the cause of justice. It requires exercise of careful and concerned discretion because certain crimes are against the State and the society as a collective demands justice to be done. That maintains the law and order situation in the society. The public prosecutor cannot act like the post office on behalf of the State Government. He is required to act in good faith, peruse the materials on record and form an independent opinion that the withdrawal of the case would really subserve the public interest at large. An order of the Government on the public prosecutor in this regard is not binding. He cannot remain oblivious to his lawful obligations under the Code. He is required to constantly remember his duty to the Court as well as his duty to the collective.

19.In the case at hand, as the application filed by the public prosecutor would show that he had mechanically stated about the conditions-precedent. It cannot be construed that he has really perused the materials and applied his independent mind solely because he has so stated. The application must indicate perusal of the materials by stating what are the materials he has perused, may be in brief, and whether such withdrawal of the prosecution would serve public interest and how he has formed his independent opinion. As we perceive, the learned public prosecutor has been totally guided by the order of the Government and really not applied his mind to the facts of the case. The learned trial Judge as well as the High Court has observed that it is a case under the Prevention of Corruption Act. They have taken note of the fact that the State Government had already granted sanction. It is also noticeable that the Anti Corruption Bureau has found there was no justification of withdrawal of the prosecution.

20. A case under the Prevention of Corruption Act has its own gravity. In Niranjan Hemchandra Sashittal and another v. State of Maharashtra(2013) 4scc 642)] while declining to quash the proceeding under the Act on the ground of delayed trial, the Court observed thus:

> "25. In the case at hand, the appellant has been charge-sheeted under the Prevention of Corruption Act, 1988 for disproportionate assets. The said Act has a purpose to serve. Parliament intended to eradicate corruption and provide deterrent punishment when criminal culpability is proven. The intendment of the legislature has an immense social relevance. 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. Be it noted, system of good governance is founded on collective faith in the institutions. If corrosions are allowed to continue by giving allowance to quash the proceedings in corruption cases solely because of delay without scrutinizing other relevant factors,

a time may come when the unscrupulous people would foster and garner the tendency to pave the path of anarchism."

21. Recently, in Dr. Subramanian Swamy v. Director, CBI(2014) 8 SCC 682, the Constitution Bench while declaring Section 6A of the Delhi Special Police Establishment Act, 1946, which was inserted by Act 45 of 2003 as unconstitutional has opined that:-

> "59. It seems to us that classification which is made in Section 6-A on the basis of status in the Government service is not permissible under Article 14 as it defeats the purpose of finding prima facie truth into the allegations of graft, which amount to an offence under the PC Act, 1988. Can there be sound differentiation between corrupt public servants based on their status? Surely not, because irrespective of their status or position, corrupt public servants are corrupters of public power. The corrupt public servants, whether high or low, are birds of the same feather and must be confronted with the process of investigation and inquiry equally. Based on the position or status in service, no distinction can be made between public servants against whom there are allegations amounting to an offence under the PC Act, 1988."
>
> And thereafter, the larger Bench further ruled: (SCC p.726, para 60)
>
> > "60. Corruption is an enemy of the nation and tracking down corrupt public servants and punishing such persons is a necessary mandate of the PC Act, 1988. It is difficult to justify the classification which has been made in Section 6-A because the goal of law in the PC Act, 1988 is to meet corruption cases with a very strong hand and all public servants are warned through such a legislative measure that corrupt public servants have to face very serious consequences." And again, the larger Bench observed:
>
> "70. Office of public power cannot be the workshop of personal gain. The probity in public life is of great importance. How can two public servants against whom there are allegations of corruption of graft or bribe taking or criminal misconduct under the PC Act, 1988 can be made to be treated differently because one happens to be a junior officer and the other, a senior decision maker.
>
> 72. Corruption is an enemy of nation and tracking down corrupt public servant, howsoever high he may be, and punishing such person is a necessary mandate under the PC Act, 1988. The status or position of public servant does not qualify such public servant from exemption from equal treatment. The decision making power does not segregate corrupt officers into two classes as they are common crime doers and have to be tracked down by the same process of inquiry and investigation."

22. We have referred to these authorities only to show that in the case at hand, regard being had to the gravity of the offence and the impact on public life apart from the nature of application filed by the public prosecutor, we are of the considered opinion that view expressed by the learned trial Judge as well as the

> High Court cannot be found fault with. We say so as we are inclined to think that there is no ground to show that such withdrawal would advance the cause of justice and serve the public interest. That apart, there was no independent application of mind on the part of the learned public prosecutor, possibly thinking that the Court would pass an order on a mere asking.

24. Careful perusal of the judgment passed by Hon'ble Apex Court referred hereinabove, clearly suggest that foremost guiding factors for moving an application for withdrawal from the prosecution would be " ***interest of justice***" and in that regard the public prosecutor to seek withdrawal from the prosecution in furtherance of the cause of public justice. It is incumbent upon the learned P.P to show that he may not be able to produce sufficient evidence to sustain the charge. Though, as per Section 321 Cr.P.C prosecution can be withdrawn at any stage, even after the framing of the charge. But at this stage, learned Court as well as learned Public Prosecutor both are expected to keep in mind that on same set of evidence, cognizance, if any, was taken by Court at the time of presentation of challan under Section 173 Cr.P.C and thereafter at the time of framing of charge under Section 288 Cr.P.C.

25. Further perusal of the judgment rendered by the Constitutional Bench as reproduced above suggest that the public prosecutor is expected to justify his application moved under section 321 Cr.P.C for withdrawal from the prosecution by clearly stating that same is being done in the interest of justice and in administration of justice. Admittedly, public prosecutor is empowered to seek withdrawal in terms of Section 321 Cr.P.C but the basic principle as emerge from the judgment referred above for withdrawal would be "advancement of administration of justice" in furtherance of administration of public justice." It clearly emerge from the judgment referred above that public prosecutor cannot be allowed to maintain the application for withdrawal from prosecution solely on the ground that no sufficient evidence is available against the accused.

26. In the present case, as emerge from the record, learned public prosecutor moved an application bearing Cr. M.A No. 131 of 2008, titled as ***State versus Chet Ram & others*** under Section 321 Cr.P.C before learned Special Judge, Bilaspur praying therein for permission to withdraw case from the prosecution. It would be apt to reproduce the contents of the application as under:-

> ***" That the statement of the witnesses and also relevant record of the case annexed with the case file clearly shows that the people of Barmana had made a representation to the Hon'ble Chief Minister in the year, 1997 for shifting their diesel pump of the Ex. Serviceman corporation from main road to some other suitable place, since it was making a hindrance and there had been blocked of road/ traffic and in general the flow of traffic was obstructed due to the present diesel pump of the Ex.-servicemen corporation. The letter of the S.P. Bilaspur also conveyed to the chairman-cum-Managing Director of H.P Ex. Serviceman corporation Hamirpur for shifting of the diesel pump to some other suitable place and there had been a correspondence with the CM/D. of the Hindustan Petroleum and with the D.C. Bilaspur and also with the Commissioner-cum-Secretary (GAD) to the Govt. of H.P. Shimla for shifting of the diesel pump to a suitable place and purchase of land for the installation of the diesel pump. The Managing Committee comprising of members of the Ex. Serviceman Corporation decided that the suit land will be purchased in Barmana and the present diesel pump be shifted to that place.***
>
> ***3. That the documents annexed with the challan also show that there had been a proper permission from the Govt. for installation/shifting of the diesel pump to a suitable place and the Managing committee of the***

Ex. Servicemen corporation had also consented for the purchase of land and installation of the diesel pump.

4. That the Managing Committee of Ex. Serviceman corporation Hamirpur was neither against the purchase of the land in Barmana nor for shifting the diesel pump to a place that had been purchased.

5. So for the statement of the witnesses are concerned they are to be seen in consonance with the record of the case which could clearly reflect and the case is totally weak and there are no chances of success of the case. The documents annexed with the case file are in favour of the accused persons and the oral evidence cannot over take the legal sanctity of the documents, which are annexed with the case file.

6. That the withdrawal of the case will be in the interest of public and exchequer of the Govt. There is also no conclusive proof of the statements on record to prove the guilt of the accused persons with the intention to have committed the offences they have been faced trial under the provisions of the IPC and PC Act.

7. That prior to the letter dated 21.3.1999, the accused had not participated in any meetings for selection of site and shifting of patrol pump from the existing petrol pump site. The sale transactions were not in exercise then market value."

27. Close scrutiny of the averments contained in the application suggest that people of Barmana made a representation to the Hon'ble Chief Minister for shifting their diesel pump owned by Ex. Servicemen Corporation to other suitable place as it was causing hindrance and blockade of the road/traffic. Accordingly, Superintendent of Police, Bilaspur conveyed aforesaid decision to the Chairman-Cum- Managing Director of the corporation i.e. respondent No.2. It also emerge from the averments contained in the application that there had been a correspondence with the C.M./D. of the Hindustan Petroleum as well as Deputy Commissioner, Bilaspur and also with the Commissioner-cum-Secretary(GAD) to the Govt. of H.P for shifting the diesel pump to the suitable place and purchase of land for installation of diesel pump. As per averments contained in the application, the Managing Committee comprising of members of corporation, decided that suitable land will be purchased at Barmana and present diesel pump would be shifted to that place. There is no specific mention of document, if any, in the application but it is averred in the application that proper permission from the government for installation of the diesel pump to a suitable place was obtained and land in question was purchased for setting up diesel pump with the consent of State as well as corporation. Applicant specifically stated that withdrawal of the case will be in the interest of public and exchequer of the government since there is no conclusive proof on record to prove the guilt of the accused persons. In para-7 of the application it has been stated that prior to issuance of notice dated 21.3.1999, accused (respondent No.2) had not participated in any meetings for shifting of diesel pump from the existing site and sale transactions were not excessive of the market value. Though, there is mention with regard to the documents but as have been observed above, no documents have been attached with the application filed under Section 321 Cr.P.C to substantiate the averments contained in the application.

28. Learned counsel representing the petitioner while advancing his arguments had made this Court to travel through various documents available on the file of learned trial Court below suggestive of the fact that respondents No.2 misusing his official position (Chairman of Committee), benefited respondent No. 3, who happened to be his son, by making corporation to purchase piece of land owned by his son for shifting of the diesel pump in view of advise rendered by District Administration in that regard. Admittedly, respondent No. 2 i.e Sh. Chet Ram Ex. Lt. Col. was the Chairman of the corporation at the relevant time, whereas respondent No.3 Sh. Pawan Kumar is his son. On the basis of complaint made under Section 13(2) of P.C. Act and Sections 420,418, 465,471, 472 read with Section 120-B of IPC, Court of learned Special

Judge, Bilaspur, referred the investigation to police under Section 156(3) of the Code of Criminal Procedure. Pursuant to the directions issued by learned Special Judge, police carried out the investigation and registered FIR 59/2002, dated 3.4.2002 and thereafter presented the challan before the Court of learned Special Judge, Bilaspur enclosing therewith documents to prove its case beyond reasonable doubt against the accused/ respondents No. 2 and 3.

29. Documents available on the record of learned trial Court below suggest that one Sh. A.P.Gautam, Colonel (Retd) Vice Chairman of the corporation sent a communication to the Chairman-cum-Managing Director of the Corporation intimating therein that Hon'ble Chief Minister of Himachal Pradesh has desired that diesel pump owned by the corporation be shifted immediately from the existing site to another suitable site at Barmana as it is causing obstruction in the free flow of traffic. He also invited the attention of the Chairman to the letter No. 14904-5, dated 1st August, 1997 regarding shifting of pump. Thereafter, vide communication dated 12th March, 1998, respondent No.2, the then, Chairman of the corporation sent communication to the Deputy Commissioner, Bilaspur requesting him to provide government land at Barmana for setting up diesel pump so that traffic problem is resolved. There is a document available on record suggestive of the fact that the matter was taken up by the Corporation for providing government land but ultimately vide communication dated 19th June, 1998, Deputy Commissioner, Bilaspur advised the Chairman of the Corporation to purchase some private land for setting up diesel pump so that old diesel pump is shifted to the new place. Aforesaid communication was sent by the Deputy Commissioner on 19th June, 1998 but it appears that no action, whatsoever, was taken at that time by the Chairman-cum-Managing Director of the corporation so far as purchase of private land for setting up diesel pump is concerned. Vide communication dated 21st March, 1999, respondent No.2,the then, Chairman-cum-Managing Director of the Corporation sent a communication to Commissioner-Cum-Secretary (GAD) to the Government of Himachal Pradesh, wherein it was stated as under:-

> ***"Keeping in view the problems of truck parking and frequent observations of Police Department, a case for allotment of Govt. suitable land on lease basis was sent to the Deputy Commissioner, Bilaspur. The District Administration directed the revenue department to search suitable land for allotment to this Corporation for the above mentioned purchase. After searching, the revenue department has intimated that no suitable Govt. land is available at Barmana for this purpose.***
>
> ***To get rid of the problems of truck parking being faced by the Ex-Serviceman Truck operations and the Police Department's interference, this Corporation now decided to purchase 2 bighas of land for shifting the consumer diesel pump from its existing place to another suitable place. A copy of one year estimated cost is enclosed herewith. Owner of the land has given his consent to give land to Corporation provided the cost of registration or any other overhead charges are borne by the Corporation.***
>
> ***It is also brought to your notice that it is very difficult to find a suitable piece of land for installation of curve side pump at Barmana. Local market rates prevailing in the market are much higher than the average market rates given by the Patwari.***
>
> ***In view of the facts mentioned above, it is requested that the sanction may please be*** **accorded at the earliest to finalize the deal.**

30. Perusal of the letter referred hereinabove suggest that the corporation had decided to purchase two bighas of land for shifting the diesel pump to another suitable place. There is specific mentioning with regard to owner of the land, who consented to give land to the corporation for setting up of the petrol pump but no specific name of the seller was disclosed in the letter dated 21st March, 1999. There are other documents collected on record by the

Investigating Agency suggestive of the fact that the piece of land, which was proposed to be purchased by the corporation for setting up diesel pump was inspected by the Managing Director of Hindustan Petroleum Corporation Limited, who after inspecting the spot had given his NOC also. During arguments as well as while perusing the record of court below this Court could also lay its hand to one document dated 1.3.2000 allegedly written by respondent No.3 namely Pawan Kumar, who happened to be son of respondent No.2 addressed to Dy. Controller(F& A) of corporation, which is reproduced as under:-

> ***" I want to bring it to your notice that because of the strategic location and my piece of land, the price of land has been fluctuating quite a bit in the past few years. I want to sell this land at a price based upon the 5 years average rate of land plus 30% solatium. I would request you to take into consideration and please speed up the proceedings so as to finalize the transaction. The Copy of five years average rate has been enclosed herewith"***

31. Perusal of the contents of this letter referred above clearly suggest that Sh. Pawan Kumar, respondent No.3 was in contact with the corporation and had been negotiating the price of the land, which he had purposed to sell to the corporation for setting up diesel pump. While examining the evidence available on record, this Court could also lay its hand to the minutes of the various meetings of the Board of Directors held during the relevant period. Perusal of the minutes of the Board meeting as available on record, nowhere suggest that respondent No.2 ever brought to the notice of the members of the Board that land purposed to be purchased for setting up diesel pump belongs to his son respondent No.3.

32. Apart from above, two sale deeds have been adduced on record by the Investigating Agency to demonstrate that how respondent No.3 caused huge financial loss to the corporation. Investigating Agency has also placed on record sale deeds dated 12.6.2000 and dated 26th May, 2000 suggestive of the fact that respondent No.3 Pawan Kumar Son of Sh. Chet Ram, respondent No.2 purchased two bighas of land for total consideration of Rs.4,00,000/-. It clearly emerge from the record that accused No.3 purchased land, which he ultimately sold to corporation, from one Sh. Krishnu son of Sh. Jangi on 6.4.1999 for total consideration of Rs. 4 lacs but later he sold the same piece of land to corporation for total consideration of Rs.8,22,800/-. Investigating Agency has also adduced on record documents to demonstrate that the person from whom the land was purchased by respondent No. 3, was later on given appointment at petrol pump owned by corporation. This Court solely with a view to ascertain the correctness and genuineness of the averments contained in the instant revision petition as well as submissions having been made on behalf of the counsel representing the petitioner at the time of arguments, critically analyzed the documents made available on record of the trial Court. This Court had an occasion to peruse the statement of the Board members recorded by the police under section 161 Cr.PC during investigation. None of the Board members, whose statements have been recorded under section 161 Cr.P.C stated that they were aware of the fact that the land purposed to be purchased for setting up diesel pump actually belonged to respondent No.3, who happened to be son of respondent No.2. There is revenue record available on record on the Court file of the learned trial Court suggestive of the fact that the piece of land, sold to the corporation by respondent No.3 for setting up diesel pump is/was not abutting the National Highway, rather two plots exists between National Highway and land purchased by the corporation from respondent No.3. Investigating Agency further collected ample evidence on record, which as per its wisdom could be sufficient to hold that respondents No.2 and 3 guilty of having committed the offences as mentioned above and presented the challan before the competent Court of law. Record suggest that the learned Special Judge, Bilaspur taking cognizance of the material made available on record issued notices to the respondents No.2 and 3. Perusal of the order dated 7.6.2005 available on Court file also suggest that copies of challan filed by the police was made available to the accused by the Court of Learned Special Judge, Bilaspur. Thereafter, surprisingly no charges whatsoever, were ever framed in the proceedings initiated by the Court of learned Special Judge, Bilaspur on the basis of the challan filed by police. This Court is shocked to see

that after presentation of challan, matter was listed for more than 25 times for framing of charge, but on every date time was procured on one pretext or other. Suddenly, after three years of presentation of the challan, learned Public Prosecutor moved an application dated 22.4.2008 under Section 321 Cr.P.C seeking permission to withdraw the case from the prosecution, contents whereof have been already reproduced hereinabove. Learned Pubic Prosecutor stated in the application that withdrawal of the case will be in the interest of justice and there is no sufficient evidence to prove the guilt of the accused person. Learned Special Judge, Bilaspur vide order dated 22.12.2008 allowed the application filed by learned public prosecutor and granted him permission as sought vide application under reference.

33. Perusal of the impugned order dated 22.12.2008 suggest that learned Special Judge while passing the impugned order also scanned the evidence on record and on the basis of the averments contained in the application as well as record made available to him concluded that there is overwhelming documentary evidence in favour of the accused and as such, accused ought not to be subjected to agony and unnecessary trial. But this Court while examining the correctness/genuineness of the averments contained in application as well as submissions made during the proceedings of the case travelled through the entire evidence, be it ocular or documentary adduced on record by Investigating Agency and really finds it difficult to agree with the aforesaid findings of the Special Judge. After perusing the evidence on record as has been discussed above, this Court is really finding it difficult to digest the observation/ finding of Special Judge, wherein while allowing the application under Section 321 Cr.P.C it has given clean chit to accused/respondents No.2 and 3.

34. Now, at this stage, this Court needs to determine whether order dated 22.12.2008 passed by learned Special Judge is strictly in terms of Section 321 Cr.P.C, where it has been specifically provided that the public prosecutor may with the consent of the Court withdraw the prosecution of any person of any offence before the pronouncement of the judgment. Similarly, this Court needs to examine that under what circumstances public prosecutor moved instant application under section 321 Cr.P.C, seeking withdrawal from the prosecution that too after three years of the presentation of the challan. Undoubtedly, section 321 Cr.P.C, clearly empowers the public prosecutor in charge of the case to withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried, before the judgment is pronounced in the case but with the consent of the Court.

35. Section 321 Cr.P.C needs three requisites to make an order under it valid:(1) The application should be filed by a Public Prosecutor who is competent to make an application for withdrawal,(2) he must be in charge of the case, (3) the application should get the consent of the Court before which the case is pending.

36. At the cost of repetition, it is again reiterated that bare reading of Section 321 Cr.P.C, leaves no scope for other interpretation to conclude that the public prosecutor can seek withdrawal from the prosecution at any stage before the pronouncement of judgment but taking note of the law laid down by the Hon'ble Apex Court from time to time as has been discussed and deliberated upon in detailed judgment referred in above, withdrawal of prosecution can be allowed only in the interest of justice and there should be ample evidence on record to suggest that public prosecutor seeking withdrawal from prosecution in furtherance of cause of public justice. Before, making an application under section 321 Cr.P.C public prosecutor is required/expected to apply his mind to all the relevant material made available on record by the Investigating Agency and satisfy himself that withdrawal from the prosecution would subserve the public interest or not. Whenever, public prosecutor moves an application under section 321, it is his bounden duty to state in detail that what material actually he considered, which compelled him to move an application for withdrawal. Collective reading of the judgment referred hereinabove as well as law laid down by the Hon'ble Apex Court from time to time clearly suggest the public prosecutor while moving an application under Section 321 Cr.P.C is required/expected to form an independent opinion on the basis of the material on record that with the withdrawal of

the case, public interest at large would be served. If public prosecutor moves an application under section 321 Cr.P.C for withdrawal after filing of challan or framing of charge it becomes more important for him to state in the application that what are those compelling circumstances which led him to file an application under Section 321 Cr.P.C. because it is only public prosecutor who presents challan under section 173 Cr.P.C and thereafter at the time of framing of charge persuades the Court to frame charges against the accused solely relying upon the documents adduced on record by the Investigating Agency suggestive of the fact that prima-facie case exist against the accused. Once investigating agency after completion of the investigation comes to a conclusion that a prima facie case exists against the accused, it submits police report along with required documents to be relied upon to the public prosecutor for filing challan under Section 173 Cr.P.C in the competent Court of law. If at that stage, learned public prosecutor comes to the conclusion that it is a fit case, where on the basis of evidence adduced on record, conviction can be recorded against the accused, he files challan under section 173 Cr.P.C. Similarly, when the challan under section 173 Cr.P.C is filed in the competent Court of law and Court on the basis of material made available to him comes to the conclusions that prima-facie case exists against the accused and issue notices to the accused. But fact remains, that in both the eventuality as referred above, public prosecutor as well as learned judge while presenting the challan as well as taking cognizance of challan under Section 173 applies their mind and then only notices are issued to the accused. Once Court as well as public prosecutor comes to the conclusion at the time of filing of challan under section 173 Cr.P.C that there is sufficient material on record to proceed against the accused, it may not be later possible for the Court on the similar material to permit the public prosecutor to withdraw from the prosecution on mere application moved under Section 321 Cr.P.C.

37. No doubt during the pendency of the trial some material may emerge, which creates doubt on the veracity of the prosecution case and in that regard public prosecutor is empowered to apply for withdrawal from prosecution but in that eventuality prosecutor is not to move an application under Section 321 in cursory manner, rather he is expected to indicate/state in the application that for these reasons, it may not be possible for the prosecution to prove case against the accused. Apart from above, public prosecutor needs to make out a case that withdrawal of prosecution is in public interest and if same is not allowed, it will be against the interest of justice.

38. Similarly, section 321 Cr.P.C while empowering the public prosecutor to move an application for withdrawal from prosecution also provides that withdrawal, if any, would be with the consent of the Court, meaning thereby, that application moved by public prosecutor under Section 321 Cr.P.C. can not only be allowed in mechanical manner without the consent of the Court. Plain reading of Section 321 Cr.P.C. somehow suggest that public prosecutor has independent power under Section 321 to withdraw prosecution, at any stage, because admittedly Section 321 Cr.P.C does not provide guidelines factor/circumstances under which public prosecutor can move an application. But careful reading of Section 321 Cr.P.C, wherein it has been specifically mentioned that "with the consent of the Court" certainly indicates towards the duly imposed/cast upon the Court by the legislation to ascertain whether the application moved by the public prosecutor is in good faith or in the public interest or not. Court while examining the application under Section 321 Cr.P.C must consider whether public prosecutor has considered the material and reached to the conclusion that withdrawal from the prosecution would serve the public interest. Similarly, duty is cast upon the Court while considering the application under Section 321 Cr.P.C to ensure that grant of consent, if any, may not result in thwarting/ stifling of the course of law or cause manifest injustice.

39. The public prosecutor while moving an application under Section 321 Cr.P.C must state that he is satisfied on the basis of material available on record that no public interest at all would be served in case prosecution is allowed to continue. Similarly, he must state in application that he has considered all the relevant materials adduced on record by the investigating agency but he is of the opinion that it may not be sufficient to hold accused guilty of

having committed the offence. Similarly, Court while granting permission is not expected to decide the same as a matter of routine merely on the basis of the averments contained in the application, rather Court is expected to consider all the relevant aspect which has been set in for consideration by the public prosecutor and no permission, if any, can be granted on mere asking of the learned public prosecutor. The Court should be satisfied that the matter adduced on record by the investigating agency may not be sufficient to hold the accused guilty of having committed offence. But above all, Court must be satisfied that withdrawal of public prosecutor from the prosecution is in public interest. The Court before deciding application under section 321 is expected to satisfy itself that before moving an application, learned public prosecutor has considered the material in good faith and has come to the conclusion that withdrawal from the prosecution will serve public interest. The Hon'ble Apex Court in the judgment referred above, has specifically observed that while deciding the application, Court must be consider whether grant of consent would thwart or stifle the course of law.

40. Now after taking into consideration the observation as well as guidelines/ factors as emerge from the judgment passed by the Hon'ble Apex Court hereinabove, this Court would be critically analyzing the material available on record to explore whether application filed by the public prosecutor under Section 321 Cr.P.C in the case was strictly in terms of guidelines/ factors which have been framed/formulated by the Hon'ble Apex Court from time to time while deliberating upon the scope of Section 321 Cr.P.C Similarly, on the basis of law as referred above, this Court would be attempting to ascertain whether impugned order passed by the Special Judge granting permission to withdraw from the prosecution was based upon the correct principles as have been culled out in the judgments referred hereinabove.

41. In the present case, interestingly, while perusing the record of the case, this court found that after 7.6.2005, no proceedings, whatsoever, have been conducted in the present case by the Court below after issuance of notices to the respondents. Records suggest that after presentation of challan, matter was listed on 25 dates for framing of charge but nothing was done. Thereafter, one fine morning learned years public prosecutor moved an application under section 321 Cr.P.C, which appears to be totally cryptic. It has averred in the application that case is totally weak and there are no chances of success of the case. But interestingly in para-5 of the application, public prosecutor has stated that documents, annexed with the case are in favour of the accused persons and the oral evidence, cannot over take the legal sanctity of the documents which are annexed with the case file, meaning thereby, that even at the stage, public prosecutor was having one set up of evidence be it ocular, suggestive of the fact that prima-facie case exist against the accused. Public prosecutor has simply sought withdrawal from the case from the prosecution in the interest of public and exchequer of the Government but there are no details that in what manner withdrawal of prosecution would serve the public interest. Rather para-7 of the application, itself suggest that somewhere in his mind even public prosecutor also knows that accused had actively participated in the selection of site for shifting the petrol pump because in this para it has been stated that prior to issuance of letter dated 21.3.1999 accused had not participated in any proceedings. But fact remains that transaction, if any, took place after 21st March, 1999, wherein admittedly respondent No.2 being Chairman of the corporation got the land of respondent No.3, who happened to be his son, purchased by corporation that too at exorbitant prices. Though, similarly learned Judge while allowing the application has stated in his order that he has scanned the record but in view of the minute scrutiny of record made by this Court in the present case, aforesaid statement of learned Special Judge does not appear to be correct, rather this Court is compelled to draw conclusion that the learned trial Court granted the permission to withdraw from the prosecution in cursory manner, merely on the basis of the averments contained in the application moved by the public prosecutor without bothering to look into the material adduced on record by the investigating agency at the time of presentation of challan under Section 173 Cr.P.C. As has been observed above, it was only this material made available to learned Judge by the public prosecutor at the time of presenting the challan under section 173 Cr.P.C, which persuaded/compelled him to

conclude at that time that prima-facie case exist against the accused and accordingly notices were issued.

42. Moreover, court below while deciding the application under section 321 Cr.P.C lost sight of the fact that accused No.1, who happened to be Chairman of the corporation has misused his official position by making corporation to purchase land of his son respondent No.3 that too on exorbitant prices. This Court is of the view that when element of corruption as clearly emerge from the record, was involved in the case, court below should have exercised due care and caution while deciding the application for withdrawal of prosecution moved by the public prosecutor.

43. It has clearly emerged from the record that accused being chairman of the corporation, while making corporation to purchase the land from his son hoodwinked all the members of the Board because at no point of time respondent No.2 disclosed to the members of the Board that the land proposed to be purchased is owned by his son. Similarly, accused No.2 misusing his official position procured approval from the government for the purchase of land of his son concealing material fact that the land is not abutting to the National Highway, rather 2-3 plots exists in between National Highway and land proposed to be purchased. Court below also failed to consider/appreciate that despite purchasing land spending Rs. 8,22,800/-, no petrol pump could be set up on the new site till date.

44. Consequently, in view of the detailed discussion made hereinabove as well as law laid down by the Hon'ble Apex Court as referred hereinabove, this Court is of the view that no grounds, whatsoever were available to the public prosecutor to seek withdrawal from the prosecution, especially any ground suggestive of the fact that withdrawal would be in furtherance of the cause of justice and serve the public interest. Similarly, Court is of the view that the learned court below while granting permission has also not acted strictly in terms of the principles/guidelines carved out in the judgment passed by Hon'ble Apex Court referred supra and as such, order passed by learned special judge deserves to be quashed and set-aside. Accordingly, criminal revision petition is allowed and impugned order dated 22.12.2008, passed by learned Special Judge, Bilaspur allowing the application filed by the public prosecutor under Section 321 Cr.P.C for permission to withdraw the case from the prosecution in case FIR No.59/2002, dated 3.4.2002, under Section 418,420,120-B IPC & 13(2) Prevention of Corruption Act, is quashed and set-aside. The Court below is directed to proceed with the matter on the basis of the challan filed by the investigating Agency and conclude the trial expeditiously.

45. Needless to say, Court below while deciding the case at hand would not be influenced by any of the observations made by this Court while deciding the present revision petition and shall decide the case at hand purely on the merits/ evidence available on record without being imbued by any observations/findings made by this Court while deciding the present petition.

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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. 2983 of 2015 along with CWP Nos. 2984, 2985, 2986, 2991, 2992, 2993 and 2994 of 2015
Judgment reserved on: 16.7.2016
Date of Decision: 26.7.2016.

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1. CWP No. 2983 of 2015

Krishan ...Petitioner

Versus

Union of India and others. ...Respondents

2. CWP No. 2984 of 2015
Hari Singh. …Petitioner
Versus
Union of India and others. …Respondents
3. CWP No. 2985 of 2015
Basant Ram. …Petitioner
Versus
Union of India and others. …Respondents
4. CWP No. 2986 of 2015
Rashamu. …Petitioner
Versus
Union of India and others. …Respondents
5. CWP No. 2991 of 2015
Soma Devi. …Petitioner
Versus
Union of India and others. …Respondents
6. CWP No. 2992 of 2015
Paras Ram. …Petitioner
Versus
Union of India and others. …Respondents
7. CWP No. 2993 of 2015
Phihun Ram. …Petitioner
Versus
Union of India and others. …Respondents
8. CWP No. 2994 of 2015
Niki Devi. …Petitioner
Versus
Union of India and others. …Respondents

Constitution of India, 1950- Article 226- It was pleaded that the properties of the petitioner have been directly and indirectly damaged on account of tunneling work being carried out by respondent for the development of four lane road from Kiratpur to Ner Chowk Section of NH-21 from Km 73.2 to Km 186.5– respondent stated that joint inspection was carried out, in which minor cracks were seen in the houses and cowsheds of the residents, which were old and not due to blasting and vibrations - a committee was constituted by Sub Divisional Collector, Sundernagar for evaluating loss/damage to the houses of the petitioners – respondent further claimed that they had taken the precautionary measures - held, that dispute involves adjudication of the facts - the Court would be required to determine whether the properties of the petitioners were damaged and only after determining the same, the individual claims of compensation can be determined by leading evidence and cross-examination of the witnesses- compensation can be awarded in exercise of writ jurisdiction, where facts are not disputed - an alternative and efficacious remedies of approaching the civil Court is available- petition disposed of with liberty to the petitioners to approach the Civil Court. (Para-7 to 16)

Cases referred:
State of Kerala and others Vs. M.K. Jose (2015) 9 SCC 433

For the Petitioner(s): Mr.Yudhvir Singh Thakur, Advocate.
For the Respondents: Mr. Ashok Sharma, Assistant Solicitor General of India with Mr.Ajay Chauhan, Advocate, for respondent No. 1.

Ms.Jyotsna Rewal Dua, Senior Advocate, with Ms.Charu Bhatnagar, Advocate, for respondents No. 2 and 3.

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. 4 to 6.

Mr.Suneet Goel, Advocate, for respondent No. 7.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

Since common question of law and fact arises for consideration in these petitions, they were all taken up together for hearing and are being disposed of by a common judgment.

2. With the consent of parties, CWP No. 2983 of 2015 is taken as the lead case.

3. The precise grievance of the petitioner is that on account of tunneling work being carried out by the respondents for development of four lane road from Kiratpur to Ner Chowk Section of NH-21 from Km 73.200 to Km 186.500 in the State of Punjab/Himachal Pradesh, their properties (houses, orchard, agricultural land) have directly and indirectly been damaged and therefore, should be compensated for the same and have prayed for the following reliefs:-

"(i) That the respondents may be directed to take immediate steps either to acquire or to protect the property (houses, orchard and agricultural land etc.) of the petitioner.

(ii) That necessary direction may be issued to appoint some expert committee to assess the damage caused to the property of the petitioner because of the act of the respondents.

(iii) That the respondents may be directed to compensate the petitioner for the loss he has suffered because of damage of his property due to the construction of tunnel-5.

(iv) That the respondents may be directed to produce entire record pertaining to the case and they may burden with cost."

4. The State authorities, who have been arrayed as respondents No. 4 to 6 in the petitions have placed on record various joint inspection reports and it is averred that during the spot inspection by respondent No. 6 on 16.5.2015 in the presence of petitioners, local residents and representatives of respondent No. 7 (Executing Agency), some minor cracks were seen in the houses and cowsheds of the residents, which were observed to be old and not due to blasting vibration and had been caused naturally with passage of time, as most of the houses were old. It is further submitted that respondent No. 6 i.e. Sub Divisional Collector, Sunder Nagar had constituted a committee vide letter dated 31.7.2015 for evaluating the loss/damage incurred to the houses of the petitioners, which reads thus:-

"The Executive Engineer, HPPWD, Sundernagar, Mandi, H.P. has verified and approved the loss in the shape of restoration of the damages to these built up structures as under:-

Sr. No.	*Name of owner with address*	*Amount for restoration for the damage assessed*
1.	*House of Sh. Phiun Ram s/o late Sh. Jindu Ram resident of village Gamohu, P.O. Kangoo, Tehsil Sundernagar, Distt. Mandi, H.P.*	*Rs.25,612.00*

2.	*House of Sh. Basant Ram s/o Krishan resident of village Gamohu, P.O. Kangoo, Tehsil Sundernagar, Distt. Mandi, H.P.*	*Rs.891.00*
3.	*Residential house of Smt. Nikki Devi D/o Durga Ram resident of village Gamohu, P.O. Kangoo, Tehsil Sundernagar, Distt. Mandi, H.P.*	*Rs.8216.00*
4.	*House of Sh. Hari Singh s/o late Sh. Shawanu Ram resident of village Gamohu, P.O. Kangoo, Tehsil Sundernagar, Distt. Mandi, H.P.*	*Rs. NIL*
5.	*House of Sh. Krishan Chand s/o late Sh. Sadh Ram resident of village Gamohu, P.O. Kangoo, Tehsil Sundernagar, Distt. Mandi, H.P.*	*Rs.872.00*
6.	*House of Sh. Paras Ram s/o late Sh. Dhungal resident of village Gamohu, P.O. Kangoo, Tehsil Sundernagarh, Distt. Mandi, H.P.*	*Rs.1370.00*
7.	*House of Smt.Soma Devi w/o late Sh. Dagu Ram resident of village Gamohu, P.O. Kangoo, Tehsil Sundernagar, Distt. Mandi, H.P.*	*Rs.2049.00*

5. On the other hand the Executing Agency i.e. respondent No. 7 in its reply has clearly averred that the grievance of the petitioners have already been redressed, as the work of the tunnel was stopped on 13.9.2015 and earlier to that all precautionary measures had been taken, so as to ensure that no direct or indirect damage is caused to the property of the petitioners as well as the residents of the area. It is averred that the small portion of land has sunk in tunnel alignment due to collapse of muck at tunnel face, but no other damage was noticed in the area.

6. In addition to the aforesaid, we may also make mention of CMP No. 2641 of 2016 preferred by the petitioner for placing additional particulars on record whereby report submitted by Mining Officer is sought to be placed on record, wherein he has made the following pertinent observations:-

> *"2. The houses of Smt. Reshmo Devi, Sh. Krishan, Sh. Basant Ram, Sh. Seema Devi, Sh. Fiun Ram, Smt. Nikki Devi and other peoples, were visited during the course of inspection. It was observed that the said houses are at the horizontal surface distance of 50 to 150 metrs. from the Tunnel alignment. Most of the Houses are single or double story structures, out of which few are new buildings but majority of them are older. Houses are constructed with stone/brick masonry with clay and cement having slates on roof. House of Sh. Fiun Ram is newly constructed pakka house with brick masonry and concrete roof structure. Cowsheds are constructed with rough stone/brick masonry with clay as jointing material."*

After making the aforesaid observation, the relevant conclusion on this aspect of the matter is summed up as under:-

> *"However, in view of fact prevailing on the spots, it was observed that cracks developed in the houses of Smt.Reshmo Devi, Sh. Krishan and Sh. Basant Ram were old and concentric, and it appears that these cracks are not developed due to*

the impact of blasting but may be due to the re-settlement of foundation or some design problems.

And the cracks developed in the cowsheds of said villagers and house of Sh.Fiun Ram were found new. These cracks were extending vertical and wide. Therefore these cracks might have been developed due to blast induced ground vibrations."

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

7. The moot question that arises for consideration in wake of replies filed by the respondents is as to whether the reliefs as claimed by the petitioners can in fact be granted in these writ petitions, in view of the seriously disputed question fact which otherwise can only be proved by leading evidence.

8. The Court herein is not dealing with simple case where the dispute between the parties can be decided on the basis of affidavits and counter affidavits, as the Court would be required to determine as to whether the properties of the petitioners have in fact been damaged and only after determining the same, the individual claims with respect to the compensation, if any, can be determined. However, these questions can only be determined after the parties are given an opportunity to lead evidence, which includes cross-examining the witnesses.

9. Though, the learned counsel for the petitioners had cited number of judgments to canvass that not only can the writ Court go into the disputed facts, but it can also award compensation. However, we find that majority of judgments as relied upon by the petitioners have already been considered by the Hon'ble Supreme Court in its decision in ***State of Kerala and others Vs. M.K. Jose (2015) 9 SCC 433***, relevant paragraphs whereof read as under:-

*"**14**. In State of Bihar v. Jain Plastics and Chemicals Ltd., (2002) 1 SCC 216 a two-Judge Bench reiterating the exercise of power under Article 226 of the Constitution in respect of enforcement of contractual obligations has stated: (SCC p. 217, para 3)*

> *"3.....It is to be reiterated that writ petition under Article 226 is not the proper proceedings for adjudicating such disputes. Under the law, it was open to the respondent to approach the court of competent jurisdiction for appropriate relief for breach of contract. It is settled law that when an alternative and equally efficacious remedy is open to the litigant, he should be required to pursue that remedy and not invoke the writ jurisdiction of the High Court. Equally, the existence of alternative remedy does not affect the jurisdiction of the court to issue writ, but ordinarily that would be a good ground in refusing to exercise the discretion under Article 226."*

In the said case, it has been further observed: (SCC p. 218, para 7)

> *"7....It is true that many matters could be decided after referring to the contentions raised in the affidavits and counter-affidavits, but that would hardly be a ground for exercise of extraordinary jurisdiction under Article 226 of the Constitution in case of alleged breach of contract. Whether the alleged non-supply of road permits by the appellants would justify breach of contract by the respondent would depend upon facts and evidence and is not required to be decided or dealt with in a writ petition. Such seriously disputed questions or rival claims of the parties with regard to breach of contract are to be investigated and determined on the basis of evidence which may be led by the parties in a properly instituted civil suit rather than by a court exercising prerogative of issuing writs."*

***15**. In National Highways Authority of India v. Ganga Enterprises, (2003) 7 SCC 410 the respondent therein had filed a writ petition before the High Court for refund of the amount. The High Court posed two questions, namely, (a) whether the*

forfeiture of security deposit is without authority of law and without any binding contract between the parties and also contrary to Section 5 of the Contract Act; and (b) whether the writ petition is maintainable in a claim arising out of breach of contract. While dealing with the said issue, this Court opined that: (SCC p. 415, para 6)

> *"6…It is settled law that disputes relating to contracts cannot be agitated under Article 226 of the Constitution of India. It has been so held in the cases of Kerala SEB v. Kurien E. Kalathil, (2000) 6 SCC 293, State of U.P. v. Bridge & Roof Co. (India) Ltd. (1996)6 SCC 22 and Bareilly Development Authority v. Ajai Pal Singh(1989) 2 SCC 116. This is settled law. The dispute in this case was regarding the terms of offer. They were thus contractual disputes in respect of which a writ court was not the proper forum. Mr Dave, however, relied upon the cases of Verigamto Naveen v. Govt. of A.P. (2001) 8 SCC 344 and Harminder Singh Arora v. Union of India (1986) 3 SCC 247. These, however, are cases where the writ court was enforcing a statutory right or duty. These cases do not lay down that a writ court can interfere in a matter of contract only. Thus on the ground of maintainability the petition should have been dismissed."*

***16**. Having referred to the aforesaid decisions, it is obligatory on our part to refer to two other authorities of this Court where it has been opined that under what circumstances a disputed question of fact can be gone into. In Gunwant Kaur v. Municipal Committee, Bhatinda (1969) 3 SCC 769, it has been held thus: (SCC p. 774, paras 14-16)*

> *"14. The High Court observed that they will not determine disputed question of fact in a writ petition. But what facts were in dispute and what were admitted could only be determined after an affidavit-in-reply was filed by the State. The High Court, however, proceeded to dismiss the petition in limine. The High Court is not deprived of its jurisdiction to entertain a petition under Article 226 merely because in considering the petitioner's right to relief questions of fact may fall to be determined. In a petition under Article 226 the High Court has jurisdiction to try issues both of fact and law. Exercise of the jurisdiction is, it is true, discretionary, but the discretion must be exercised on sound judicial principles. When the petition raises questions of fact of a complex nature, which may for their determination require oral evidence to be taken, and on that account the High Court is of the view that the dispute may not appropriately be tried in a writ petition, the High Court may decline to try a petition. Rejection of a petition in limine will normally be justified, where the High Court is of the view that the petition is frivolous or because of the nature of the claim made dispute sought to be agitated, or that the petition against the party against whom relief is claimed is not maintainable or that the dispute raised thereby is such that it would be inappropriate to try it in the writ jurisdiction, or for analogous reasons.*
>
> *15. From the averments made in the petition filed by the appellants it is clear that in proof of a large number of allegations the appellants relied upon documentary evidence and the only matter in respect of which conflict of facts may possibly arise related to the due publication of the notification under Section 4 by the Collector.*
>
> *16. In the present case, in our judgment, the High Court was not justified in dismissing the petition on the ground that it will not determine disputed question of fact. The High Court has jurisdiction to determine questions of fact, even if they are in dispute and the present, in our judgment, is a case in which in the interests of both the parties the High Court should have*

entertained the petition and called for an affidavit-in- reply from the respondents, and should have proceeded to try the petition instead of relegating the appellants to a separate suit.
(emphasis supplied)

***17**. In ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd. (2004) 3 SCC 553, a two-Judge Bench after referring to various judgments as well as the pronouncement in Gunwant Kaur (supra) and Century Spg. And Mfg. Co. Ltd. v. Ulhasnagar Municipal Council (1970) 1 SCC 582, has held thus: (ABL International case, SCC pp. 568-69 & 572, paras 19 & 29)*

> *"19. Therefore, it is clear from the above enunciation of law that merely because one of the parties to the litigation raises a dispute in regard to the facts of the case, the court entertaining such petition under Article 226 of the Constitution is not always bound to relegate the parties to a suit. In the above case of Gunwant Kaur this Court even went to the extent of holding that in a writ petition, if the facts require, even oral evidence can be taken. This clearly shows that in an appropriate case, the writ court has the jurisdiction to entertain a writ petition involving disputed questions of fact and there is no absolute bar for entertaining a writ petition even if the same arises out of a contractual obligation and/or involves some disputed questions of fact.*
>
> * * *
>
> *27. From the above discussion of ours, the following legal principles emerge as to the maintainability of a writ petition:*
> *(a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.*
>
> *(b) Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.*
>
> *(c) A writ petition involving a consequential relief of monetary claim is also maintainable.*

While laying down the principle, the Court sounded a word of caution as under: (ABL International case, SCC p. 572, para 28)

> *"28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions 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. The Court has imposed upon itself certain restrictions in the exercise of this power. (See Whirlpool Corpn. v. Registrar of Trade Marks (1998) 8 SCC 1.) And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction."*

***18**. It is appropriate to state here that in the said case, the Court granted the relief as the facts were absolutely clear from the documentary evidence brought which*

pertain to interpretation of certain clauses of contract of insurance. In that context, the Court opined: (ABL International Ltd. case SCC p. 578, para 51)

> *"51 .... The terms of the insurance contract which were agreed between the parties were after the terms of the contract between the exporter and the importer were executed which included the addendum, therefore, without hesitation we must proceed on the basis that the first respondent issued the insurance policy knowing very well that there was more than one mode of payment of consideration and it had insured failure of all the modes of payment of consideration. From the correspondence as well as from the terms of the policy, it is noticed that existence of only two conditions has been made as a condition precedent for making the first respondent Corporation liable to pay for the insured risk, that is: (i) there should be a default on the part of the Kazak Corporation to pay for the goods received; and (ii) there should be a failure on the part of the Kazakhstan Government to fulfil their guarantee."*

And it eventually held: (SCC pp. 578-79, para 51)

> *"51..... We have come to the conclusion that the amended clause 6 of the agreement between the exporter and the importer on the face of it does not give room for a second or another construction than the one already accepted by us. We have also noted that reliance placed on sub-clause (d) of the proviso to the insurance contract by the Appellate Bench is also misplaced which is clear from the language of the said clause itself. Therefore, in our opinion, it does not require any external aid, much less any oral evidence to interpret the above clause. Merely because the first respondent wants to dispute this fact, in our opinion, it does not become a disputed fact. If such objection as to disputed questions or interpretations is raised in a writ petition, in our opinion, the courts can very well go into the same and decide that objection if facts permit the same as in this case.*

***19**. In this regard, a reference to Noble Resources Ltd. v. State of Orissa and Another (2006) 10 SCC 236 would be seemly. The two-Judge Bench referred to the ABL International, Dwarkadas Marfatia & Sons v. Board of Trustees, Port of Bombay, (1989) 3 SCC 293, Mahabir Auto Stores v. Indian Oil Corp. (1990) 3 SCC 752 and Jamshed Hormusji Wadia v. Board of Trustees, Port of Mumbai, (2004) 3 SCC 214 and opined thus: (Nobal Resources case SCC p. 246, para 29)*

> *"29. Although the scope of judicial review or the development of law in this field has been noticed hereinbefore particularly in the light of the decision of this Court in ABL International Ltd. each case, however, must be decided on its own facts. Public interest as noticed hereinbefore, may be one of the factors to exercise the power of judicial review. In a case where a public law element is involved, judicial review may be permissible. (See Binny Ltd. v. V. Sadasivan (2005) 6 SCC 657 and G.B. Mahajan v. Jalgaon Municipal Council, (1991) 3 SCC 91)*

Thereafter, the court in Noble Resources case, proceeded to analyse the facts and came to hold that certain serious disputed questions of facts have arisen for determination and such disputes ordinarily could not have been entertained by the High Court in exercise of its power of judicial review and ultimately the appeal was dismissed."

10. It would be noticed that the Hon'ble Supreme Court after taking into consideration the whole gamut of law, has thereafter made the following pertinent observations:-

> *"**20**. We have referred to the aforesaid authorities to highlight under what circumstances in respect of contractual claim or challenge to violation of contract*

can be entertained by a writ court. It depends upon facts of each case. The issue that had arisen in ABL International was that an instrumentality of a State was placing a different construction on the clauses of the contract of insurance and the insured was interpreting the contract differently. The Court thought it apt merely because something is disputed by the insurer, it should not enter into the realm of disputed questions of fact. In fact, there was no disputed question of fact, but it required interpretation of the terms of the contract of insurance. Similarly, if the materials that come on record from which it is clearly evincible, the writ court may exercise the power of judicial review but, a pregnant one, in the case at hand, the High Court has appointed a Commission to collect the evidence, accepted the same without calling for objections from the respondent and quashed the order of termination of contract.

21. *The procedure adopted by the High Court, if we permit ourselves to say so, is quite unknown to exercise of powers under Article 226 in a contractual matter. We can well appreciate a Committee being appointed in a Public Interest Litigation to assist the Court or to find out certain facts. Such an exercise is meant for public good and in public interest. For example, when an issue arises whether in a particular State there are toilets for school children and there is an assertion by the State that there are good toilets, definitely the Court can appoint a Committee to verify the same. It is because the lis is not adversarial in nature. The same principle cannot be taken recourse to in respect of a contractual controversy. It is also surprising that the High Court has been entertaining series of writ petitions at the instance of the respondent, which is nothing but abuse of the process of extraordinary jurisdiction of the High Court. The Appellate Bench should have applied more restraint and proceeded in accordance with law instead of making a roving enquiry. Such a step is impermissible and by no stretch of imagination subserves any public interest."*

11. It would be evidently clear from the aforesaid exposition of law that the writ Court may in appropriate case award compensation where the facts are not in dispute; there is established negligence in the acts and omissions of the respondent authority/authorities on the face of record and there is a consistent deprivation of a fundamental right of the petitioner or his legal representative. That apart, the Court cannot appoint an expert committee to assess the damage if any caused to the properties of the petitioners as such course would be totally impermissible as the Court cannot be used to collect evidence in favour of the petitioners.

12. It would be noticed that the respondents have disputed all the allegations as set out by the petitioners and therefore, in such circumstances, it is not safe or even prudent for this Court to rely upon any of the material placed on record, that too without affording either of the parties a chance of cross-examination.

13. Even otherwise, it is more than settled that the High Court in exercise of its writ jurisdiction under Article 226 should not interfere with the matters, which are in the realm of private laws and it can otherwise be taken to be well settled that where there is disputed question of fact, which require evidence before the same can be established, then as a matter of practice, the Court would not entertain such writ petition.

14. It is equally settled law that when an alternative and equally efficacious remedy is open to the litigant, he should be required to pursue that remedy and not invoke the writ jurisdiction of the High Court. Equally, the existence of alternative remedy does not affect the jurisdiction of the Court to issue writ, but ordinarily that would be a good ground for refusing to exercise the discretion under Article 226.

15. These petitions involve seriously disputed questions of fact and even otherwise the rival claims of the parties are such, which can only be investigated and determined on the

basis of evidence, which may be led by the parties in a properly instituted civil suit rather than by a court exercising prerogative of issuing writs.

16. In view of the aforesaid discussion, we are of the considered view that all these writ petitions are not maintainable, as the proper remedy for the petitioners is to approach the civil court for redressal of their grievances. However, we make it clear that in the event of the petitioner(s) approaching the civil Court within a period of thirty days from the receipt of this judgment, not only shall the petitioner(s) be entitled to benefit of Section 80(2) of the Code of Civil Procedure, but even the period of limitation spent in pursuing these litigations shall be excluded. We further make it clear that in the event the aforesaid suit being filed within the time frame as granted by this Court, the Court where such suit(s) are instituted shall decide the same as expeditiously as possible and in no event later than 31st March, 2017.

17. Before parting, we may observe that nothing observed herein above shall be construed to be an opinion on merits of the case and in the event of the petitioners filing civil suit(s), the Court shall proceed to determine the case on merits without being persuaded or influenced by any of the observations made herein above, which essentially have been made only for the determination and disposal of these writ petitions.

The petitions are disposed of in the aforesaid terms. All interim orders vacated and in case any amount is paid to any of the petitioners herein pursuant to the interim orders passed by this Court the same shall be refunded by them forthwith to the authorities.

****

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

Madan Lal Mehta son of late Sh H.L.Mehta. …Petitioner.

Vs:

State of Himachal Pradesh and another. …Non-petitioners.

Cr.MMO No. 15 of 2016.
Order reserved on: 23.5.2016.
Date of Order: July 26, 2016.

Code of Criminal Procedure, 1973- Section 482- Parties entered into the compromise and prayed that FIR registered for the commission of offences punishable under Sections 279, 337 and 338 IPC be quashed- held, that offence punishable under Section 279 is a not personal criminal offence but is a criminal offence against public at large- permission cannot be granted to compound criminal offence filed against public at large- petition dismissed. (Para-5 and 6)

Cases referred:

Narinder Singh and others Vs State of Punjab and another, JT 2014 (4) SC 573
Nancy Bhatt and another Vs. State of Himachal Pradesh, 2015 (2) Him.L.R.1095
State of Punjab Vs. Dharam Vir Singh Jethi, 1994 SCC (Crime) 500
Vineet Narain Vs. Union of India, 1996 (2) SCC 199
Anukul Chandra Pradhan Vs. Union of India, 1999 (6) SCC 354
Jakia Nasim Ahesan and another Vs. State of Gujarat and others, 2011 (12) SCC 302

For petitioner: Mr.R.K.Bawa, Sr. Advocate with
Mr. Amit Kumar Dhumal, Advocate.
For non-petitioner No.1: Mr.M.L.Chauhan Addl. Advocate General.
For non-petitionerNo.2 None.

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 for quashing FIR No. 53 of 2014 dated 19.11.2014 registered under Sections 279, 337 and 338 of Indian Penal Code in police station New Shimla District Shimla HP and for setting aside and quashing all consequential proceedings before learned Judicial Magistrate Ist Class Court No.4 Shimla in criminal case No. RBT 62-2 of 2015 title State of HP Vs. Madan Lal

2. Brief facts of the case are that on dated 19.11.2014 at about 9 PM at phase-3 New Shimla accused Madan Lal was driving his car bearing registration No. HP 07A 0252 in rash and negligent manner upon public way and hit Alto K10 HP-62 1316 and thereafter car over turned causing simple as well as grievous injuries. FIR No. 53 of 2014 dated 19.11.2014 was registered in police station new Shimla under Sections 279, 337 and 338 IPC. After completion of investigation, investigation report filed before learned Judicial Magistrate Shimla. Learned Judicial Magistrate issued notice of accusation under Section 279, 337 and 338 IPC. Learned Trial Court examined testimony of PW1 Promil Bhardwaj and criminal case is subjudice before learned Judicial Magistrate Shimla.

3. Court heard learned Advocate appearing on behalf of petitioner and learned Additional Advocate General appearing on behalf of non-petitioner No.1. Court 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 is liable to be accepted as mentioned in memorandum of grounds of petition relating to criminal offence punishable under section 279 IPC which is criminal offence against general public?.

(2) Final Order.

Findings upon point No.1 with reasons.

5. Submission of learned Advocate appearing on behalf of petitioner that the case has been compromised interse parties and on the basis of out of court settlement annexure P3 dated 17.12.2015 executed between complainant Sh Shiv Thakur and accused Madan Lal petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that accused is facing accusation qua criminal offence punishable under section 279 IPC. It is held that criminal offence under section 279 IPC is always committed upon public way. It is held that offence under section 279 IPC is not personal criminal offence but is a criminal offence against public at large. It is held that section 279 IPC is incorporated in Indian Penal Code in order to protect public at large upon public way. Even section 279 IPC is non-compoundable offence as per section 320 code of criminal procedure 1973. Criminal offences under section 279 are increasing day by day upon public way causing endanger to human life. Hon'ble Apex Court of India has held that High Court should not grant permission to compound criminal cases which are against public at large. In view of the fact that criminal offence punishable under section 279 IPC is a criminal offence against society at large court is of the opinion that it is not expedient in the ends of justice to allow petition. See JT 2014 (4) SC 573 title Narinder Singh and others Vs State of Punjab and another. Hon'ble Apex Court of India held 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 criminal case (2) Rape criminal case (3) Dacoity criminal case (4) Prevention of Corruption Act case (5) 307 IPC case. (6) Criminal offence against society. It is well settled law that law laid down by Hon'ble Apex Court of India is binding upon all courts as per Article 141 of Constitution of India. It is well settled law that after filing charge sheet FIR could not be quashed. See 2015 (2) Him.L.R.1095 title Nancy Bhatt and another Vs. State of Himachal Pradesh. See 1994 SCC (Crime) 500 State of Punjab Vs. Dharam Vir Singh Jethi**.** See 1996 (2) SCC 199 title

Vineet Narain Vs. Union of India. See 1999 (6) SCC 354 title Anukul Chandra Pradhan Vs. Union of India. See 2011 (12) SCC 302 title Jakia Nasim Ahesan and another Vs. State of Gujarat and others. In view of above stated facts and in view of the fact that criminal offence under section 279 IPC is criminal offence against society at large and not personal criminal offence it is not expedient in the ends of justice to allow petition. Point No.1 is answered in negative.

Point No.2(Final Order).

6. In view of findings on point No.1 petition filed under section 482 Cr.PC is dismissed. Parties are directed to appear before learned Trial Court on 12.8.2016. File of learned Trial Court along with certified copy of order be sent back forthwith. Cr.MMO No. 15 of 2016 is disposed of. All pending application(s) if any are also 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.

Roshan Lal ....Appellant.
versus
UCO Bank and others ....Respondents.

LPA No.:19 of 2016
Reserved on: 19.07.2016
Pronounced on: 26.07.2016

Constitution of India, 1950- Article 226- Petitioner was appointed as Assistant Cashier-cum-Godown Keeper in the bank- he was promoted to the Officer Cadre and was asked to join at Hyderabad- petitioner did not join and submitted a representation to the Bank Authorities expressing his inability to join at Hyderabad – request was declined – a new promotion policy was circulated- petitioner applied for promotion according to new promotion policy, however, maximum age of promotion was fixed as 56 years in the new policy –case of petitioner was turned down - held, that petitioner has not questioned the new promotion policy- eligibility of the petitioner was to be determined as per the Rules occupying the field at the time of notification of vacancy- writ petition was rightly dismissed- appeal dismissed. (Para-2 to 9)

For the Appellant: Mr.Praneet Gupa, Advocate.
For the Respondents: Mr.Sanjay Dalmia, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J.

This appeal is directed against the judgment, dated 31st December, 2015, passed by a learned Single Judge of this Court in CWP No.7632 of 2012, titled Roshan Lal vs. CMD UCO Bank and others, whereby the writ petition, filed by the petitioner (appellant herein), came to be dismissed, (for short, the impugned judgment).

2. Facts of the case, in brief, are that the writ petitioner was initially appointed as Assistant Cashier-cum-Godown Keeper in the respondent-Bank on 17th November, 1977, was promoted to the officer's cadre on 22nd October, 2006 and was asked to join at Hyderabad. The petitioner did not join and submitted the representation (Annexure P-1) to the Bank Authorities expressing his inability to join at Hyderabad and requested to retain him at Dharamshala Region or he would be compelled to seek reversion. It is apt to reproduce the relevant portion of Annexure P-1 hereunder:

"………..Therefore, keeping in view the above facts, it is neither possible to leave my son and father alone nor bring them with me at new place of posting. You are requested to consider my case sympathetically to retain me in Dharamsala region or otherwise I will be compelled to seek reversion."

3. The said request of the petitioner did not find favour with the Bank Authorities and the competent Authority, vide order dated 10th November, 2006 (Annexure P-3), reverted the petitioner to the post he was holding. It is apt to reproduce the relevant portion of Annexure P-3 hereunder:

"In this context, please be informed that in terms of para 3.8.3(a) and its note of Promotion Policy Settlement for Workmen Staff 1988 as amended, you request for such refusal/reversion has been acceded to under the following terms & conditions:

i) You will be debarred for promotion for five (5) years from the date of your reversion/refusal;

ii) You will be reverted to your substantive cadre which you occupied prior to your promoting subject to availability of similar vacancy in the same seniority region. However, if no similar vacancy is available, you will be revered only as a clerk and be posted in the same seniority region. ……………."

4. It has further been pleaded that the respondent-Bank amended the promotion policy (Annexure P-4) w.e.f. 16th July, 2012 and circulated the same vide letter dated 30th July, 2012 and as per the new promotion Policy, maximum age prescribed for promotion from clerical cadre to officers' cadre was 56 years as on 31st March, 2012.

5. The respondent-Bank issued circular, dated 25th July, 2012, (Annexure P-5), whereby the vacancy position was notified and applications were invited from the employees working in the clerical cadre. Acting upon the said notification, the petitioner applied vide application (Annexure P-6) disclosing his service particulars etc., meaning thereby he had not questioned the new Promotion Policy (Annexure P-4) or the circular (Annexure P-5). The application of the petitioner for promotion to the next promotional post was rejected for the reason that he had already crossed the upper age limit i.e. 56 years as per the extant promotion policy i.e. "Promotion Policy Settlement for Workmen Staff, 2012" (Annexure P-4). Clause 3.4 of the said Promotion Policy deals with the "Eligibility" and Clause 3.4.2 provides the maximum age limit for promotion from clerical cadre to officers' cadre in Bank's Junior Management Grade Scale-I, which reads as under:

*"**Age:***

The maximum age limit shall be 56 completed years as on 31st March of preceding date of notification."

6. Consequent thereto, the petitioner approached the respondents, but was informed that since he was not eligible, his application for promotion had been rejected, constraining the petitioner to file the writ petition, with the following reliefs:

"i) That the petitioner may be considered for the post of Officers cadre in JMG Scale-I w.e.f. 2-11-2011,

ii) A writ in the nature of mandamus to strike down retrospective provisions of the policy as ultra virus and unsustainable in the eyes of law;

iii) To direct the Respondents to treat the petitioner as eligible for the promotion for the post of JMG-Sclae-I and considering him for promotion due to him on the basis of his seniority with effect from the date he is found due for promotion;"

7. From the perusal of the above reliefs, the petitioner has neither questioned the new promotion policy i.e. Annexure P-4 nor has sought the quashment of the order, whereby his application was rejected on the ground that he was not eligible. Without seeking the basic reliefs, the writ petition was not maintainable.

8. The eligibility of the petitioner was to be determined as per the Rules occupying the field at the time when the vacancy position was notified and the vacant posts were decided to be filled up, by way of promotion, in terms of Annexure P-4. The vacancy position was notified on 25th July, 2012, after coming into effect the amended promotion policy. The petitioner also tendered his application in terms of the advertisement notice (Annexure P-4) without any demur. Therefore, the petitioner cannot be permitted to contend that he was eligible, entitled to be promoted as per the policy in vogue before coming into force the amended promotion policy (Annexure P-4) and he was to be considered for promotion immediately after the ban period of five years was over.

9. It is also apt to mention here, at the cost of repetition, that the petitioner was promoted in the year 2006, but he opted not to join and avail the promotional avenue, due to which the respondent-Bank reverted him to the post he was occupying at that time. The said reversion was accepted by the petitioner without any protest and was never questioned. Thereafter, the occasion for consideration of the petitioner to the next promotional post arose at the time when the vacancy position was notified after the amendment of the promotion policy (Annexure P-4) and as per the said policy, the petitioner was ineligible having crossed the upper age limit.

10. Having said so, the Writ Court has rightly dismissed the writ petition. As a consequence, the impugned judgment is upheld and the instant appeal is dismissed, alongwith pending CMPs, 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.

Saluja Motors Pvt. Ltd. …Petitioner.

Versus

District Magistrate and others …Respondents.

CWP No. 1892 of 2016
Date of order: 26.07.2016

Constitution of India, 1950- Article 226- Petitioner stated that it is running its business in the premises as tenant- respondents No. 1 and 2 have passed orders for sealing the premises, whereby petitioner has been thrown out of its business - held, that writ petition is maintainable at the instance of a tenant- petitioner is running business in the premises as tenant which stands locked- possession of the petitioner is lawful, and petitioner cannot be deprived of the possession without following the mandate of law- petitioner will be unable to run the business and to pay salary to the employees- therefore, direction issued to respondents No. 1 and 2 to unlock the premises and hand over the possession to the petitioner within a week on furnishing an undertaking that petitioner will hand over the possession after four months. (Para-3 to 13)

Case referred:

Harshad Govardhan Sondagar versus International Assets Reconstruction Company Limited and others, (2014) 6 Supreme Court Cases 1,

Present: Mr. Naresh K. Sood, Senior Advocate, with Mr. Sumeet Raj Sharma, Advocate, for the petitioner.

Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma & Mr. Kush Sharma, Deputy Advocate Generals, for respondents No. 1 and 2.

Mr. Sunil Mohan Goel, Advocate, for respondents No. 3 and 4.
Ms. Anu Tuli Azta, Advocate, for respondent No. 5.

The following judgment of the Court was delivered:

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

CMP No. 6038 of 2016

Respondent No. 5 has filed reply to the main petition and it is stated that the same be treated as objections to the application also. Other respondents sought time to file reply and objections within one week.

2. Learned Senior Counsel appearing on behalf of the petitioner stated at the Bar that the dispute is between respondents No. 3, 4 and 5, but the scapegoat is the petitioner-company. It is averred and argued that the petitioner is a tenant and running its business. Respondents No. 1 and 2 have made the orders whereby the petitioner-company has been thrown out of its business because the entire premises has been sealed.

3. The question is – whether the petitioner has a remedy by the medium of the writ petition?

4. This Court in **CWP No. 627 of 2016,** titled as **M/s Tube Expansion and Equipments Pvt. Ltd. Versus District Magistrate, District Solan and others,** decided on 11th April, 2016, has decided the issue. It is apt to reproduce para 12 of the judgment herein:

> *"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, 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."*
>
> *(Emphasis added)*

5. It would also be profitable to reproduce relevant portion of paras 22 and paras 23, 26 and 29 of the judgment rendered by the Apex Court in the case titled as **Harshad Govardhan Sondagar versus International Assets Reconstruction Company Limited and others,** reported in **(2014) 6 Supreme Court Cases 1,** herein:

> *"22. We may now consider the nature of the right of the lessee and as to when the lease under the Transfer of Property Act gets determined. Sections 105 and 111 of the Transfer of Property Act, which are relevant in this regard, are quoted hereinbelow:*

xxx xxx xxx

Section 105 thus provides that a lessee of an immovable property has a right to enjoy such property, for a certain time or in perpetuity when a lessor leases an immovable property transferring his right to enjoy such property for a certain time or in perpetuity. Section 111 of the Transfer of Property Act, 1882 provides the different modes by which a lease gets determined. Thus, so long as a lease of an immovable property does not get determined, the lessee has a right to enjoy the property and this right is a right to property and this right cannot be taken away without the authority of law as provided in Article 300-A of the Constitution. As we have noticed, there is no provision in Section 13 of the SARFAESI Act that a lease in respect of a secured asset shall stand determined when the secured creditor decides to take the measures mentioned in Section 13 of the said Act. Without the determination of a valid lease, the possession of the lessee is lawful and such lawful possession of a lessee has to be protected by all courts and tribunals.

23. We may now look at the provisions of Section 14 of the SARFAESI Act to find out whether it confers any power on the Chief Metropolitan Magistrate or the District Magistrate to assist the secured creditor in taking possession of the secured asset which is in lawful possession of the lessee under a valid lease.

24. ....

25. ....

26. The opening words of sub-section (1) of Section 14 of the SARFAESI Act make it clear that where the possession of any secured assets is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred by the secured creditor "under the provisions of the Act", the secured creditor may, for the purpose of taking possession or control of any such secured asset, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof. Thus, only if possession of the secured asset is required to be taken under the provisions of the SARFAESI Act, the secured creditor can move the Chief Metropolitan Magistrate or the District Magistrate for assistance to take possession of the secured asset. We have already held that Section 13 of the SARFAESI Act does not provide that the lease in respect of a secured asset will get determined when the secured creditor decides to take the measures in the said section. Hence, possession of the secured asset from a lessee in lawful possession under a valid lease is not required to be taken under the provisions of the SARFAESI Act and the Chief Metropolitan Magistrate or the District Magistrate, therefore, does not have any power under Section 14 of the SARFAESI Act to take possession of the secured asset from such a lessee and hand over the same to the secured creditor. When, therefore, a secured creditor moves the Chief Metropolitan Magistrate or the District Magistrate for assistance to take possession of the secured asset, he must state in the affidavit accompanying the application that the secured asset is not in possession of a lessee under the valid lease made prior to creation of the mortgage by the borrower or made in accordance with Section 65A of the Transfer of Property Act prior to receipt of a notice under sub-section (2) of Section 13 of the SARFAESI Act by the borrower. We would like to clarify that even in such cases where the secured creditor is unable to take

possession of the secured asset after expiry of the period 60 days of the notice to the borrower of the intention of the secured creditor to enforce the secured asset to realize the secured debt, the secured creditor will have the right to receive any money due or which may become due, including rent, from the lessee to the borrower. This will be clear from clause (d) of sub-section (4) of Section 13, which provides that in case the borrower fails to discharge his liability in full within the notice period, the secured creditor may require, at any time by notice in writing, any person who has acquired any of the assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

27. ……………

28. ……………

29. Sub-section (3) of Section 14 of the SARFAESI Act provides that no act of the Chief Metropolitan Magistrate or the District Magistrate or any officer authorised by the Chief Metropolitan Magistrate or District Magistrate done in pursuance of Section 14 shall be called in question in any court or before any authority. The SARFAESI Act, therefore, attaches finality to the decision of the Chief Metropolitan Magistrate or the District Magistrate and this decision cannot be challenged before any court or any authority. But this Court has repeatedly held that statutory provisions attaching finality to the decision of an authority excluding the power of any other authority or Court to examine such a decision will not be a bar for the High Court or this Court to exercise jurisdiction vested by the Constitution because a statutory provision cannot take away a power vested by the Constitution. To quote, the observations of this Court in Columbia Sportswear Co. v. Director of Income Tax : (SCC p. 234, para 17)

> *"17. Considering the settled position of law that the powers of this Court under Article 136 of the Constitution and the powers of the High Court under Articles 226 and 227 of the Constitution could not be affected by the provisions made in a statute by the Legislature making the decision of the tribunal final or conclusive, we hold that sub-section (1) of Section 245S of the Act, insofar as, it makes the advance ruling of the Authority binding on the applicant, in respect of the transaction and on the Commissioner and income-tax authorities subordinate to him, does not bar the jurisdiction of this Court under Article 136 of the Constitution or the jurisdiction of the High Court under Articles 226 and 227 of the Constitution to entertain a challenge to the advance ruling of the Authority."*

In our view, therefore, the decision of the Chief Metropolitan Magistrate or the District Magistrate can be challenged before the High Court under Articles 226 and 227 of the Constitution by any aggrieved party and if such a challenge is made, the High Court can examine the decision of the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, in accordance with the settled principles of law."

6. Keeping in view the ratio laid down by the Apex Court and this Court in the judgments (supra), it is held that tenant can maintain the writ petition. Accordingly, it is held that the writ petition is maintainable.

7. Learned Senior Counsel appearing on behalf of the writ petitioner submitted that he is under instructions to make a statement that the petitioner may be allowed to retain the

possession of the premises for four months enabling it and its employees to earn the livelihood. Further stated that in the meantime, respondents No. 1 to 4 be directed to go ahead with the auction proceedings and other related proceedings, as are required to be drawn and to take the said proceedings to its logical end within the time frame, preferably within four months or earlier to that.

8. Keeping in view the averments contained in the writ petition and the application read with the statement made by the learned Senior Counsel and the discussions made hereinabove, the question is – whether the petitioner has carved out a case for grant of interim relief, at this stage?

9. We are of the considered view that the petitioner has carved out a case for grant of interim relief for the reason that all the three ingredients, which are *sine qua non* for grant of interim relief, are in favour of the petitioner for the following reasons:

10. Admittedly, the petitioner is running its business in the premises as tenant, which stands locked, has affected its business and has put its reputation on stake. The possession of the petitioner is lawful, of which it cannot be deprived of without following the mandate of law and as held by the Apex Court in the judgment (supra), thus, has carved out a *prima facie* case.

11. Balance of convenience also leans in favour of the petitioner for the reason that it is running the business making both ends meet, is paying salary to its employees and in case interim relief is not granted, all the persons, who are earning livelihood because of this business, have to suffer.

12. Further, in case interim relief is not granted, the petitioner will suffer irreparable loss for the reason that the premises stands locked because of which the machinery, stocks, spare fixtures and furniture lying inside the premises/workshop for the sale and repairs of the vehicles will be damaged and also the affected persons will not be able to earn their livelihood.

13. Accordingly, order of possession, dated 5th July, 2016, (Annexure P-13) and possession notice, dated 15th July, 2016, (Annexure P-11) are stayed and respondents No. 1 & 2 are directed to unlock and hand over the possession to the petitioner within a week provided the petitioner executes an undertaking to the satisfaction of the Registrar (Judicial) to the effect that it has to hand over the possession after four months.

14. List the writ petition on **4th August, 2016.** Copy **dasti.**

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

Smt. Satya daughter of late Sh Molku and others. ...Plaintiffs.

Vs.

Sh. Jagdish son of late Sh Puran Chand and another ...Defendants.

Civil Suit No.72 of 2007.
Order reserved on 23.5.2016.
Interim order: July 26, 2016.

Code of Civil Procedure, 1908- Order 1 Rule 10- Plaintiff filed a civil suit for recovery of Rs. 48 lacs on the ground that suit land is shown to be sold for Rs. 12 lacs but in fact was sold for Rs. 16 lacs- presence of purchaser is necessary to decide the controversy and to settle all questions- purchaser had alienated the property in favour of 'P' who is also necessary party- hence, both P and M ordered to be impleaded as parties. (Para-2 and 3)

For plaintiffs: Mr Ramesh Sharma, Advocate.
For defendants: Mr. Imran Khan, Advocate.

The following order of the Court was delivered:

P.S.Rana, Judge.

Interim order under order 1 rule 10(2) Code of Civil procedure 1908.

At this stage it is observed by Court that as per relief clause of plaint present civil suit is filed for recovery of Rs.4800000/- (Forty eight lacs) with interest @ 18% per annum w.e.f. 4.11.2006 on the ground that suit land measuring 52 bighas 12 biswa was sold in favour of vendee Smt. Monika Gupta wife of Sh Rajesh Gupta by way fictitious sale deed amounting to Rs.1200000/- (Twelve lacs only) whereas factually suit land was sold for more than Rs.6000000/- (Sixty lacs) in favour of Smt. Monika Gupta. There are direct allegations against Smt. Monika Gupta in present civil suit relating to fictitious sale deed Ext PW3/A placed on record. It is well settled law that in judicial proceedings no one should be condemned unheard on the concept of audi alteram partem. In view of direct allegations against Smt. Monika Gupta that she has executed sale deed Ext PW3/A in fictitious manner in consideration amount of Rs.1200000/- (Twelve lacs) Court is of the opinion that Smt. Monika Gupta is necessary party in present civil suit.

2. It is well settled law that court can implead necessary party in civil suit at any stage of proceedings if the presence of party is necessary for adjudication of civil suit. It is well settled law that theory of dominus litus would not be applied upon necessary party. See AIR 1995 Allahabad 7 title Committee of Management Ratan Muni Jain Inter College and another Vs. III Additional Civil Judge Agra and others. It is held that Smt. Monika Gupta ought to have been joined as co-defendant in present civil suit. It is held that presence of Smt. Monika Gupta as co-defendant is necessary in the present suit in order to adjudicate civil suit effectually and completely and to settle all questions involved in civil suit. Hence in view of above stated facts Smt. Monika Gupta wife of Sh Rajesh Gupta C/o Registrar/Chairman Bells Institute Mehli post office Kasumpti Shimla HP is ordered to be impleaded as co-defendant No.3 in present civil suit No. 72 of 2007 under order 1 rule 10(2) code of civil procedure 1908.

3. It is also observed by court that Smt. Monika Gupta has alienated suit property on 23.10.2013 vide registered sale deed No. 447 of 2013 placed on record in favour of Smt. Preeti Arora daughter of Sh Sanjeev Kumar wife of Sh Jahnoo Arora resident of village Deonghat Tehsil and District Solan HP in consideration amount of Rs.25000000/- (Two crores fifty lacs). It is held that Smt. Preeti Arora is also necessary party in present suit in order to decide civil suit effectually and completely and to settle all questions involved in the suit. Decision of civil suit No. 72 of 2007 will have direct effect upon sale deed No. 447 of 2013 dated 23.10.2013 executed in favour of Smt. Preeti Arora qua suit land. Hence Smt. Preeti Arora is also ordered to be impleaded as co-defendant No.4 in present civil suit under order 1 rule 10(2) code of civil procedure 1908 being necessary party in civil suit. Plaint relating to memo of parties be amended forthwith thereafter copy of plaint along with amended memo of parties and annexure be served upon co-defendant No. 3 Smt. Monika Gupta and co-defendant No.4 Smt. Preeti Arora returnable within four weeks. Be listed thereafter.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

State of Himachal Pradesh … Appellant

Versus

Rajinder Thakur alias Raju & Ors. … Respondents

Cr. Appeal No. 512 of 2012
Reserved on: 04.07.2016
Date of decision: 26.07.2016

Indian Penal Code, 1860- Section 302 read with Section 34- Deceased S had gone to Theog to attend a case- he did not return and his dead body was found- sharp edged weapon wounds were found on his head and left leg- many other injuries were found on his person- accused were arrested who made disclosure statements leading to recovery of weapon- accused were tried and acquitted by the trial Court- held, in appeal that no person had seen the incident and the prosecution had relied upon circumstantial evidence- PW-10, PW-23, PW-24 and PW-25 had not supported the prosecution version - the fact that accused were last seen with the deceased was not proved- there are contradictions and discrepancies regarding the recovery of dead body- weapons of offence did not have any blood- these were not shown to the Doctor who had conducted autopsy- it was not proved that weapons were used by accused for the commission of offence- motive was also not established- these factors were considered by the trial Court who had rightly acquitted the accused- appeal dismissed. (Para-40 to 62)

Cases referred:
Vijay Thakur Vs. State of Himachal Pradesh, (2014) 14 Supreme Court Cases 609
Manthuri Laxmi Narsaiah Vs. State of Andhra Pradesh, (2011) 14 SCC 117

For the appellant: Mr. V.S. Chauhan, Additional Advocate General with Mr. Vikram Thakur and Mr. Puneet Rajta, Deputy Advocate Generals.
For the respondents: Mr. Surender Verma, Advocate, for respondents No. 1 to 5. Mr. Pradeep Kumar Sharma, Amicus Curiae.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.:

By way of the present appeal, appellant/State has challenged the judgment passed by the Court of learned Additional Sessions Judge, Fast Track Court, Shimla, in Sessions Trial No. 17-S/7 of 2010, dated 30.06.2012, vide which, learned trial Court has acquitted the accused persons for commission of offence under Section 302 read with Section 34 I.P.C.

2. The case of the prosecution was that on 16.06.2010, Laxmi Singh, Pradhan, Gram Panchayat, Dhamandri, informed Police Post, Fagu, on telephone that a dead body was lying in the courtyard of Bhuteshwar Temple covered with a gunny bag at village Majholi. Constable Mohan Singh telephonically forwarded the said information to Sub Inspector at Police Station, Theog, who on receipt of the said information reached Dhamandri alongwith other police officials. Statement of Hira Singh was recorded under Section 154 Cr.P.C., who told the police that he was an agriculturist by profession and was having two sons and one daughter. His elder son Suresh Kumar had gone to Theog on 15.06.2010 to attend a case. His son did not return back on that night and on 16.06.2010, he received telephonic call from his sister-in-law Begi Devi to the effect that Suresh Kumar was lying dead in village Majholi. On receipt of the said information, he alongwith his wife went to village Majholi and found one dead body in the verandah of the inn. Removal of the gunny bag revealed that the dead body was of their son. There were sharpedge weapon wounds on his head and left leg. Besides, the said two major injuries, there were many injuries on the back and stomach of the dead body, which was smeared in pool of blood. He also found blood near the shop of Devi Ram. The complainant informed the police that he was sure that his son was killed by Devi Ram and his associates. On the basis of the said information, FIR was registered. The dead body was sent for postmortem. On 17.06.2010 accused were arrested. While in police custody, accused Dhyan Singh, Sanjay and Roop Singh made disclosure statements to the effect that they can identify the place where they had hidden the sticks and on the basis of the said disclosure statements, weapon of offence were recovered. Case property was sent to FSL, Junga and call details of the accused persons were also obtained. Investigation revealed that the accused gave beatings to the deceased near the shop of Devi Ram with sticks and thereafter, they dragged him from the shop of Devi Ram and

took him upto Bhuteshwar Temple inn and after beating him, they left the dead body in the courtyard. On 16.06.2016 accused Sanjay covered the dead body with gunny bag with the help of accused Roop Singh. After completion of investigating, challan was presented and as a prima facie case was found against the accused, they were charged and put to trial for offence punishable under Section 302 read with Setcion34 I.P.C. The accused pleaded not guilty and claimed trial.

3. In order to substantiate its case, the prosecution in all examined 35 witnesses. Defence also examined 5 witnesses.

4. On the basis of material produced on record by the prosecution, the learned trial Court held that there was no direct evidence of the offence and the prosecution depended upon circumstantial evidence, namely, (a) disclosure statement of the accused, (b) accused and the deceased having been last seen together and (c) existence of a motive and the learned trial Court held that the prosecution was not able to complete the chain of circumstances so as to link the accused with the commission of offence and accordingly, learned trial Court acquitted the accused by giving them benefit of doubt.

5. Mr. V.S. Chauhan, learned Additional Advocate General, strenuously argued that the judgment passed by the learned trial Court was not sustainable as the findings returned by the learned trial Court were perverse and not borne out from the material on record. Mr. Chauhan argued that the prosecution had proved its case beyond reasonable doubt against the accused, however, the learned trial Court totally misread and misappreciated the evidence on record and grave miscarriage of justice had been committed by acquitting the accused. He also argued that the learned trial Court had erred in concluding that there was no evidence that the accused had killed the deceased. According to him, the presence of main accused Rajinder Thakur stood established as per record and PW-10 Guman Singh had specifically stated that when they were going towards Bhuteshwar Temple, Suresh Heta came from other side and he was drunk. He also shook hands with Suresh Heta and also asked him as what was the matter to which he responded that it had no concern with him. He also admitted that in his presence Suresh Heta gave fist blows to Rajidner Thaikur and Karan Singh. Mr. Chauhan also submitted that PW-8 Rukmani had also categorically stated that on 15th of the month her husband was at Gharat and her son had gone to Dhalli and it was little dark when she heard noise coming from the side of Devi Ram's shop. As she was alone at home, she got frightened and that is why she did not come out from the house. According to Mr. Chauhan, all these important aspects of the matter which directly linked the accused with the commission of the offence were erroneously ignored by the learned trial Court. Mr. Chauhan, further argued that the disclosure statements of the accused had led to the recovery of the weapons of offence and further the finding returned by the learned trial Court to the effect that the prosecution could not prove the motive behind the murder was totally perverse because it stood proved on record by way of the statement of PW-1 that there was old enmity between the parties. Accordingly, on these basis, it was submitted on behalf of the appellant that the judgment of acquittal passed by the learned trial Court was not sustainable and was liable to be set aside and the accused were liable to be convicted for commission of offence under Section 302 read with Section 34 IPC.

6. On the other hand, learned counsel for the respondents and learned Amicus Curiae, have submitted that there was no merit in the present appeal and the judgment passed by the learned trial Court was neither perverse nor was there any infirmity in the same. It was contended by the learned counsel for the respondents as well as learned Amicus Curiae that the judgment passed by the learned trial Court was a well reasoned judgment and the conclusions arrived therein were based on material which had been placed on record by the prosecution which did not link the accused with the commission of the offence. It was further submitted by the learned counsel that accused were facing criminal charge and it was a well settled law that the onus was upon the prosecution to prove their case against the accused beyond reasonable doubt, which the prosecution had failed to do in the present case. Accordingly, they submitted

that the appeal deserved dismissal and the judgment passed by the learned trial Court be confirmed in the interest of justice.

7. We have heard learned counsel for the parties and Mr. Pradeep Kumar Sharma, Advocate, learned Amicus Curiae and have also gone through the records of the case as well as the judgment passed by the learned trial Court.

8. Before proceeding further, it is relevant to take note of the statements made by the relevant prosecution witnesses.

9. Hira Singh has entered into the witness box as PW-1 and stated that the deceased was his son, who left the house on 15.06.2010 at around 8.00 A.M. for attending Court hearing at Theog. He did not return back on the night of 15.06.2010. On 16.06.2010 Begi Devi, his sister-in-law (Sali) telephonically informed him that Suresh had a quarrel at Majholi on 15.06.2010 and on receipt of the said information at 2.30 P.M., he and his wife went to Majholi. He further deposed that they went to the premises of Bhuteshwar Temple Sarai at Majholi and they found that dead body of his son was lying covered with gunny bag in the verandah. The walls and the floor were smeared with blood. There was shop of Devi Ram about 20 mtrs. From Temple and they went to the shop of Devi Ram. They found that the earth from the verandah of the shop of Devi Ram right upto the road was showing signs of dragging. There was blood on the road uptill where the signs of dragging could be found. He further deposed that they suspected Devi Ram because people used to drink in his shop and they also suspected Moda since he used to remain in the shop of Devi Ram all time. He also stated that they also suspected Rajinder son of Karam Singh because Rajinder had quarreled with the complainant in the year 1997. In his cross-examination, he was confronted with his statement recorded under Section 154 Cr.P.C., wherein it was not so reported that he had told the police that Begi Devi had told the complainant about the quarrel his son had on the previous day at Majholi. In his cross-examination, he stated that Deep Ram was his uncle and Virender Heta was his cousin and that they were already on the spot before the complainant reached there. He also admitted that his son deceased Suresh might be consuming liquor as he used to remain with his vehicle. He further stated that he does not remember as to how many cases were pending against his deceased son. The said witness was also confronted with his statement under Section 154 Cr.P.C. wherein it was not so stated that he had told the police that he suspected Rajinder son of Karam Singh. He further stated that he was not informed by anyone that Rajinder, Sanjay and Moda were in the shop of Devi Ram and he named them because they used to remain in the shop of Devi Ram all time.

10. Smt. Suni Devi, mother of the deceased, entered the witness box as PW-2 and she has also stated that the deceased had gone to Theog to attend a case and he did not return home during night. She further deposed that on 16.06.2010 she received a call from her sister Begi Devi, who enquired whether Suresh had returned previous night. She told her that he had not returned, whereupon she told her that he had a quarrel at Majholi Dhar on the evening of 15.06.2010 and Suresh was lying dead at Majholi Dhar. Thereafter, she and her husband went to Majholi. On reaching there, they found that dead body of Suresh was lying in the verandah of Temple Sarai, covered with a gunny bag. She also stated that on removal of gunny bag, it revealed that Suresh was having numerous injuries on his body. She also stated that blood was also found on the road below the shop of Devi Ram. She also stated that they heard that Suresh had a quarrel with sons of Negi previous night and long back, Negi had quarrel with her husband regarding land. In her cross-examination, she admitted that her son might be consuming liquor.

11. Kanshi Ram has entered into the witness box as PW-3 and stated that his house is adjoining to Bhuteshwar Temple. On 16.06.2016, his cattle were grazing nearby the temple and he was alongwith his cattle. The dead body was lying in the verandah of Sarai and it was covered with a gunny bag. Blood stains were on the wall and also on the floor. He went to Pradhan Laxmi Singh, who was not at his house and he was stated to be available in the

Panchayat Ghar. On this, PW-3 went to Dhamandri and informed the factum of dead body lying in the verandah of Sarai to the Pradhan who telephonically intimated the incident to the police.

12. Laxmi Singh has entered into the witness box as PW-4 and stated that he was Pradhan of Gram Panchayat Dhamandri from 2006 to 2010 and for a few months in the year 2011. On 16.06.2010 he was in the Panchayat Ghar and was informed in the Panchayat Ghar that one dead body was lying in the Sarai of Bhuteshwar Temple and he further informed the police telephonically about this fact. In his cross-examination, he has stated that the police reached the spot at around 3.00 P.M. and remained there till 7.00 – 8.00 P.M.

13. Virender Heta has entered into the witness box as PW-5 and stated that the deceased was his nephew. He has also deposed that on 15.06.2010 Suresh had come to the Court at Theog to attend hearing of a case, which was fixed for three consecutive dates from 15th June to 17th June, 2010. He was representing Suresh in the Court proceedings. On Suresh 16.06.2010 Suresh did not come to the Court and he received call from Vijay Heta that Suresh was lying dead in Majholi. He further deposed that on receipt of the said information he and Rakesh, brother of the deceased, went to the spot where they found the dead body of Suresh in the verandah of Sarai. In his cross-examination, he has stated that Suresh was required to attend hearing on and with effect from 15.06.2010 in a case registered against him under Sections 323, 341 and 506 I.P.C.

14. Deep Ram has entered the witness box as PW-6 and he deposed that on 16.06.2010 he was in his field when he received a call at 11.00 A.M. that body of Suresh was lying in Majholi. He immediately went to Majholi around 11.30 A.M. - 12 noon. Dead body was lying covered with gunny bag in the Sarai and when they uncovered it, the body was of Suresh. He also stated that he and Vijay had gone to the spot together and that dead body was having injuries on head, face and legs.

15. Bal Krishan has entered into the witness box as PW-7 and stated that he has a stone crusher on Kotkhai road, short of Chaila. He was at the crusher site when he received call from Virender Heta that dead body of Suresh was lying in Majholi and as such, he went to Sainj. From Sainj, he Virender and Rakesh went to Majholi. Suresh was lying dead. He further deposed that on 20.06.2010, he and Vijay came to Police Station, Theog, in connection with this case and in their presence the accused gave clothes to the police in Police Station Theog. He has also deposed that Dhyan Singh, Roop Singh and Sanjay made disclosure statements to the effect that they only knew about the Dandas used in the commission of crime and the place where they were concealed by each of them and their disclosure statements were separately recorded by the police which were signed by accused, him, Vijay and Madsan Singh. Thereafter, he has deposed with regard to the discovery of the weapon of offence on the basis of said disclosure statements.

16. Rukmani has entered the witness box as PW-8 and stated that she is a resident of Majholi and her house is below the road. On the fateful day, her husband was at Gharat. She also stated that the shop of Devi was above the road. It was little dark when she heard noise coming from the side of Devi Ram's shop. None else was persent in the house at that time except her. That commotion lasted quite long. She did not come out of her house. She got frightened. She took the children of Ramesh and went for sleep. Children of Ramesh were school going and they were studying in 5th and 3rd classes. On the next day, when many persons collected there, she came to know that a dead body was lying covered in a house type temple. The said witness was declared as hostile.

17. PW-9 Keshav Ram has stated that Suresh was his nephew and on 16.06.2010 he was going to Court at Theog. He met Rakesh, who was under stress and confused. On his asking, Rakesh told that Suresh had a quarrel and he had died in that. He further stated that he informed Begi Devi, his sister, on phone about this fact.

18. PW-10 Guman Singh, stated that he runs hotel at Maipul and he also used to drive taxi bearing No. HP-01-3400. He also deposed that least year during summer, he brought passengers from Maipul to Hoti but he did'nt know the names of those passengers since he ferried many passengers. He was also declared as a hostile witness.

19. PW-11 Akash, PW-12 Manoj Kumar, PW-23 Devi Ram, PW-24 Vinod Kumar, PW-25 Prem Lal, PW-26 Chaman Lal, PW-29 Sandeep Kumar, PW-30 Joginder and PW-31 Laxmi Singh, were also declared as hostile witnesses as they resiled from their previous statements which were made by them before the police. All these witnesses were subjected to lengthy cross-examination by the learned Public Prosecutor but nothing cogent and relevant could be extracted from the cross-examination of the said witnesses to further the case of the prosecution.

20. PW-13 Partap Singh, PW-14 Pradeep Kumar, PW-15 Constable Ramesh Chand, PW-16 Surinder Singh, PW-17 Constable Mohar Singh, PW-19 HHC Ramesh Chand, PW-20 H.C. Sunil Kumar, PW-22 HC Dev Raj and PW-27 Naseeb Singh Patial, are formal witnesses.

21. PW-18 MHC Het Ram has stated about the factum of the case property being deposited with him and being registered in the Malkhana. He has also stated that he sent all these articles to FSL Junga for chemical examination through Constable Ramesh Chand, who after depositing the same with FSL handed over receipt to him.

22. Dr. Pawan Sharma has entered into the witness box as PW-21 and stated that on 17.06.2010 an application Ext. PW21/A alongwith inquest papers was filed and he conducted preliminary examination and issued PMR Ext. PW21/B, which is in his hand and bears his signatures. He also stated that he did not open the body and referred the matter to IGMC, Shimla. He also gave the description of the injuries which were found on the body of the deceased. In his cross-examination, he has stated that lacerated wounds, contusions and abrasions, can occur if he a person falls or rolls down on a hard surface. He also stated that if a person is in a state of intoxication, there is possibility of his rolling down or falling while walking.

23. PW-28 Ajay Sehagal, Scientific Officer, Biology and Serology Department, FSL, Dharamshala, has deposed that sealed parcels pertaining to the present case were received from Crime Branch, State FSL, Junga, by him from Physics and Ballistic Division, FSL, on various dates. He has further deposed that as per report, human blood of group A was found on "Boru, Pant Rajinder Thakur, blood of Suresh Kumar". On the shoes analyzed, the blood was not sufficient in quantity and therefore, determination of grouping was not possible. He has also deposed that blood group of deceased Suresh Kumar was A Group.

24. ASI Mohan Singh has entered the witness box as PW-32 and stated that on 16.06.2010 at around 2.25 P.M., Laxmi Singh, Pradhan, Gram Panchayat Dhamandri, telephonically informed Incharge Police Post Fagu that a dead body was lying in the verandah the Sarai of Bhuteshwar Temple. This fact was telephonically informed by him to SHO Ram Phal and Incharge ICPP Fagu on his mobile phone and he alongwith constable Kanwar Singh went to the spot as per the directions of the S.H.O. He has further deposed that he reached the spot alongwith constable Kanwar Singh and SHO Ram Phal came alongwith other police officials. They found a dead body on the verandah of Bhuteshwar Temple Sarai which was covered with a big gunny bag. Blood was spread in the verandah of Sarai near the dead body. He further stated that when they removed the gunny bag, they came to know that the dead body was of Suresh Kumar resident of village Odar. Thereafter, they took photographs of the spot and the dead body and statement of Hira Singh was recorded under Section 154 Cr.P.C. In his cross-examination, he has stated that he talked with SHO Theog Ram Phal on telephone at 2.25 P.M. He has further deposed that Majholi was at a distance of 25 K.M. away from Police Post Fagu. He further stated that he reached there at 4.15 P.M. He also stated in his cross-examination that they first time came to know that the dead body was that of Suresh when

they removed the gunny bag from over the dead body. According to him, S.H.O. and other police officials reached 2-3 minutes after his arrival. Virender Heta, Deep Ram and Hira Singh were already on the spot. He has also stated that Devi Ram was not on the spot and he did not spot any blood stain in between the shop of Devi Ram and the road leading from there to Sarai. He admitted it to be correct that Majholi was thickly populated. According to him, the dead body was sent to hospital with constable Suridner Kumar between 6.00 P.M. to 6.15 P.M.

25. PW-33 Baldev Thakur has deposed that he had partly investigated the case and recorded statements of the witnesses on 24.07.2010. He has also stated that he presented challan in the Court and also received report from FSL Junga. In his cross-examination, he has stated that he was not aware whether Rukmani Devi was earlier associated in the investigation or not. He has further stated that her statement was recorded in the Police Station. He has also stated that the statements of the witnesses were recorded as per their version.

26. S.I. Ram Phal Yadav has entered into the witness box as PW-34 and stated that on 16.06.2010 he received information from Police Post Fagu that one dead body covered in a gunny bag was lying in the verandah of Bhuteshwar Temple Sarai. On receiving the said information, the same was entered in the daily diary register and thereafter, he alongwith other police officials proceeded towards the spot. He has stated that when he reached the spot, Hira Singh and other villagers were already present there. HC Mohan alongwith one constable of Police Post Fagu was also there. He has also stated that Hira Singh got his statement recorded under Section 154 Cr.P.C. with him and on the basis of the said statement, FIR was registered under Section 302 read with Section 34 I.P.C. In his cross-examination, he has stated that prior to 2.30 P.M., he had not received any information regarding the dead body in the Sarai of Bhuteshwar Temple. He has denied that Viredner Heta and Rakesh Heta approached him before 2.30 P.M. at Police Station Theog. According to him, they did not give any information regarding dead body either telephonically or in person before 2.30 P.M. He has admitted that before he reached the spot, Hira Singh had seen the dead body and identified the deceased as Suresh Kumar. He has also admitted that sister of Hira Singh told Hira Singh that the dead body of Suresh Kumar was lying in the temple complex. He has also stated that he did not spot blood soaked soil in between the shop of Devi Ram and the road and between Bhuteshwar Temple and the road. He has also admitted that Suresh was having criminal history and there were many cases pending against him. He has also stated that it had not come in his investigation that any altercation took place between Rajinder and the complainant in between 1997 to 2010. He has also admitted that the witnesses associated on 16.06.2010 had not seen any altercation between the deceased and the accused. He has also admitted that he had not associated any witness from Theog while recording the statements of the accused under Section 27 of the Evidence Act or recovery of clothes.

27. Dr. Sangeet Dhilon, has entered into the witness box as PW-35 and stated that on 17.06.2010 an application was filed alongwith inquest papers for the autopsy of Suresh Kumar son of Hira Singh. She has given details of multiple antemortem injuries which were found on the body of the deceased. According to her, the deceased died as a result of antemortem head injury and his blood alcohol concentration was 204.58 ml percent.

28. Defence also examined 5 witnesses. DW-1 HC Surinder Kumar produced on record details of the cases pending against deceased Suresh Heta. As per the said record, three criminal cases were pending against Suresh Heta.

29. DW-2 Sandeep Kumar stated that Rajinder Negi was his cousin and clothes Ext. P-25 to P-27, did not belong to Rajinder Negi nor were they taken by the police from their house between 17.06.2010 to 20.06.2010. There is Court observation that clothes Ext. P-25 to Ext. P-27 were over sized whereas Rajinder Negi was having a small built.

30. DW-3 Bhagat Singh has stated that Dhyan Singh was his younger brother and the clothes and chappal, Ext. P-21 to Ext. P-23 did not belong to Dhyan Singh nor they were taken from their house between 17.06.2010 to 20.06.2010.

31. DW-4. Tara Devi has stated that Sanjay was her son and the clothes and shoes Ext. P-17 to Ext. P-19, did not belong to Sanjay Kumar nor they were taken by the police from their house in between 17.06.2010 to 20.06.2010.

32. DW-5 Reena Thakur deposed that Rajinder Thakur was her husband and clothes and shoes Ext. P-12 to Ext. P-15 did not belong to Rajinder Thakur nor they were taken from their house between 17.06.2010 to 20.06.2010.

33. Admittedly, in the present case, there is no eye witness. No person has seen the occurrence of the incident and there is no witness who has actually seen the accused committing the offence of murder or placing the dead body of the deceased in the courtyard of Temple Sarai. Therefore, everything depends upon the circumstantial evidence.

34. During the course of arguments, learned Additional advocate General has culled out the following circumstances connecting the accused with the commission of the offence:-

> "1. Last seen together.
>
> 2. Recovery of the dead body.
>
> 3. Disclosure statements.
>
> 4. Motive.

35. The Honble Supreme Court in **Vijay Thakur** Vs. **State of Himachal Pradesh**, (2014) 14 Supreme Court Cases 609, has carved out the following salient points on the basis of which guilt of the accused can be brought home in the case of circumstantial evidence:

> "(i) The circumstances from which the conclusion of guilt is to be drawn must or should be and not merely 'may be' fully established;
>
> (ii) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;
>
> (iii) The circumstances should be of a conclusive nature and tendency;
>
> (iv) They should exclude every possible hypothesis except the one to be proved; and
>
> (v) 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."

36. Further, the Hon'ble Supreme Court in **Manthuri Laxmi Narsaiah** Vs. **State of Andhra Pradesh**, (2011) 14 SCC 117 has held as under:

> "6. It is by now well settled that in a case relating to circumstantial evidence the chain of circumstances has to be spelt out by the prosecution and if even one link in the chain is broken the accused must get the benefit thereof. We are of the opinion that the present is in fact a case of no evidence."

37. It is settled law that where a case rests upon circumstantial evidence, such evidence in order to base conviction, must be complete and incapable of explanation of any other hypothesis than that of 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.

38. In these circumstances because it is a case of circumstantial evidence, this Court has to satisfy its judicial conscience as to whether by way of circumstantial evidence produced on record by the prosecution, it has been able to link the commission of the offence with the accused or not.

39. Now, we will apply the above salient features to the facts of the present case in order to ascertain as to whether there is any infirmity or perversity with the judgment passed by the learned trial Court in the present case.

1.Last seen together:

40. To prove the said circumstance, out attention has been drawn to the statements of PW-8, PW-10, PW-23 and PW-24.

41. A perusal of the statement of PW-8 Rukmani demonstrates that all she has stated is this that on the fateful night she heard noise coming from the side of Devi Ram's house but she did not come out of her house as she was frightened and on the next day, she came to know that a dead body was lying covered in a house type temple. Even perusal of her statement recorded under Section 161 Cr.P.C. reveals that it is not mentioned there in that she actually saw the accused fighting or having an altercation with the deceased.

42. PW-10 Guman Singh has not supported the case of the prosecution. In his cross-examination, he has stated that on the fateful day Karm Singh was sitting on the front seat of the vehicle and Rajinder Thakur on the rear seat. He has admitted it to be correct that they had come to Bhuteshwar Temple from Hoti and when they were going towards Bhuteshwar Temple, Suresh Heta came from other side and he was drunk. He has also admitted that he shook hands with Suresh Heta and also asked him as to what was the matter to which he responded that he had no concern with it. He also admitted that in his presence Suresh Heta gave fist blows to Rajinder Thakur and Karam Singh. He has further admitted that Karam Singh had come back from Majholi in his vehicle and got down at Hoti, whereas Rajinder Thakur and Suresh remained at Majholi. In his cross-examination, he has stated that he was not knowing Rajinder Thakur and Karam Singh previously. He has further stated that he cannot say that the person who was drunk and had met them on that day was Suresh Heta or some one else.

43. PW-23 Devi Ram, who according to the prosecution, was an eye witness, has not supported the case of the prosecution. He has denied that on 15.06.2010 at around 6.00 P.M. - 6.30 P.M. any altercation took place between the deceased and the accused. He has not admitted the contents of his statement to this effect recorded under Section 161 Cr.P.C. In fact, he has denied the factum of having made any such statement before the Investigating Officer on 17.06.2010.

44. PW-24 Vinod Kumar has also not supported the case of the prosecution and denied that on 15.06.2010, at around 7.00 P.M., when he was returning from the field of Devi Ram, he found accused and the deceased sitting in Bhuteshwar Temple and enjoying drinks. He has also denied the factum of having made any statement under Section 161 Cr.P.C.

45. Similarly, PW-25 Prem Lal has also not supported the case of the prosecution and he has denied that on 15.06.2010, at around 7.30 P.M., he had gone to the shop of Devi Ram and he had seen the accused and deceased sitting near Bhuteshwar Temple. He has also denied the factum of having given any statement as was recorded under Section 161 Cr.P.C.

46. From a perusal of the testimony of the said witnesses, it cannot be said that the prosecution has placed on record any cogent material from which it can be concluded and deciphered beyond reasonable doubt that on the fateful evening the deceased and the accused were last seen together. The evidence placed on record by the prosecution is shaky and does not appear to be trustworthy. None of the witnesses relied upon by the prosecution has supported its case to prove the factum of the deceased having been last seen with the accused. Therefore, in our considered view, the prosecution has not been able to prove this circumstance against the accused.

2.Recovery of the dead body:

47. The factum of recovery of the dead body of the deceased from Sarai of Bhuteshwar Temple though is a matter of record, however, in this regard also, there are some glaring discrepancies in the statements of the prosecution witnesses.

48. PW-32 ASI Mohan Singh has categorically stated that on 16.06.2010 at 2.25 P.M., Laxmi Singh, Pradhan, Gram Panchayat Dhamandri telephonically informed Police Post Fagu that a dead body was lying in the verandah of Bhuteshwar Temple Sarai and on receipt of the said information, he inter alia, passed the said information to SHO Ram Phal at Police Station Theog and went to the spot alongwith constable Kanwar Singh. He has further stated that when he reached the spot they found one dead body in the verandah of Bhuteshwar Temple Sarai which was covered with a big gunny bag. It is only after they removed the gunny bag that they came to know that the dead body was that of Suresh Kumar. The relevant extract of his examination-in-chief is quoted herein-below:-

> **"We found one dead body in the veranda of Bhuteshwar Temple Sarai, which was covered with a big gunny bag. Blood spread in the veranda of Sarai near the dead body. When we removed the gunny bag, we came to know that the dead body is of one Suresh Kumar, resident of village Odar."**

49. Thus, it is apparent from his deposition that according to him till the time the gunny bag was not removed, it was not in the knowledge of anyone as to whose dead body it was.

50. However, PW-34 SI Ram Phal has stated in his cross-examination that before he reached the spot, Hira Singh had seen the dead body and had come to know that the same was of Suresh Kumar. Incidentally, as per PW-32, SI Ram Phal reached the spot after him. Now when we peruse the statement of complainant Hira Singh PW-1, he has deposed that on 16.06.2010, his sister-in-law Begi Devi informed him that the deceased had a quarrel at Majholi on 15.06.2010 and on receipt of the said information, he alongwith his wife Suni Devi went to Majholi and found the dead body of their son lying covered with gunny bag in verandah of the Sarai. PW-3 Virender Heta has deposed that on 16.06.2010, he received call from Vijay Heta that Suresh was lying dead in Mjaholi and on receipt of the said information, they went to Majholi and when they reached there, they found that a dead body was lying in the verandah of Sarai of Bhuteshwar Temple covered with gunny bag. He further deposed that besides them, the parents of Suresh and 15-20 other persons of their family, were also there. When the gunny bag was removed, they found that deceased had received injuries on head, chest, back and on both legs. He has also stated that the police reached at about 3.00 P.M. PW-6 Deep Ram has stated that on 16.06.2010 he received a call that body of Suresh was lying in Majholi and he went to Majholi at around 11.30 A.M.-12.00 Noon and found that the dead body was lying covered with gunny bag in the Sarai. He has further stated that when they uncovered it, the dead body was found to be that of Suresh. He and Vijay had gone to the spot together.

51. On the basis of what has been mentioned above, it is apparent that there are discrepancies in the statements of the prosecution witness with regard to the mode and manner leading to the discovery of the fact that the dead body was that of Suresh. According to PW-6 Deep Ram, he reached the spot between 11.30 A.M.-12.00 Noon and uncovered the dead body, which was in gunny bag and discovered the same as that of Suresh. PW-34 in his statement has stated that before he alongwith the police party reached there, the father of the deceased had already seen the dead body and identified it to be that of Suresh. However, PW-32 in his statement has stated that the factum of the dead body was that of Suresh was discovered only when the police party had reached the spot and thereafter, the gunny bag was removed from the body. There is not even an iota of evidence produced on record by the prosecution to connect the accused with the death of the deceased. There is no eye witness who has supported the case of the prosecution that an altercation took place between the deceased and the accused and that

deceased was killed by accused. No person has deposed that the accused were seen placing the body of the deceased in the verandah of the Sarai of Bhuteshwar Temple. Therefore, in our considered view, this circumstance has also not been able to be proved by the prosecution, so as to link the accused with the commission of the offence.

3.<u>Disclosure statements:</u>

52. The case of the prosecution is that while the accused were in custody, they have given statements under Section 27 of the Evidence Act, which has led to the recovery of alleged weapon of offence. The disclosure statements are Ext. PW7/B, Ext. PW7/C and Ext. PW7/D. We will deal with the said disclosure statements one by one.

53. Ext. PW7/B is the disclosure statement made by Dhyan Singh to the effect that he can get the place demarcated where he had hidden "Dandas" with which the deceased was beaten. This statement is dated 20.06.2010 and Vijay Kumar and Bal Krishan are witnesses to the said statement. Vijay Kumar has not been examined by the prosecution. Bal Krishan has entered the witness box as PW-7. Ext. PW7/C is the disclosure statement of accused Roop Singh of the same date, to the same effect and this statement is also made in the presence of Vijay Kumar and Bal Krishan. Ext. PW7/D is the disclosure statement of accused Sanjay Kumar of the same date, to the same effect and this statement is also made in the presence of Vijay Kumar and Bal Krishan.

54. Recoveries Memos are Ext. PW7/F, Ext. PF7/H and Ext. PW7/K. Recovery has been effected in the presence of Vijay Kumar and Bal Krishan. The alleged Dandas recovered on the basis of the disclosure statements of the accused are Ext. P-35, Ext. P-37 and Ext. P-40.

55. It is a matter of record that despite the fact that there were 39 injuries on the body of deceased Suresh, the alleged weapon of offences Ext. P-35, Ext. P-37 and Ext.P-40 were not found having even single drop of blood on them. These weapon of offence were never shown to the Doctor, who conducted the autopsy, so as to have the opinion of the said Doctor as to whether the injuries which were found on the body of the deceased could have been inflicted with said Dandas or not. Bal Krishan has not been able to satisfactorily explain as to what he was doing at the Police Station on 20.06.2010 when the alleged disclosure statements were made by the accused in his presence and in the presence of Vijay, who was closely related to the deceased. He has admitted that he was related to the deceased and he had good relations with the family of the deceased. He has also admitted that he went to the spot, where the dead body of the deceased was found at village Majholi on 16.06.2010.

56. Even otherwise, it is settled law with regard to Section 27 of the Evidence Act, that what is important is discovery of the material object at the disclosure of the accused but such disclosure alone would not automatically lead to the conclusion that the offence was also committed by the accused. In fact, thereafter, burden lies on the prosecution to establish a close link between discovery of the material object and its use in the commission of the offence. What is admissible under Section 27 of the Act is the information leading to discovery and not any opinion formed on it by the prosecution.

57. Thus, it is apparent from the statement of PW-7 that he is an interested witness as he was related to the deceased and was having good relations with the family of the deceased. His testimony does not inspires confidence. The appellant has not been able to satisfy this Court that why no independent witness was associated either with the recording of the disclosure statements of the accused or with the recovery effected on the basis of the said disclosure statements of the accused. Further, the prosecution has also not been able to place any material on record from which the Dandas recovered on the basis of the disclosure statements can be connected with the commission of the offence. In this view of the matter, in our considered view, even this circumstance has not been proved by the prosecution against the accused.

4. <u>Motive:</u>

58. The prosecution has attributed that the accused had a motive to do away with Suresh Heta, as there was some dispute between the father of the deceased and Rajinder Thakur since the year 1997 over some land but there is nothing on record to substantiate this. Not only this, PW-34 has clearly stated that it has not come in his investigation that any altercation took place in between Rajinder and complainant i.e. father of the deceased between 1997 to 2010. On the other hand, it stands established on record that the deceased was having criminal record and there were criminal cases pending against him. It has also come on record that at the time of his death, he was intoxicated. Be that as it may, the fact of the matter remains that the prosecution has not been able to bring any cogent material on record from where it can be inferred by this Court that the accused had a motive to do away with the deceased. Therefore, this circumstance has also not been proved by the prosecution against the accused.

59. It is settled position of law that suspicion however strong cannot be a substitute for proof. In a case resting completely on the circumstantial evidence the chain of circumstances must be so complete that they lead only to one conclusion, that is, the guilt of the accused.

60. Therefore, when we take into consideration all these circumstances together alongwith the material produced on record by the prosecution to prove the said circumstances and to link the accused with the commission of the offence, the only conclusion which can be arrived at is that the prosecuting has miserably failed to prove either of the circumstances and it has has failed to link the accused with the commission of the offence.

61. A perusal of the judgment passed by the learned trial Court, also demonstrates that all these aspects of the matter have been gone into by the learned trial Court and thereafter, it has come to the conclusion that the prosecution was not able to prove its case against the accused. In our considered view, the judgment so passed by the learned trial Court is neither perverse nor the conclusions arrived at by the learned trial Court are not borne out from the record.

62. Therefore, we uphold the judgment of acquittal passed by the learned trial Court and dismiss the present appeal being devoid of any merit. Bail bonds, if any, furnished by the accused are discharged.

63. We place on record our appreciation for the assistance rendered to the Court by learned Amicus Curiae in the adjudication of the case.

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

Union of India and others .....Petitioners.

Versus

P.K. Sarin .....Respondent.

CWP No.1666 of 2013.
Judgment reserved on: 19.07.2016.
Date of decision: July 26, 2016.

Constitution of India, 1950- Article 226- Respondent joined services of the petitioners as Junior Engineers on 02.08.1976 - he was promoted as Assistant Engineer in 1984- he was placed under suspension but was allowed to cross efficiency bar- prosecution lodged against him resulted into acquittal- period of suspension was ordered to be treated as on duty- review DPC was held to consider the grant of second ACP and the case of the respondent was rejected- respondent filed

an original application, which was allowed- aggrieved from the order, present writ petition has been filed- held, that respondent was due for crossing of the efficiency bar and was allowed to cross the same- therefore, it was unfair on the part of the petitioners to seek review of the same after more than 11 years- competent authority could not have denied the favourable consideration after permitting the respondent to cross efficiency bar- petition dismissed.

(Para-6 to 10)

For the Petitioners : Mr.Ashok Sharma, Assistant Solicitor General of India with Mr.Ajay Chauhan, Advocate.

For the Respondent : Respondent in person.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

This petition is directed against the order passed by the learned Central Administrative Tribunal (for short 'Tribunal') whereby the Original Application as filed by the respondent herein came to be allowed and the petitioners were directed to grant to the respondent the benefit of ACP with effect from the due date.

2. The case has a chequered history. The respondent joined services of the petitioners as Junior Engineer on 02.08.1976 and in 1984 was promoted as Assistant Engineer. On 13.03.1991, he was implicated in a trap case alongwith Junior Engineer S.K.Awasthi and was placed under suspension on 29.04.1991. Vide order dated 16.11.2000, the respondent was allowed cross efficiency bar with effect from 01.10.1990. The prosecution launched against the respondent resulted in his acquittal vide order dated 20.08.2002 and thereafter the suspension of the respondent also came to be revoked on 27.01.2003 and this period of suspension vide order dated 12.03.2004 was ordered to be treated on duty for all purposes.

3. On 01.03.2007, the respondent approached the learned Tribunal for grant of ACP and vide order dated 20.08.2009, the petitioners were directed to conduct review DPC to consider the claim of the respondent with effect from 01.08.2000 by ignoring the adverse ACRs. The petitioners assailed this order by approaching the Hon'ble Delhi High Court and vide order dated 02.11.2010, the petition was disposed of by directing the petitioners to constitute a review DPC to consider the grant of second ACP and it was observed as under:-

> *"15. But, with reference to ACP benefit it has to be noted that the respondent has been granted the benefit of crossing the efficiency bar and thus the law laid down in Brij Nath Pandey's case (supra) would have to be considered and in all probability the petitioner must get the ACP benefit, but we leave it without expressing any conclusive opinion for the reason this would be the job of the Review Committee.*
>
> *16. We are informed that in compliance of the decision dated 25.2.2009 disposing of WP(C) 802/2006 representation against the below benchmark ACR grading has been considered and rejected.*
>
> *17. Thus, there is no requirement for us to direct that for purposes of ACP benefit the ritual of again receiving a representation against the below benchmark ACR grading and considering the same be completed.*
>
> *18. However, the effect of the respondent having been granted benefit of crossing the efficiency bar with reference to the decision of the Supreme Court in Brij Nath Pandey's (supra) has to be considered and thus we direct that a Review Committee be constituted to decide the grant of ACP benefit to the respondent having regard to the fact that the respondent has been cleared for crossing the efficiency bar. Needful would be done within a period of 3 months from today and if ACP benefit is accorded arrears would be paid to the respondent within further*

2 months thereof failing which the amount payable would carry interest @8% per annum reckoned after 5 months from today."

4. The petitioners vide order dated 08.02.2011 rejected the claim of the respondent constraining him to approach the Hon'ble Delhi High Court by way of contempt petition which was, however, dismissed granting liberty to the respondent to take recourse to such action as may be available to him. This led to the filing of the Original Application No.71/HP/2012 before the learned Tribunal, who vide their order dated 04.10.2012 allowed the application by observing as under:-

> *"2. It is beyond the pale of controversy that the period for which the applicant herein was under suspension had been ordered to "be treated as a period spent on duty for all purposes under sub-rule (4)". It is also no longer a matter of controversy that the applicant was allowed to cross the efficiency bar as well, vide order dated 16.11.2000 (Annexure A-3).*
>
> *3. The view obtained by the competent authority in allowing the applicant to cross the efficiency bar notwithstanding, the grant of ACP benefit was denied to him on the premise that he does not make the bench-mark.*
>
> *4. In fact, the applicant raised the relevant plea before the Delhi High Court as well which (plea) was dealt with by the High Court with the observations which are extracted hereunder:-*
>
> > *"But with reference to ACP benefit it has to be noted that the respondent has been granted the benefit of crossing the efficiency bar and thus the law laid down in Brij Nath Pandey's case (supra) would have to be considered and in all probability the petitioner must get the ACP benefit, but we leave it without expressing any conclusive opinion for the reason this would be the job of the Review Committee."*
>
> *5. In view of the apparent and also conceded commonality of the period which had to be taken into consideration for the allowance of EB-crossing and also the grant of ACP benefit, the competent authority cannot deny a favourable consideration to the applicant for the latter facet of the relief; while reiterating the validity of its view in having allowed the applicant to cross the efficiency bar under the former facet, particularly when the period under suspension had been ordered to be treated as the period spent on duty. Obviously, no ACR for that period could have been recorded. The available record was taken into consideration by the competent authority in allowing the applicant to cross the efficiency bar."*

5. It is against this order of the learned Tribunal that the present petition has been filed on the ground that the learned Tribunal had granted relief only on the ground that the respondent had crossed the efficiency bar, whereas, it was not so because the petitioners had thereafter served a show-cause notice why the notification allowing him to cross the efficiency bar despite he having average confidential report be not withdrawn. The recommendations of the Reviewing Efficiency Bar Committee had been accepted by the competent authority and it was decided to cancel the order dated 16.11.2000 through which permission crossing efficiency bar had been granted in respect of the respondent.

We have heard the learned Assistant Solicitor General of India for the petitioners and respondent, who has appeared in person and also gone through the records of the case.

6. It is not in dispute that the respondent was due for crossing of the efficiency bar with effect from 01.10.1990 and infact had been allowed to cross the same vide order dated 16.11.2000 and, therefore, it was unfair on the part of the petitioners to have sought review of the same after more than 11 years vide meeting dated 01.02.2011.

7. In addition to this, we may note that even in the earlier litigation which had reached the Hon'ble Delhi High Court, the respondent was tentatively held entitled to get ACP.

8. Apart from above, it is not in dispute that the period which had been taken into consideration for the allowance of EB crossing and that of grant of ACP is virtually the same and, therefore, as rightly held by the learned Tribunal, the competent authority could not have denied the favourable consideration to the latter facet of the relief when admittedly they had permitted the respondent to cross the efficiency bar under the former facet. This assumes importance because admittedly the period of suspension of the respondent has already been ordered to be treated the period spent on duty and, therefore, obviously no ACR for the said period could have been recorded.

9. It is not only to late in the day, but would be too harsh upon the respondent, who is a retiree, to hold at this stage that he was erroneously permitted to cross the efficiency bar or that he is not entitled to the ACP in question.

10. Having said so, 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 MANSOOR AHMAD MIR, C.J. AND HON'BLE MR.JUSTICE TARLOK SINGH CHAUHAN, J.

Urmila Sharma and others ……….Appellants.
versus
State of H.P. and others ……….Respondents.

LPA No.5 of 2011
Decided on: July 26, 2016**.**

Constitution of India, 1950- Article 226- Writ petition was dismissed by the Court on the ground that civil suit is pending between the parties- it was not disputed that civil suit is pending adjudication before the civil court- held, that writ petition is not maintainable and was rightly dismissed by the Single Judge- appeal dismissed. (Para-2 to 4)

For the Appellants:	Mr.Ashok Sharma, Senior Advocate, with Mr.Ajay Chauhan, Advocate.
For the Respondents:	Mr.Shrawan Dogra, Advocate General, with Mr.Anup Rattan, Addl.A.G., Mr.J.K. Verma and Mr.Kush Sharma, Dy.A.Gs., for respondents No.1 to 4 and 6. Mr.Hamender Chandel, Advocate, for respondent No.5. Nemo for respondent No.7.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

This appeal is directed against the judgment and order, dated 17th December, 2010, passed by a learned Single Judge of this Court in CWP No.2280 of 2007, titled Kaushlya Devi vs. State of H.P. and others, whereby the writ petition was dismissed on the premise that the lis relating to the subject matter of the writ petition was pending between the parties before the civil court also, (for short, the impugned judgment).

2. It is apt to reproduce paragraphs 8 and 9 of the impugned judgment hereunder:

> *"8. Unless it is clearly established that the construction has, in fact, been raised on joint property of the parties, i.e. the petitioner and respondent No.7, no direction can be issued*

for revocation of revised-cum-completion plan, which purports to be in respect of construction, raised on respondent No.7's exclusive property bearing Khasra No.1524/1361/718/2/1. Respondents are disputing petitioner's claim that construction has been raised on joint property, bearing Khasra No.1353/706. They have refuted the allegation not only in the present writ petition, but also in the suit, pending before the Civil Court. Matter is still pending with the Civil Court. The said Court has yet to decide whether the construction is on the joint property of the parties or exclusive property of respondent No.7.

9. In the facts and the circumstances of the case, as summed up hereinabove, right course for the petitioner is to approach the Civil Court where the suit is pending for revocation of revised-cum-completion plan, as a consequential relief to the relief of mandatory injunction, already sought by her."

3. During the course of hearing, the learned counsel for the parties informed that the said Civil Suit bearing No.226/1 of 08/09, titled Sita Paul vs. Municipal Corporation, Shimla, is still pending adjudication before the Civil Judge (Junior Division), Court No.8, Shimla.

4. In view of the above, the writ petition was not maintainable and rightly came to be dismissed by the learned Single Judge. Accordingly, the impugned judgment merits to be upheld and the same is upheld. Consequently, the appeal is dismissed. However, the Civil Judge concerned is directed to decide the civil suit, referred to above, as early as possible, preferably within six months from today. Pending CMPs, if any, also stand disposed of .

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Gajinder Singh …. Appellant

Versus

Heminder Singh alias Mohinder Singh Negi …. Respondent

RSA No. 220 of 2007
Reserved on: 22.07.2016
Date of decision: 27.07.2016

Code of Civil Procedure, 1980- Section 100- Plaintiff filed a civil suit for recovery of Rs. 42,545/- pleading that he and defendant were real brothers and joint owners of Maruti Gypsy- vehicle was used by the defendant with the consent of the plaintiff- vehicle was stolen in the year 1998 and was found in an accidental condition- it was insured with National Insurance Company- matter was reported to the National Insurance Company- a Surveyor was appointed to assess the damage- but no amount was paid- plaintiff wrote a letter to the Insurance Company and was informed that amount of Rs. 63,500/- had been paid to the defendant- plaintiff filed a civil suit for claiming half of the amount- suit was decreed by the trial court- an appeal was preferred, which was allowed- held, in second appeal that plaintiff had examined himself and two witnesses to prove his case- defendant had not examined any person to corroborate his version- bills produced on record to substantiate the version of the defendant that he had spent money on the repair of the vehicle were not proved- vehicle was jointly registered in the name of plaintiff and defendant- in these circumstances, plaintiff was entitled to ½ of the amount- Appellate Court had wrongly set aside the judgment of the trial Court- appeal allowed. (Para-10 to 21)

Cases referred:

Avtar Singh and Others Vs. Gurdial Singh and Others, (2006) 12 Supreme Court Cases 552
hreedhar Govind Kamerkar Vs. Yesahwant Govind Kamerkar and another, (2006) 13 Supreme Court Cases 481
Ponnusami Chettiar Vs. Kailasam Chettiar, A.I.R.(34) 1947 Madras 422

For the appellant: Mr. K.D. Sood, Senior Advocate with Mr. Rajnish K. Lal and Mr. Ankit Aggarwal, Advocates.

For the respondent: Ms. Ritta Goswami and Ms. Komal Chaudhary, Advocates.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.:

By way of the present appeal, the appellant has challenged the judgment passed by the Court of learned District Judge, Kinnaur Division at Rampur Bushahr, in civil Appeal No. 24 of 2005, dated 13.03.2007, vide which, learned Appellate Court has set aside the judgment and decree passed by the Court of learned Civil Judge (Senior Division), District Kinnaur at Reckong Peo, in Civil Suit No. 52-1 of 2002, dated 10.06.2005.

2. This appeal was admitted on 28.08.2008 on the following substantial questions of law:-

1. Whether the findings of the court below are based on misreading, misconstruction of oral and documentary evidence more particularly the statements of PW1 to PW3 an documents Exhibit PW1/A, PW1/B.

2. Whether the judgment of the District Judge is contrary to the provisions of order 20 rule 1 and judgment of this Court reported in AIR 2000(1) SC 15 Om Parkash –v- State of H.P.

3. Whether the judgment of the court below vitiated in view of the admission made by the defendant in the application under order 41 rule 27 CPC when the defendant had failed to substantiate the case in the absence of the documents being not proved and in not deciding the application under order 41 rule 27 CPC which has vitiated the findings.

3. At the time of arguments, Mr. K.D. Sood, learned Senior Counsel for the appellant, has submitted that he will be pressing substantial question of law No. 2 only because substantial questions of law No. 4 and 6 were wrongly framed.

4. Brief facts necessary for the adjudication of the present case are that the appellant/plaintiff filed a suit for recovery of Rs.42,545/- against the defendant on the ground that he and defendant were real brothers and they were joint owners of Maruti gypsy (HP-25-0004), which vehicle was registered with the Registering and Licencing Authority Kalpa, District Kinnaur. As per the plaintiff, the vehicle was mostly used by the defendant with the consent of the plaintiff and the plaintiff used to call for the vehicle as and when required by him. In the year 1998, the said vehicle was stolen and was thereafter found in an accidental condition. A criminal case was duly registered with the police in this regard. The vehicle was insured with the National Insurance Company Ltd. Branch Office at Tapri and the factum of vehicle having been stolen and the same subsequently been found in an accidental condition was duly communicated to the Insurance Company. The said Company visited the spot and got the damage assessed. It was further the case of the plaintiff that at the time of the purchase of the vehicle he had paid the entire sale consideration but keeping in view the fact that the defendant also required the same and he was his real brother, vehicle was purchased in the joint name of the plaintiff and defendant. Further, as per the plaintiff, after the assessment of the damage by the Insurance Company, the plaintiff did not hear anything with regard to the payment of the claim. In these circumstances, he wrote a letter to the Insurance Company on 16.05.2002 and in response thereof, he was intimated by the Insurance Company that the said Company had already made compensation to the tune of Rs.63,500/- vide cheque No. 814191 dated 21.12.1999, which was duly received by the defendant on 21.12.1999. According to the plaintiff, the defendant was legally bound to pay half of the said amount, which he had

received from the Insurance Company to the plaintiff. However, this was not done by the defendant and accordingly, on these basis, the suit was filed by the plaintiff.

5. In the written statement, though the defendant admitted the factum of the registration of vehicle in the joint names of the plaintiff and defendant, however, according to him, the plaintiff had consented to get the ill-fated vehicle overhauled and it was also agreed that whatever expenses were incurred in the repair of the vehicle, same were to be borne equally by the plaintiff and the defendant. According to the defendant, he incurred an amount of Rs.70,187.76 in the repair of the said vehicle on 01.06.1999, which was substantiated by two different bills amounting to Rs.56,137.76 and Rs.18,050.00 respectively. Further, as per him, after receiving the claim amount from insurer on 21.11.1999 the plaintiff was duly informed and apprised of the adjustment of claim amount towards the expenses incurred by the defendant but the plaintiff did not respond. Therefore, on this plea, the defendant denied the claim of the plaintiff.

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

1. Whether the plaintiff is entitled to the recovery of Rs.42,545/- alongwith interest, as alleged? ... OPP
2. Whether the suit is barred by limitation? ... OPD
3. Whether the plaintiff is estopped from filing this suit by his act and conduct? ... OPD
4. Whether the plaintiff has no cause of action to file the present suit OPD
5. Relief.

7. The following findings were returned on the said issues by the learned trial Court on the basis of the material produced before it by the respective parties:

Issue No. 1	:	The plaintiff is entitled to the recovery of Rs.31,750/- plus interest at the rate of 6% per annum.
Issue No. 2	:	No.
Issue No. 3	:	No.
Issue No. 4	:	No.
Relief	:	Suit decreed as per operative portion of the Judgment.

8. The learned trial Court held that it was an admitted fact that the vehicle in question was registered in the joint names of plaintiff and defendant. It further held that it was also an admitted fact that both the plaintiff and defendant were real brothers and whereas, the plaintiff was permanently residing at Rampur Bushahr for last many years and the defendant was residing at Powari in District Kinnaur. It further held that the factum of vehicle being stolen and thereafter, the same being found in an accidental condition and being in the possession of the defendant was also an admitted fact. The learned trial Court further held that the insurance of the said vehicle was carried out with National Insurance Company Ltd. having its Branch Office at Tapri and receiving of an amount of Rs.63,500/- by the defendant from the said Insurance Company by way of cheque No. 814191 dated 21.12.1999 in lieu of the claim of vehicle in issue was also an admitted fact. On these basis, the learned trial Court held that it was difficult to say that amount as was being claimed by the defendant was actually incurred by him on the repair of the vehicle as the defendant had failed to prove on record the alleged bills on which he was pressing his claim. It further held that even otherwise there was nothing on record to prove that an amount of Rs.70,187.76 was actually incurred by the defendant on the repair of the vehicle in question. Accordingly, the learned trial Court concluded that the record reflected that claim amount of Rs.63,500/- was received by the defendant from Insurance

Company on 21.12.1999 and he had not paid half amount to the plaintiff. Learned trial Court held that the plaintiff was entitled to the said amount i.e. half of the claim amount which had been received from the Insurance Company alongwith interest. Accordingly, the suit was decreed by the learned trial Court in favour of the plaintiff for recovery of Rs.31,750/- alongwith interest.

9. Feeling aggrieved by the said judgment passed by the learned trial Court, the defendant filed an appeal.

10. Learned Appellate Court vide its judgment dated 13.03.2007 allowed the appeal filed by the defendant and set aside the judgment and decree passed by the learned trial Court. Learned Appellate Court held that the main question which arose for consideration in the appeal was whether the plaintiff was entitled to the half of the amount of claim received from the Insurance company? Learned Appellate Court held that learned counsel for the plaintiff had made suggestions to the defendant that before receipt of the insurance compensation, the defendant had submitted the final bill of repair to the Insurance Company and only thereafter the Insurance Company had paid the compensation. It further held that there was no evidence that the Insurance Company had paid the compensation in excess of the repair amount. It further held that it was not the case of the plaintiff that he had paid any amount for the repair of the vehicle. Learned Appellate Court held that whatever amount defendant had received had been spent by him on the repair of the vehicle and only then the Insurance Company had allowed the compensation. On these basis, the learned Appellate Court held that the learned trial Court had erred in decreeing the suit on the ground that the defendant had not proved the bills as the same in fact stood proved from the admission of the plaintiff as well as the Insurance Company that they had paid the compensation in lieu of the bills of repairs submitted by the defendant. Learned Appellate Court further held that in the absence of any contribution by the plaintiff towards the repair expenses, the plaintiff was not entitled to receive half of the amount of compensation which was paid for making the vehicle roadworthy by the Insurance Company. On these basis, learned Appellate Court held that the fact that the defendant had not proved the bills had no effect as the same stood proved from the suggestions made by the learned counsel for the plaintiff that the defendant had submitted the bills of repair to the Insurance Company and only then the Insurance company had paid the compensation in favour of both the brothers. On these basis, learned Appellate Court allowed the appeal and set aside the judgment and decree passed by the learned trial Court.

11. Feeling aggrieved by the said judgment passed by the learned Appellate Court, vide which, it has upset the judgment and decree passed by the learned trial Court, the plaintiff has filed the present appeal.

12. Mr. K.D. Sood, learned Senior Counsel appearing for the appellant has argued that learned Appellate Court has erred in setting aside the well reasoned judgment and decree passed by the learned trial Court. According to Mr. Sood, learned Appellate Court failed to appreciate that the defendant had not produced on record even an iota of evidence to substantiate his contention that he had spent any money on the repairs of the vehicle in issue with the consent which the plaintiff allegedly had agreed to share alongwith the defendant. As per Mr. Sood, this concocted story of the defendant was believed by the learned Appellate Court, which has resulted in great injustice to the present appellant. According to Mr. Sood, it stood proved on record that the entire compensation amount paid by the Insurance Company to the defendant, has been appropriated by him and the plaintiff has not been paid his share out of the said compensation amount though the plaintiff was entitled to half of the said amount. This important aspect of the matter had been totally over looked by the learned Appellate Court and that too by placing unnecessary importance to the suggestions given to the defendant without appreciating that the case of the plaintiff could not have been negated on the basis of the said suggestion. As per Mr. Sood, the plaintiff had never admitted that an amount of Rs.70,187.00 had been incurred as expenses by the defendant on the repair of the vehicle in issue nor the defendant had placed any material on record to substantiate this contention. Therefore, in absence of any contemporary material to justify this contention of the defendant on record, the

learned appellate Court has erred in allowing the appeal of the defendant and set aside the judgment passed by the learned trial Court.

13. On the other hand, Ms. Ritta Goswami, Advocate, had submitted that in view of the admission made by the plaintiff by way of suggestions put to the defendant in his cross-examination there was no need for the defendant to prove that he had actually spent an amount of Rs.70,187/- on the repair of the vehicle in question by placing any material on record. Ms. Goswami argued that it was well settled principle of law that a fact which stood admitted by the other party need not be proved. According to her, as the factum of defendant having spent money on the repair of the vehicle stood admitted by the plaintiff, therefore, this fact was not to be proved by the defendant. In order to substantiate her contention, she placed reliance on the following judgments:-

(i) ***Avtar Singh and Others Vs. Gurdial Singh and Others*, *(2006) 12 Supreme Court Cases 552***,

(ii) ***Shreedhar Govind Kamerkar Vs. Yesahwant Govind Kamerkar and another*, *(2006) 13 Supreme Court Cases 481***, *and*

(iii) ***Ponnusami Chettiar Vs. Kailasam Chettiar*, *A.I.R.(34) 1947 Madras 422***.

14. Accordingly, she argued that there was no merit in the present appeal and the same deserves dismissal.

15. I have heard learned counsel for the parties and have also gone through the records of the case as well as the judgments passed by both the learned Courts below.

16. A perusal of the records of the present case demonstrate that to substantiate its case, plaintiff has examined two witnesses in addition to the plaintiff himself having stepped into the witness box, whereas, the defendant ha not examined any person as his witness except entering into the witness box himself. Besides this, the plaintiff has exhibited two documents to substantiate his case i.e. Registration Certificate of the vehicle Ext. PW1/A and reply to the letter of the plaintiff given by the Insurance Company Ext. PW1/B. On the other hand, the defendant has not produced any document on record to substantiate his case.

17. The two alleged bills which were produced by the defendant to substantiate his contention that he had spent money on the repair of the vehicle were not proved on record.

18. The factum of the plaintiff and defendant being joint owners of the vehicle in question is not in dispute and the same is also evident from Ext. PW1/A. Similarly, the factum of the entire claim amount having been paid by the Insurance Company to the defendant is also evident from communication dated 23.05.2002 Ext. PW1/B. The factum of this claim amount having been appropriated by the defendant is also not in dispute. Accordingly, in this background, it has to be adjudicated whether the learned Appellate Court has erred in setting aside the judgment and decree passed by the learned trial Court or not. Plaintiff has entered the witness box as PW-1 to prove his case. PW-2 Anil Kumar, Registration Clerk, RLA Kalpa, has proved on record that the vehicle in question was jointly registered in the names of the plaintiff and defendant. Similarly, PW-3 Pratap Singh has proved on record the entire claim amount of vehicle No. HP 25-0004 was paid to the defendant and that he has appropriated the entire amount. Exhibits PW1/A and PW1/B are to this effect. Thus, the plaintiff has placed material on record from where it can be deduced that the vehicle in question was jointly owned by him and his brother i.e. the defendant and the entire claim amount which was paid by the Insurance Company in lieu of the said vehicle was not only to be paid to the defendant but he has also appropriated the same to the exclusion of the plaintiff.

19. On the other hand, the defendant has not placed any material whatsoever on record to substantiate his case that he has spent an amount of over Rs.70,000/- on the repair of the vehicle. Besides his bald statement to this effect, there is no other evidence produced by him

either ocular or documentary. In these circumstances, in my considered view, whereas the learned trial Court had rightly decreed the suit of the plaintiff, learned Appellate Court has erred in setting aside the said well reasoned judgment passed by the learned trial Court. The reasonings which has been given by the learned Appellate Court while setting aside the judgment passed by the learned trial Court are not sustainable. Learned Appellate Court has heavily relied upon the suggestions which have been made to the defendant during the course of his cross-examination to non-suit the plaintiff. However, the learned Appellate Court has failed to appreciate that on the strength of the suggestions so made to defendant by no stretch of imagination, it could be held that the plaintiff had admitted the factum of the defendant having been spent more than Rs.70,000/- on the repair of the vehicle. The onus to prove the factum of having incurred expenses on the repair of the vehicle was on the defendant which he failed to discharge. The judgments cited by the learned counsel for the respondent in this background are of no assistance to the respondent. The factum of admission being the best form of evidence and Section 58 of the Evidence Act postulating that things admitted need not be proved as held by the Hon'ble Supreme Court in ***Avtar Singh and Others Vs. Gurdial Singh and Others***, ***(2006) 12 Supreme Court Cases 552*** and ***Shreedhar Govind Kamerkar Vs. Yesahwant Govind Kamerkar and another***, ***(2006) 13 Supreme Court Cases 481***, is a well settled proposition of law. However, on the basis of material from the material on record in the present case, it cannot be concluded that at any stage the plaintiff has admitted defendant having been spent an amount of Rs.70,000/- on the repairs of the vehicle. The arguments of Ms. Goswami that the bills submitted by the defendant which are not exhibited ipsofacto were admissible in law in view of the law laid down by the High Court of Madras in ***Ponnusami Chettiar Vs. Kailasam Chettiar***, ***A.I.R.(34) 1947 Madras 422***, is also without any merit. The High Court of Madras in the above mentioned judgment has held that if the execution of the document is admitted then it need not be proved. There is no quarrel with the said proposition of law. Had it been a case that the plaintiff herein had admitted the fact of defendant having carried out the repairs of the vehicle and having spent money on the said repairs and had he admitted the bills produced in this regard by the defendant, then there was no need for the defendant to have proved the said bills. But the fact of the matter remains that the plaintiff has never admitted any of the above mentioned facts. Therefore, the judgment cited by the learned counsel for the respondent is of no assistance to her.

20. Accordingly, in my considered view, the judgment and decree passed by the learned Appellate Court are not sustainable in law and learned Appellate Court has erred in setting aside the well reasoned judgment passed by the learned trial Court. The substantial question of law is answered accordingly.

21. In view of what has been discussed above, the present appeal is allowed with costs and the judgment and decree passed by the learned Appellate Court dated 13.03.2007 in Civil Appeal No. 24 of 2005 is set aside and the judgment and decree dated 10.06.2005 passed by the learned trial Court in Civil Suit No. 52-1 of 2002 is upheld. Miscellaneous application(s) pending, if any, also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Lachhmi Chand …Petitioner.

Vs.

The Presiding Judge, Industrial Tribunal-cum-Labour Court, Shimla and another …Respondents.

CWP No.: 4694 of 2009
Reserved on: 22.07.2016
Date of Decision: 27.07.2016

Industrial Disputes Act, 1947- Section 25- Claimant was appointed as a Forest Guard by the respondent and he worked as such for years together and had put in 240 days in each calendar year- respondents terminated the services of the petitioner without any notice or without payment of any compensation- claim petition was dismissed by the Labour Court- held, that claim put by the claimant that he was engaged by the respondents as Forest Guard in the year 1974 and he continued to serve as such till his termination was not substantiated by him by producing any cogent material on record- petitioner has not proved his Mandays chart from which it can be inferred that he had completed 240 days in preceding 12 months from the date of termination of his services- record produced by the respondents shows that claimant was engaged as a Guard for 30 days on a consolidated wage of Rs 1046.50/- Labour Court had gone into all the materials while dismissing the petition- the finding of fact recorded by the Labour Court should not be interfered unless the findings so returned by the learned Labour Court are perverse or not borne out from the material on record- petition dismissed. (Para-11 to 16)

Case referred:

State of H.P. and another Vs. Shankar Lal and other connected matters, ILR 2016 (I) HP 225 (D.B.)

For the petitioner: Mr. J.R. Poswal, Advocate.
For the respondents: Nemo for respondent No. 1.
Mr. K.D. Sood, Sr.Advocate, with Mr. Rajnish K. Lal, for respondent No.2.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. **:**

By way of present writ petition, the petitioner has challenged the award passed by learned Industrial Tribunal-cum-Labour Court, Shimla in Reference No. 267 of 1998 dated 01.08.2009 vide which, learned Labour Court has rejected the claim of the petitioner.

2. In brief, facts necessary for adjudication of the present case are that on an industrial dispute raised by the petitioner/claimant (hereinafter referred to as 'claimant'), the following reference was received by learned Labour Court from appropriate Government for adjudication:

> *"Whether the termination of services of Shri Lakshmi Chand by the M/s Ballarpur Industries, Unit Shree Gopal papers, Yamuna Nagar (Haryana) w.e.f. 14.3.1995 without any notice, chargesheet, enquiry and without compliance of Section 25-F of the Industrial Disputes Act, 1947 is legal and justified? If not, to what relief of service benefits, back wages, seniority and amount of compensation, Shri Lakshmi Chand is entitled to?"*

3. As per the statement of claim filed by the claimant, he was appointed as a Forest Guard by the respondents and he worked as such with the respondents for years together and had put in 240 days in each calendar year. But despite this, the respondents terminated his services without any requisite notice nor was he given any pay in lieu of the notice. As per the claimant, no retrenchment compensation was paid on account of services rendered by him and in such circumstances, he filed the claim petition praying for reinstatement in service alongwith consequential relief of back wages, continuity of service and allied service benefits.

4. In reply filed to the said claim petition, the respondents denied the claim of the workman. As per the respondents, Ballarpur Industries Limited was a multi unit and multi activity company engaged in the manufacturing of paper amongst other products and the company was having five paper mills in the country for which raw material was required for manufacturing of paper in its mills. As per the respondents, it was carrying on the activity of collecting raw materials for its mills located in different parts of country from various sources

throughout the country. One of such raw material was Bhabhar grass and the company had taken on lease some area of the forest land in Himachal Pradesh from the State Government and said lease expired in March, 1994. Thereafter, the same was renewed in November,1994 up to March, 1995. The respondent-company established Nalagarh Block in the State of Himachal Pradesh for collection of Bhabhar grass. This collection Centre was an independent and separate activity of the company. As the period of lease of forest used to be usually for a period of six months, therefore, in Nalagarh Block no permanent work force was ever employed. It was further the case of the respondents that for the activity of the said Block, company was engaging temporary labour force for a fixed duration depending upon the availability of Bhabhar grass which was further depending on several climatic conditions. Further, as per the company, the last lease of the forest in Nalagarh Block where the claimant was engaged was from 28th November, 1994 to 31st March, 1995 and after that the lease was not renewed by the Government of Himachal Pradesh and thus, the activity of collection of Bhabhar grass at Nalagarh Block came to a permanent end on 31st March, 1995. According to the company, the said activity was permanently closed down w.e.f. 31st March, 1995. On merits, the stand of the workman that he had continuously worked for more than 240 days in each calendar year was also not admitted. The company contended that engagement of claimant had come to an automatic end by efflux of time with the closing of activity at Nalagarh Block w.e.f. 31.03.1995 and on these basis, according to the company, the claimant was neither entitled to any reinstatement nor any back wages as he had claimed.

5. On the basis of pleadings of the parties, learned Labour Court framed the following issues:

> *"1. Whether the termination of services of the petitioner by respondent w.e.f. 14.3.1995 in violation of Section 25-F of the I.D. Act? OPP*
>
> *2. Whether the reference is not maintainable? OPR*
>
> *3. Relief."*

6. On the basis of material produced on record by the respective parties, following findings were returned to the said issues by the learned Labour Court:

> *"Issue No. 1: No.*
>
> *Issue No. 2: No.*
>
> *Relief: Reference answered in negative per operative part of award."*

7. Another important fact which needs mention at this stage is that during pendency of the claim petition, the claimant filed an application to place on record certain documents, which application of his was dismissed by learned Labour Court vide order dated 04.08.2008. The order so passed by learned Labour Court vide which it dismissed the application of the claimant was never challenged by way of any legal proceedings by the claimant and the same attained finality.

8. The claimant entered the witness box as PW-1 and stated that he was engaged with the respondents as Forest Guard w.e.f. 01.07.1974 and he continuously worked as such till his services were terminated w.e.f. 14.03.1995. He also stated that he was not served with any notice at the time of termination of his services nor any retrenchment compensation was paid to him. In his cross-examination, he stated that when was employed, no appointment letter was issued to him. He admitted in his cross-examination that the respondent-company was not having any lease from the State of Himachal Pradesh and that the work of collecting grass continued up till 1995-96.

9. Ramesh Chand, Manager (HR) of the respondent-company entered the witness box as RW-1 and stated that the company was having a collection centre of Dry Grass at Nalagarh, H.P., which was a seasonal activity and they used to purchase from the State Government on lease basis. He further deposed that the said lease continued up to March, 1995

and thereafter, it was discontinued. He also stated that the company used to engage seasonal employees during those days and no seasonal work existed after March, 1995. He stated that the company had not engaged any employee at any point of time at Nalagarh and the claimant was engaged in 1993 for seasonal work for specified time, payment for which was made by cheque, which he refused to accept. He also placed on record termination receipts of the petitioner as well as engagement letter and documents pertaining to termination of lease by the State Government. He categorically denied that the company had engaged the claimant on regular basis. In his cross-examination, he denied that the claimant was engaged in the year 1974.

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

11. The claim put forth by the petitioner to the effect that he was engaged as Forest Guard by the respondent-company in the year 1974 and he continued to serve as such till has arbitrary termination on 14.03.1995 is not substantiated by him by producing any cogent material on record. No evidence has been led by the claimant either ocular or documentary from which it could be inferred that the petitioner was engaged on regular basis as a Forest Guard by the respondent-company. Petitioner has not proved his Mandays chart from which it could be deciphered that he had completed 240 days in preceding 12 months from the date when his services were illegally terminated.

12. It is settled law that where a workman alleges that his services have been terminated in violation of the provisions of Section 25-F, then the burden of proof to prove this fact lies on the workman, who has to show that he worked continuously for 240 days in the preceding one year from the date of his alleged termination and the workman has to adduce cogent and reliable evidence in this regard, on the basis of which, it can be deduced by the appropriate Court of law that the claimant had actually worked for more than 240 days in the preceding 12 months from the date when his services were illegally terminated. The petitioner in the present case has miserably failed to substantiate his contention that the provisions of Section 25-F of the Industrial Disputes Act have been violated. Not only this, a perusal of the statement of claim filed by the claimant clearly demonstrates that the same is cryptic and totally vague. The statement of claim is quoted hereinbelow from which it is amply clear that the same was totally vague.

> *"1. That the petitioner was appointed by the respondent as Forest Guard and worked with the respondent for years together. The petitioner has put in 240 days in each calander year.*
>
> *2. That the petitioner was terminated from service by the respondent without serving requisite notice. The petitioner was not given pay in lieu of notice. No retrenchment compensation was paid on account of service rendered by him.*
>
> *3. No enquiry whatsoever was held in to the charges if any. The petitioner made efforts to get employment but failed.*
>
> *It is, therefore, prayed that this Hon'ble Court be pleased to answer the reference by awarding the relief of reinstatement in service alongwith consequential relief of back wages.*
>
> *Any other relief as is deemed just and proper in the facts and circumstances of the case may also be granted besides the costs of petition."*

13. Not only this, the claimant did not produce any material on record to substantiate his claim that he was in fact engaged as a regular Forest Guard in the year 1974 and he continued to serve as such till 14.03.1995. Application filed by him to produce on record certain documents was rejected by learned Labour Court vide order dated 04.08.2008 and that order was never challenged by the claimant. On the other hand, respondent company placed on record material to substantiate its contention that the engagement of the claimant was for temporary work pertaining to collection of grass and the company was not having any lease to

carry out the said work from March 1995 onwards. Whereas the petitioner has not placed his letter of engagement etc. on record, the respondent-company has placed on record as Ex.-RR, communication dated 18.02.1995 from which it is evident that the claimant was lastly engaged as a Guard for 30 days on a consolidated wage of `1046.50/- w.e.f. 14.02.1995. It has also placed on record Ex. RI, memorandum dated 13.03.1995 vide which, the services of the claimant were terminated.

14. A perusal of the award passed by learned Labour Court demonstrates that all these aspects of the matter have been gone into in detail by learned Labour Court and after appreciation of material on record, learned Labour Court has concluded that the claimant was not able to establish its case for grant of any relief in his favour.

15. It has been held by this Court in LPA No. 4 of 2016 titled **State of H.P. and another** Vs. **Shankar Lal and other connected matters**, decided on 02.01.2016, as under:-

> *"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.*

16. Thus, it is evident that as far as the awards passed by the learned Labour Courts are concerned, the finding of fact so recorded by the learned Labour Court should not be interfered until and unless the findings so returned by the learned Labour Court are perverse or not borne out from the material on record.

17. In the present case, it cannot be said that the findings returned by the learned Labour Court are either perverse or not borne out from the material on record, therefore, the same do not warrant any interference.

18. Accordingly, I concur with the award passed by the learned Labour Court and hold that there is no merit in the present writ petition and the same is accordingly dismissed, so also the pending miscellaneous application (s), if any.

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

Munshi Ram (deceased) through his LRs: Dev Kumari and others …Appellants/Defendants

Versus

Sher Singh and others …Respondents/Plaintiffs

R.S.A. No. 271 of 2005
Date of decision: 27th July, 2016

Indian Succession Act, 1925- Section 63- Plaintiffs pleaded that B had died issueless – defendants claimed that B had executed a Will- Appellate Court had failed to take notice that plaintiffs had alleged fraud, undue influence, coercion etc. regarding the execution of the Will- the correct legal position was not noticed by the Appellate Court – Appeal allowed and case remanded to Appellate Court for decision afresh. (Para-7 to 12)

Cases referred:

H. Venkatachala Iyengar vs. B.N. Thimmajamma and others AIR 1959 SC 443
Shashi Kumar Banerjee and others vs. Subodh Kumar Banerjee and others AIR 1964 SC 529
Jaswant Kaur vs. Smt. Amrit Kaur and others (1977) 1 SCC 369,

For the Appellants: Mr. Bharat Thakur, Advocate, for appellants No. 1(a) and 4.
For the Respondents : Mr. Tara Singh Chauhan, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (*oral*)

The dispute in this Regular Second Appeal is about the succession to 8 bigha 13 biswas land belonging to Budhu Ram, who was a bachelor and obviously died issueless. According to the plaintiffs/respondents, he died intestate and claimed to have proportionately inherited the suit land alongwith defendants/ appellants in accordance with the provisions of Hindu Succession Act, 1956 (for short 'Act').

2. On the other hand, the appellants/defendants claimed to have succeeded to the suit land exclusively on the basis of a Will executed by Budhu Ram.

3. Looking at the order I propose to pass, it is not relevant to refer to the pleadings in detail. Suffice it to say that out of the pleadings to the parties, the learned trial Court framed the following issues on 19.6.1992:

1. *Whether the plaintiffs and defendants are joint owner in possession of the suit land as alleged? OPP*
2. *Whether Sh. Budhu Ram executed a valid Will in favour of defendant No.1? OPP*
3. *Whether the suit is time barred? OPD*
4. *Whether the suit is not properly valued for the purpose of court fee and jurisdiction? OPD*
5. *Whether the suit is not properly verified? OPD*
6. *Relief.*

4. After recording the evidence and evaluating the same, the suit of the plaintiffs was decreed by the learned trial Court.

5. The appeal preferred against the judgment and decree, also came to be dismissed by the learned first Appellate Court giving rise to the instant appeal.

6. On 26.9.2006, this Court admitted the appeal on the following substantial question of law:

Whether the two courts below have failed to appreciate the evidence pertaining to the execution of Will in the right perspective and as a result of that failure, there has been miscarriage of justice.

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

7. The reason why I have intentionally not referred to the facts of the case in detail or to the statements recorded of the witnesses is that the learned first Appellate Court has completely failed to take into consideration that it was the plaintiffs who had alleged fraud, undue influence, coercion etc. in regard to the execution of the Will and, therefore, such pleas had to be proved by them. As such, the onus even as per issue No.2 had been rightly placed upon them. But the learned lower Appellate Court proceeded to decide the case as if it was dealing with a case where the issue framed was with regard to the suspicious circumstance surrounding in the Will and thereby placed the onus upon the defendants to prove the Will.

8. The learned lower Appellate Court has failed to take into consideration the correct legal position in matters of Will as laid down by the three Hon'ble Judges of the Hon'ble Supreme Court in ***H. Venkatachala Iyengar vs. B.N. Thimmajamma and others AIR 1959 SC 443*** and thereafter approved by the Hon'ble Constitution Bench of the Hon'ble Supreme Court in ***Shashi Kumar Banerjee and others vs. Subodh Kumar Banerjee and others AIR 1964 SC 529*** and thereafter reiterated in a number of cases including three Judges of the Hon'ble

Supreme Court in ***Smt. Jaswant Kaur vs. Smt. Amrit Kaur and others (1977) 1 SCC 369***, wherein the legal position was succinctly summed up in the following manner:

> "10. *"There is a long line of decisions bearing on the nature and standard of evidence required to prove a will. Those decisions have been reviewed in an elaborate judgment of this Court in R. Venkatachala Iyengar v.B.N. Thirnmajamma & Others.(AIR 1959 SC 443). The Court, speaking through Gajendragadkar J., laid down in that case the following propositions :*
>
> > *1. Stated generally, a will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters. As in the ease of proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.*
> >
> > *2. Since section 63 of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by section 63 of the Evidence Act, one attesting witness at least has .been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the court and capable of giving evidence.*
> >
> > *3. Unlike other documents, the will speaks from the death o[the testator and therefore the maker of the will is never available for deposing as to the circumstances in which the will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the will.*
> >
> > *4. Cases in which the execution of the will is surround- ed by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he re- ceives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.*
> >
> > *5. It is in connection with wills, the execution of which is surrounded by suspicious circumstance that the test of satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.*
> >
> > *6. If a caveator alleges fraud, undue influence, coercion etc. in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution' of the will may raise a doubt as to whether the testator was*

> *acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter."*

9. Thus, it is absolutely clear from the aforesaid exposition of law that if a caveator alleges fraud, undue influence, coercion etc. in regard to the execution of the Will, such pleas have to be proved by him and only where the circumstances surrounding the execution of the Will may raise a doubt as to whether the testator was acting of his own free Will, then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter.

10. The learned first Appellate Court has not at all dealt with this aspect of the matter and, therefore, the judgment and decree passed by it cannot be sustained.

11. In view of the aforesaid discussion, the substantial question of law is answered accordingly. The appeal is allowed and the same is remanded to the learned first Appellate Court for decision afresh. The parties are directed to appear before the learned first Appellate Court below on **22nd August, 2016.**

12. Taking into consideration the fact that the suit was filed more than two and half decades back, the learned first Appellate Court shall make all endeavour to decide the same expeditiously as possible and in no event later than 31st December, 2016.

The appeal is disposed of in the aforesaid terms, so also the pending application(s) if any, leaving the parties to bear their own costs.

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

Oriental Insurance Company Ltd. …Appellant

Versus

Chetna Devi and others. …Respondents

FAO (MVA) No. 184 of 2016
Date of decision: 27.7.2016

Motor Vehicles Act, 1988- Section 140, 163 and 166- Claim petition was dismissed by the Tribunal by holding that deceased himself was at fault and the benefit of the Act could not be extended to a tortfeaser- claimants were held entitled to Rs. 50,000/- under no fault liability- held, that provision of Section 140 is meant to provide the benefit to the claimants and is not dependent upon the fault- no error was committed by the Tribunal- appeal dismissed. (Para-2 to 8)

Cases referred:

Eshwarappa and another Vs. C.S. Gurushanthappa and another 2010 ACJ 2444
United India Insurance Co. Ltd. Vs. Sunil Kumar and another 2013 ACJ 2856.

For the Appellant: Mr. Lalit Sharma, Advocate.
For the Respondents: Mr.H.S. Rangra, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J (oral).

In the claim petition filed by the claimants under Section 163 of the Motor Vehicle Act (for short 'Act'), the learned Tribunal dismissed the same by holding that the deceased himself was at fault and therefore, the benefit of the Act could not be extended to a tortfeaser. It

was further held that the party to suffer loss in motor vehicle claim must be the third party, whereas in the instant case it was the legal representatives of the registered owner, insurer cum driver of the vehicle that had preferred the claim petition. However, the claimants were held entitled to the amount of Rs.50,000/- deposited by the appellant under no fault liability, which findings have been assailed in this appeal.

2. The learned counsel for the appellant would argue that once the claimants are not entitled to any amount under Section 163 or 166 of the Act, on account of the deceased being a tortfeaser himself, then the claimants are also not entitled any amount that may have been deposited by it under no fault liability as envisaged under Section 140.

3. The learned counsel for the appellant while putting forth such contention has probably ignored Sub Section 4 of Section 140 of the Act, which reads thus:-

> *"140 (4) A claim for compensation under sub-section (1) shall not be defeated by reason of any wrongful act, neglect or default of the person in respect of whose death or permanent disablement the claim has been made nor shall the quantum of compensation recoverable in respect of such death or permanent disablement be reduced on the basis of the share of such person in the responsibility for such death or permanent disablement."*

4. Further Sub Section (1) of Section 141 of the Act makes the compensation under Section 140 of the Act in respect of any claim of compensation based on the principle of no fault under any of the provisions of the Motor Vehicle Act.

5. Even otherwise such issue is now no longer res integra in view of the judgment rendered by the Hon'ble Supreme Court in ***Eshwarappa and another Vs. C.S. Gurushanthappa and another 2010 ACJ 2444***, wherein it has been observed as under:-

> *"13. Then there is section 141 which reads as under:*
>
> > *"141. Provisions as to other right to claim compensation for death or permanent disablement.----(1) The right to claim compensation under section 140 in respect of death or permanent disablement of any person shall be in addition to any other right, except the right to claim under the scheme referred to in section 163A (such other right hereafter in this section referred to as the right on the principle of fault) to claim compensation in respect thereof under any other provision of this Act or of any other law for the time being in force.*
> >
> > *(2) A claim for compensation under section 140 in respect of death or permanent disablement of any person shall be disposed of as expeditiously as possible and where compensation is claimed in respect of such death or permanent disablement under section 140 and also in pursuance of any right on the principle of fault, the claim for compensation under section 140 shall be disposed of as aforesaid in the first place.*
> >
> > *(3) Notwithstanding anything contained in sub-section (1), where in respect of the death or permanent disablement of any person, the person liable to pay compensation under section 140 is also liable to pay compensation in accordance with the right on the principle of fault, the person so liable shall pay the first-mentioned compensation and-*
> >
> > *(a) if the amount of the first-mentioned compensation is less than the amount of the second-mentioned compensation, he shall be liable to pay (in addition to the first-mentioned compensation) only so much of the second-mentioned compensation as is equal to the amount by which it exceeds the first mentioned compensation;*

> *(b) if the amount of the first-mentioned compensation is equal to or more than the amount of the second- mentioned compensation, he shall not be liable to pay the second-mentioned compensation."*

Sub-section (1) of section 141 makes the compensation under section 140 independent of any claim of compensation based on the principle of fault under any other provision of the Motor Vehicles Act or under any other law but subject to any claim of compensation under section 163A of the Act. Sub-sections (2) and (3) further provide that even while claiming compensation under the principle of fault (under section 166) one may claim no fault compensation under section 140 and in that case the claim of no fault compensation shall be disposed of in the first place and the amount of compensation paid under section 140 would be later adjusted if the amount payable as compensation on the principle of fault is higher than it.

14. *Finally, section 144 gives overriding effect to the provisions of Chapter X. Section 144 reads as follows:*

> *"144. Overriding effect.-The provisions of this Chapter shall have effect notwithstanding anything contained in any other provision of this Act or of any other law for the time being in force."*

15. *Seen in isolation the above provisions might appear harsh, unreasonable and arbitrary in as much as these create the liability of the vehicle(s) owner(s) even where the accident did not take place due to any wrongful act, neglect or default of the owner or owners of the vehicle or vehicles concerned but entirely due to the wrongful act, neglect or default of the person in respect of whose death or permanent disablement the claim has been made but the above provisions must be seen along with certain provisions of Chapter XI. Section 146 forbids the use of the vehicle in a public place unless there is in force, in relation to the use of the vehicle, a policy of insurance complying with the provisions of that chapter. Section 147 contains the provisions that are commonly referred to as `Act only insurance'. The provisions of sections 146 and 147 are meant to create the large pool of money for making payments of no fault compensation. Thus the liability arising from section 140 would almost invariably be passed on to the insurer to be paid off from the vast fund created by virtue of sections 146 and 147 of the Act unless the owner of the vehicle causing accident is guilty of some flagrant violation of the law.*

16. *Seen thus, the provisions of chapter X together with sections 146 and 147 would appear to be in furtherance of the public policy that in case of death or permanent disablement of any person resulting from a motor accident a minimum amount must be paid to the injured or the heirs of the deceased, as the case may be, without any questions being asked and independently of the compensation on the principle of fault.*

17. *The provisions of section 140 are indeed intended to provide immediate succour to the injured or the heirs and legal representatives of the deceased. Hence, normally a claim under section 140 is made at the threshold of the proceeding and the payment of compensation under section 140 is directed to be made by an interim award of the Tribunal which may be adjusted if in the final award the claimants are held entitled to any larger amounts. But that does not mean, that in case a claim under section 140 was not made at the beginning of the proceedings due to the ignorance of the claimant or no direction to make payment of the compensation under section 140 was issued due to the over-sight of the Tribunal, the door would be permanently closed. Such a view would be contrary to the legal provisions and would be opposed to the public policy.*

18. *In light of the discussions made above, we are unhesitatingly of the view, that the Tribunal was completely wrong in denying to the appellant, 14 the*

compensation in terms of section 140 of the Act. We find and hold that the appellant (as well as the other 3 claimants) were fully entitled to no fault compensation under section 140 of the Act. We, accordingly, direct the insurance company to pay to the appellant Rs.25,000/- along with simple interest @ 6% p.a. from the date of the order of the Tribunal till the date of payment. The other 3 claimants are not before this Court, but that is presumably because they are too poor to come to this Court. Since, we have allowed the claim of the appellants, there is no reason why this order should not be extended to the other 3 claimants as well. We, accordingly, do so. The insurance company is directed to make the payment as directed in this judgment within 3 months."

6. It is then contended by the learned counsel for the appellant that the issue involved in the instant appeal is now pending before the larger Bench of Hon'ble Supreme Court in its reference made in ***United India Insurance Co. Ltd. Vs. Sunil Kumar and another 2013 ACJ 2856***.

7. Even this contention is equally without any force, because there in the Hon'ble supreme Court has categorically held that the provisions of Section 163-A of the Act do not include a negative clause like the one contained in Section 140 (4) of the Act and therefore, the liability to make compensation under Section 163-A is on the principle of no fault and therefore, the question as to who is at fault is immaterial and foreign to an inquiry under Section 163-A, as it makes no provision for any apportionment of the liability. It is thus clear that the interpretation of Section 140 or any of its sub sections is neither directly nor indirectly involved for interpretation in the aforesaid case and it is for this precise reason that even in the reference made to the larger Bench, the judgment passed earlier in *Eshwarappa case* has not even been mentioned.

8. In view of the above discussion, I find 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 AJAY MOHAN GOEL, J.

Sh. Padam Singh Thakur .....Petitioner.

Vs.

Sh. Madan Chauhan .....Respondent.

Cr. Revision No.: 96 of 2012
Reserved on: 15.07.2016
Date of Decision: 27.07.2016

Negotiable Instruments Act, 1881- Section 138- Accused issued a post dated cheque for a sum of Rs.1,18,000/- in favour of the complainat, which was dishonoured with the endorsment 'insufficient funds'- accused did not pay the amount to the complainant despite receipt of valid notice of demand – accused was tried and convicted by the trial Court- an appeal was preferred, which was dismissed- it was contended in the revision that trial Court did not have territorial jurisdiction as incident had taken place within the jurisdiction of Judicial Magistrate 1st Class, Theog- mere issuance of demand notice from Shimla will not confer the jurisdiction upon the Court at Shimla- held, that cheque was payable at Kotkhai and was dishonoured at Kotkhai- mere issuance of demand notice at Shimla will not confer the jurisdiction upon the Court at Shimla- no objection regarding lack of jurisdiction was raised by the accused before the trial Court and the judgment cannot be set aside on the ground of lack of territorial jurisdiction since no failure of justice had taken place - even otherwise Judicial Magistrate 1st Class exercises

jurisdiction within a particular district where he is appointed, therefore, Magistrate at Shimla had jurisdiction to entertain the complaint- revision dismissed. (Para-13 to 26)

Cases referred:
Sanjay Kumar & Ors. Vs. State of H.P. 2008(1) Current Law Journal 184
Raj Kumari Vijh Vs. Dev Raj Vijh AIR 1977 Supreme Court 1101
State of Karnataka Vs. Kuppuswamy AIR 1987 Supreme Court 1354
Union of India and other Vs. Ex-Gnr Ajeet Singh (2013) 4 Supreme Court Cases 186

For the petitioner: Mr. V.S. Chauhan, Advocate.
For the respondent: Mr. B.S. Chauhan, Sr. Advocate, with Mr. Vaibhav Tanwar, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. **:**

By way of present petition, petitioner has challenged the judgment passed by the Court of learned Additional Sessions Judge, Shimla in Criminal Appeal No. 31-S/10 of 2009 dated 23.01.2012 vide which, learned Appellate Court has upheld the judgment of conviction passed by the Court of learned Judicial Magistrate 1st Class, Court No. VI, Shimla in Cr. Complainant No. 402/3 of 2007/06.

2. Brief facts necessary for the adjudication of present case are that in a complainant filed by the present respondent (hereinafter referred to as "complainant') under Section 138 read with Section 142 of the Negotiable Instruments Act, 1881 against the petitioner/accused, learned trial Court returned the findings of conviction against the accused for having committed offence under Section 138 read with Section 142 of the Negotiable Instruments Act, 1881 and accordingly it sentenced the accused to undergo simple imprisonment for a period of six months and also to pay compensation to the tune of Rs.19000/- to the complainant. As per the complainant, the accused was well acquainted with him and both of them knew each other since long. Accused approached the complainant and requested him to lend an amount of Rs.1,18,000/- for meeting out domestic expenses and also for doing business. The said amount was lent by the complainant to the accused and in lieu of the same, accused issued posted dated cheque No. 966545 dated 14.10.2006 for an amount of Rs.1,00,000/- and cheque No. 966546 dated 14.10.2006 for an amount of Rs.18,000/- in favour of the complainant, both payable at UCO Bank, Kotkhai. Further, as per the complainant, when he presented the said two cheques to his banker, the same were dishonoured by the banker of the accused on the ground "funds insufficient". Thereafter, a legal notice was sent by the complainant to the accused and he was called upon to make good the payment. When despite this, the accused did not pay the said amount to the complainant, he filed a complaint under the provisions of Negotiable Instruments Act.

3. As a prima facie case was found against the accused, Notice of Accusation was put to him, to which he pleaded not guilty.

4. In order to substantiate his case, the complainant examined three witnesses. Though initially the accused intended to lead evidence in his defence, but subsequently vide separate statement, he closed his evidence without examining any defence witness.

5. On the basis of material on record, learned trial Court held that the accused had not disputed the loan transaction as entered between him and the complainant and issuance of cheques in lieu of the same as well as the factum of dishonouring of the said cheques, but he had come up with the defence that he had taken loan from the elder brother of the complainant and the said loan already stood returned to him. Further, as per learned trial Court, the defence so put up by the accused could not be corroborated and on the other hand, the complainant on the

basis of material on record was able to prove that in lieu of loan advanced by him to the accused, the accused had issued two cheques in his favour which were dishonoured. Accordingly, learned trial Court allowed the complaint and convicted the accused.

6. It is relevant to refer at this stage that during the course of trial of the said case before the learned trial Court, no objection at any stage was taken by the accused to the effect that learned trial Court was not having territorial jurisdiction to adjudicate upon the matter.

7. Feeling aggrieved by the said judgment of conviction, the accused preferred an appeal. Learned appellate Court vide judgment dated 23.01.2012 upheld the judgment of conviction passed by the learned trial Court and dismissed the appeal. A perusal of the judgment passed by the learned appellate Court demonstrates that two points were argued in appeal on behalf of the accused and these points were:

(a) *that the case of the complainant as narrated in the complaint and as deposed by him on oath was totally improbable and suspicious; and*

(b) *that the cheques in issue were drawn at UCO Bank, Kotkhai and were presented for encashment by the complainant with his banker at Kotkhai and intimation regarding dishonouring of the same was also at Kotkhai, hence cause of action arose to the complainant within the jurisdiction of the Court of learned Judicial Magistrate 1st Class at Theog and not at Shimla and mere sending of demand notice from Shimla did not confer jurisdiction on the Court of Judicial Magistrate 1st Class, Shimla.*

Therefore, on these basis, the judgment passed by the learned trial Court was attacked in appeal.

8. On the point of jurisdiction, learned appellate Court held that though it was not in dispute that the cheques in question were drawn at UCO Bank, Kotkhai by the accused and they were also presented by the complainant for encashment with his banker at Kotkhai and the commission of the offence punishable under Section 138 of the Negotiable Instruments Act took place at Kotkhai, within the jurisdiction of learned Judicial Magistrate 1st Class, Theog and mere sending of demand notice from Shimla did not confer any territorial jurisdiction on the Court of learned Judicial Magistrate 1st Class, Shimla, however, the accused cannot be permitted to take this plea at a belated stage in appellate proceedings and the judgment of conviction passed by the learned trial Court was protected by the provisions of Section 462 of the Code of Criminal Procedure, 1973, because it could not be said that there was lack of inherent jurisdiction with the Court of learned Judicial Magistrate 1st Class, Shimla to adjudicate upon the matter pertaining to Negotiable Instruments Act and the appellant had also not substantiated as to what prejudice was caused to him as a result of the case having been tried at Shimla. It further held that no such plea was in fact taken by the appellant before learned trial Court at any time and accordingly, learned appellate Court rejected this ground. Thereafter, learned appellate Court on the basis of appreciation of the material placed on record by the complainant as well as on the basis of appreciation of the reasonings given by the learned trial Court in allowing the complaint and convicting the accused, upheld the judgment of conviction passed by learned trial Court.

9. Feeling aggrieved by the said judgment passed by learned appellate Court, the accused has filed the present revision petition.

10. During the course of arguments, learned counsel for the petitioner has argued that the judgments passed by learned Courts below whereby the accused has been convicted, are liable to be set aside on this score alone that the learned trial Court which at the first instance had adjudicated upon the matter had no territorial jurisdiction to hear and decide the case. Accordingly, on this ground, it has been argued that the judgments under challenge were perverse and were liable to be set aside. No other point was urged.

11. On the other hand, Mr. B.S. Chauhan, learned Senior Counsel for the respondent/complainant submitted that the petitioner cannot be permitted to challenge the judgments passed by both the learned Courts below on this count for the reason that the accused at no stage during pendency of the case before learned trial Court ever objected to this fact that learned trial Court was not having territorial jurisdiction to adjudicate upon the matter. According to learned Senior Counsel, once the accused had submitted himself to the territorial jurisdiction of the Court of learned Judicial Magistrate 1st Class, Shimla and had acquiesced to the trial of the said case by learned Judicial Magistrate 1st Class, Shimla, he was estopped both at the appellate stage and now before this Court from challenging the judgment passed by both the learned Courts below on this ground. Mr. Chauhan further argued that even otherwise, the judgment of conviction passed by learned trial Court and upheld by learned appellate Court was protected by the provisions of Section 462 of the Code of Criminal Procedure, 1973 because it is not the case of the petitioner that there was inherent lack of jurisdiction with the Court of learned Judicial Magistrate 1st Class, Shimla to adjudicate upon the matter arising out of Negotiable Instruments Act nor the petitioner has been able to demonstrate as to what prejudice has been caused to him on account of the accused having been tried by learned Judicial Magistrate 1st Class, Shimla. Accordingly, Mr. Chauhan submitted that there was no merit in the present petition and the same was liable to be dismissed.

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

13. The factum of cheques in question issued by the accused in favour of the complainant being payable in UCO Bank at Kotkhai is not in dispute. Further, the factum of said cheques having been presented by the complainant for encashment with his banker, i.e. State Bank of India at Kotkhai is also not in dispute. Further, the factum of the said cheques having been dishonoured at Kotkhai is also not in dispute. It is also not in dispute that mere sending of a demand notice from Shimla cannot confer any territorial jurisdiction on the Court of learned Judicial Magistrate 1st Class, Shimla to take cognizance and try a complaint under the Negotiable Instruments Act, in which cause of action has arisen in Kotkhai. However, the fact of the matter still remains that when the complaint was filed before the Court of learned Judicial Magistrate, 1st Class, Shimla and the case was tried by learned Judicial Magistrate, no objection with regard to territorial jurisdiction of the said Court was taken by the accused. On the contrary, the accused contested the case on merits and suffered the judgment passed by learned trial Court.

14. Incidentally, a perusal of the grounds of appeal filed before learned Appellate Court also demonstrates that it was not the case of accused in appeal that though the issue of jurisdiction was raised before learned trial Court, but the same was not answered by it. Therefore, it is apparent and evident that the accused submitted himself to the territorial jurisdiction of learned Judicial Magistrate 1st Class, Shimla and also acquiesced to the jurisdiction of the said Court and contested the case before the said Court on merit. It is only after he was convicted by learned trial Court that he raised the issue of jurisdiction for the first time in appeal.

15. At this stage, it is necessary to refer to Section 462 of the Code of Criminal Procedure, 1973, which provides as under:

> "462. **Proceedings in wrong place.-** *No finding, sentence or order of any Criminal Court shall be set aside merely on the ground that the inquiry, trial or other proceedings in the course of which it was arrived at or passed, took place in a wrong sessions division, district, sub-division or other local area, unless it appears that such error has in fact occasioned a failure of justice."*

16. Therefore, it is evident that under the provisions of Section 462 of the Code of Criminal Procedure, 1973, no finding, sentence or order of any Criminal Court can be set aside merely on the ground that the inquiry, trial or other proceedings in the course of which it was arrived at or passed, took place in a wrong Sessions Division, District, Sub-Division or other local area, unless it appears that such error has occasioned a failure of justice.

17. Coming to the facts of the present case, learned counsel for the petitioner could not satisfy as to what prejudice was caused to the accused by the trial of the said case before learned Judicial Magistrate 1st Class, Shimla. He has not been able to point out any fact from which it can be deciphered that because the trial took place before learned Judicial Magistrate 1st Class, Shimla, this has occasioned failure of justice. It is also not the case of the petitioner that the Court of learned Judicial Magistrates 1st Class, Shimla was not otherwise having jurisdiction to entertain and adjudicate a case under the provisions of Negotiable Instruments Act, 1881.

18. Another important aspect of the matter is that the case has been adjudicated by learned Judicial Magistrate 1st Class, Shimla which Court is under Sessions Division, Shimla. As per the petitioner, the case should have been tried by learned Judicial Magistrate 1st Class, Theog, which Court is also incidentally within the Sessions Division, Shimla.

19. Jurisdiction of a Judicial Magistrate is governed by Section 14 of the Code of Criminal Procedure, 1973, which reads as under:

> *"14. Local jurisdiction of Judicial Magistrates.*
>
> *(1) Subject to the control of the High Court, the Chief Judicial Magistrate may, from time to time, define the local limits of the areas within which the Magistrates appointed under section 11 or under section 13 may exercise all or any of the powers with which they may respectively be invested under this Code:*
>
> *Provided that the Court of a Special Judicial Magistrate may hold its sitting at any place within the local area for which it is established.]*
>
> *(2) Except as otherwise provided by such definition, the jurisdiction and powers of every such Magistrate shall extend throughout the district.*
>
> *(3) Where the local jurisdiction of a Magistrate, appointed under section 11 or section 13 or section 18, extends to an area beyond' the district, or the metropolitan area, as the case may be, in which he ordinarily holds Court, any reference in this Code to the Court of Session, Chief Judicial Magistrate or the Chief Metropolitan Magistrate shall, in relation to such Magistrate, throughout the area within his local jurisdiction, be construed, unless the context otherwise requires, as a reference to the Court of Session, Chief Judicial Magistrate, or Chief Metropolitan Magistrate, as the case may be, exercising jurisdiction in relation to the said district or metropolitan area."*

20. Further, Section 15 of the Code of Criminal Procedure provides as under:

> *"15. Subordination of Judicial Magistrates.*
>
> *(1) Every Chief Judicial Magistrate shall be subordinate to the Sessions Judge; and every other Judicial Magistrate shall, subject to the general control of the Sessions Judge, be subordinate to the Chief Judicial Magistrate.*
>
> *(2) The Chief Judicial Magistrate may, from time to time, make rules or give special orders, consistent with this Code, as to the distribution of business among the Judicial Magistrates subordinate to him."*

21. This Court in **Sanjay Kumar & Ors.** Vs. **State of H.P.** 2008(1) Current Law Journal 184 has held that this Court in exercise of its powers under sub-sections (2) and (3) of Section 11 of the Code of Criminal Procedure has issued a Notification authorizing all the Judicial Magistrates posted within a particular District to exercise the powers of inquiry and trial in respect of the cases pertaining to any part of the District. That is to say, the Magistrates have been conferred the powers to be exercised by them throughout the area of the District they are posted in.

22. Learned Judicial Magistrate 1st Class, Shimla is posted in District Shimla. According to the petitioner, the jurisdiction to try the present petition was with learned Judicial Magistrate 1st Class, Theog, which is also posted in District Shimla. Therefore, even according to

the petitioner, the case was triable before a Judicial Magistrate in District Shimla, though at Theog, but not at proper Shimla. Keeping in view what has been held by this Court in the abovementioned case, it is apparently clear that learned Judicial Magistrate 1st Class Shimla is duly authorized to exercise the powers of inquiry and trial in respect of a case pertaining to any part or area of the District, i.e. District Shimla as the said Magistrate has been conferred the powers to be exercised by it throughout the area of the District he is posted. This Court does not intend to say that all cases of Negotiable Instruments Act pertaining to District Shimla can be tried by a Judicial Magistrate 1st Class, Shimla, especially in view of the amendment carried out in the Negotiable Instruments Act, but, the fact of the matter still remains that keeping in view the peculiar facts and circumstances of the present case wherein issue of territorial jurisdiction was not raised during the entire period when the case was being tried by learned Judicial Magistrate 1st Class and it has been raised only at the appellate stage, the judgment passed by the learned trial Court is saved by the provisions under Section 462 of the Code of Criminal Procedure as well as the findings returned by this Court in the abovementioned case.

23. The Hon'ble Supreme Court in **Smt. Raj Kumari Vijh** Vs. **Dev Raj Vijh** AIR 1977 Supreme Court 1101 has held:

> *"7. Section 531 of the Code reads an follows-*
>
> *"531. No finding, sentence or order of any Criminal Court shah be set aside merely on the ground that the inquiry, trial or other proceeding in the course of which it was arrived at or passed, took place in a wrong sessions division, district, sub-division or other local area, unless it appears that such error has in fact occasioned a failure of justice."*
>
> *The section therefore relates to a defect of jurisdiction. As has been stated by this Court inPurushottamdas Dalmia v. The State of West Bengal(1) those are two types of jurisdic- tion of a criminal court, namely, (1) the jurisdiction with respect to the power of the court to try particular kinds of offences, and (2) its territorial jurisdiction. While the former goes to the root of the matter and any transgression of it makes the entire trial voild, the latter is not of a peremptory character and is curable under section 531 of the Code. Territorial jurisdiction is provided "just as a matter of convenience, keeping in mind the administrative point of view with respect to the work of a particular court, the convenience of the accused who will have to meet the charge levelled against him and the convenience of the witnesses who have to appear before the Court'. Sub-section (8) of section 488 in fact provides that proceedings under the section "may be taken against any person in any district where he resides or is, or where he last resided with his wife or, as the case may be, the mother of the illegitimate child." This therefore is ordinarily the requirement as to the fling of an application under section 488 within the limits of the jurisdiction of the magistrate concerned."*

24. It has also been held by the Hon'ble Supreme Court in **State of Karnataka** Vs. **Kuppuswamy** AIR 1987 Supreme Court 1354:

> *"14. The High Court, however, observed that provisions of Sec. 465 Cr.P.C. can not be made use of to regularise this trial. No reasons have been stated for this conclusion. Sec. 465 Cr.P.C. reads as under:*
>
> *"Finding or sentence when reversible by reason of error, omission or irregularity:-*
>
> *(1) Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other pro- ceedings under this Code, or any error, or irregularity in any sanction for the prosecu- tion,*

unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby.

(2) In determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings."

It is provided that a finding or sentence passed by a Court of competent jurisdiction could not be set aside merely on the ground of irregularity if no projudice is caused to the accused. It is not disputed that this question was neither raised by the accused at the trial nor any prejudice was pleaded either at the trial or at the appellate stage and therefore in absence of any prejudice such a technical objection will not affect the order or sentence passed by competent court. Apart from Sec. 465, Sec. 462 provides for remedy in cases of trial in wrong places. Sec. 462 reads as under:

"Proceedings in wrong place:

No finding, sentence or order of any Criminal Court shall be set aside merely on the ground that the inquiry trial or other proceedings in the course of which it was arrived at or passed, took place in a wrong sessions divi- sion, district, sub-division or other local are unless it appears that such error has in fact occasioned a failure of justice."

This provision even saves a decision if the trial has taken place in a wrong Session Division or Sub-Division or a district or other local area and such an error could only be of some consequence if it results in failure of justice otherwise no finding or sentence could be set aside only on the basis of such an error.

15. It is therefore clear that even if the trial before the III Additional City Civil and Sessions Judge would have been in a Division other than the Bangalore Metropolitan Area for which III Additional City Civil and Sessions Judge is also notified to be a Sessions Judge still the trial could not have been quashed in view of Sec. 462. This goes a long way to show that even if a trial takes place in a wrong place where the Court has no territorial jurisdiction to try the case still unless failure of justice is pleaded and proved, the trial can not be quashed. In this view of the matter therefore reading Sec. 462 alongwith Sec. 465 clearly goes to show that the scheme of the Code of Criminal Procedure is that where there is no inherent lack of jurisdiction merely either on the ground of lack of territorial jurisdiction or on the ground of any irregularity of procedure an order or sentence awarded by a competent court could not be set aside unless a prejudice is pleaded and proved which will mean failure of justice. But in absence of such a plea merely on such technical ground the order or sentence passed by a competent court could not be quashed.

16. It is not disputed that the plea of prejudice or failure of justice is neither pleaded nor proved. Not only that even the judgment of the High Court does not indicate any possi- bility of prejudice or failure of justice. Learned counsel appearing for the respondent also did not suggest. any possibility of projudice or failure of justice. Under these circumstances therefore the view taken by the High Court does not appear to be correct in view of the language of Sec. 462 read with Sec. 465. The judgment of the High Court is therefore set aside. The direction of remand made by the High Court is also quashed. It is unfortunate that these matters pertaining to incidents of 1980 should not have been disposed of till today and that the matter should have remained pending on such technical grounds for all these years. We therefore direct that the appeals be remitted back to the High

Court so that they are heard and disposed of on merits as expeditiously as possible."

25. Recently, the Hon'ble Supreme Court in **Union of India and other** Vs. **Ex-Gnr Ajeet Singh** (2013) 4 Supreme Court Cases 186 has held:

"*22. So far as the failure of justice is concerned, this Court in Darbara Singh v. State of Punjab, AIR 2013 SC 840, held that: "Failure of justice" is an extremely pliable or facile expression, which can be made to fit into any situation in any case. The court must endeavour to find the truth. There would be "failure of justice"; not only by unjust conviction, but also by acquittal of the guilty, as a result of unjust failure to produce requisite evidence. Of course, the rights of the accused have to be kept in mind and also safeguarded, but they should not be overemphasised to the extent of forgetting that the victims also have rights. It has to be shown that the accused has suffered some disability or detriment in respect of the protections available to him under the Indian criminal jurisprudence. "Prejudice" is incapable of being interpreted in its generic sense and applied to criminal jurisprudence. The plea of prejudice has to be in relation to investigation or trial, and not with respect to matters falling outside their scope. Once the accused is able to show that there has been serious prejudice caused to him, with respect to either of these aspects, and that the same has defeated the rights available to him under criminal jurisprudence, then the accused can seek benefit under the orders of the court." (Emphasis added) (See also: Shivaji Sahebrao Bobade & Anr. v. State of Maharashtra, AIR 1973 SC 2622; Rafiq Ahmed @ Rafi v. State of U.P., AIR 2011 SC 3114; Rattiram & Ors. v. State of M.P., AIR 2012 SC 1485; and Bhimanna v. State of Karnataka, AIR 2012 SC 3026)*

23. In Ramesh Harijan v. State of U.P., AIR 2012 SC 1979, this court dealt with the issue of the liberal approach adopted by the court to grant an unwarranted acquittal, and held that while dealing with a criminal case, it is a matter of paramount importance for any court to ensure that the mis-carriage of justice be avoided in all circumstances. (See also: Sucha Singh v. State of Punjab, AIR 2003 SC 3617; and S. Ganesan v. Rama Raghuraman & Ors., (2011) 2 SCC 83)

24. The expression "failure of justice" would appear, sometimes, as an etymological chameleon. The Court has to examine whether there is really a failure of justice or whether it is only a camouflage. Justice is a virtue which transcends all barriers. Neither the rules of procedure, not technicalities of law can stand in its way. Even the law bends before justice. The order of the court should not be prejudicial to anyone. Justice means justice between both the parties. The interests of justice equally demand that the "guilty should be punished" and that technicalities and irregularities, which do not occasion the "failure of justice"; are not allowed to defeat the ends of justice. They cannot be perverted to achieve the very opposite end as this would be counter-productive. "Courts exist to dispense justice, not to dispense with justice. And, the justice to be dispensed, is not palm-tree justice or idiosyncratic justice". Law is not an escape route for law breakers. If this is allowed, this may lead to greater injustice than upholding the rule of law. The guilty man, therefore, should be punished, and in case substantial justice has been done, it should not be defeated when pitted against technicalities. (Vide : Ramesh Kumar v. Ram Kumar & Ors., AIR 1984 SC 1929; S. Nagaraj v. State of Karnataka,1993 Supp (4) SCC 595; State Bank of Patiala & Ors. v. S.K Sharma, AIR 1996 SC 1660; and Shaman Saheb M. Multani v. State of Karnataka, AIR 2001 SC 921)."

26. Therefore, keeping in view the law laid down by the Hon'ble Supreme Court as well as the discussion held above, in my considered view, there is no merit in the present petition and the learned appellate Court has rightly upheld the judgment of conviction passed by learned trial Court in view of the statutory provisions of Section 462 of the Code of Criminal Procedure. Accordingly, the present petition is dismissed being devoid of any merit.

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

Sardar Thakur Singh. …Appellant

Versus

Municipal Council, Solan & Another. …Respondents

RSA No. 198 of 2007
Judgment Reserved on: 20.7.2016
Date of decision: 27.7.2016

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit for permanent prohibitory and mandatory injunction for restraining the defendant No. 1 from handing over the possession of stall cum shop and restraining defendnat No. 2 from taking the possession of stall-cum-shop- it was pleaded that plaintiff was a tenant over the suit land on monthly rent of Rs. 220/-- defendant No. 2 was allowed to carry on business by the plaintiff- defendant No. 1 had decided to demolish the wooden stalls and convert them into pucca building- plaintiff had a right to occupy the stall and defendant No. 2 had no right- defendant No. 1 stated that possession was delivered by the plaintiff in favour of defendant No. 2- matter is pending before Municipal Council- defendant No. 2 pleaded that plaintiff and defendant No. 2 constituted a joint family- stall was allotted to defendant No. 2- suit was dismissed by the trial court- an appeal was preferred, which was dismissed- held, in appeal that even if the building is destroyed or demolished, the lease is not determined as long as the land beneath it continues to exist- therefore, tenancy will not come to an end on the demolition of the stall- plaintiff had not appeared in the witness box- his son admitted that plaintiff and defendant no. 2 formed one family and they used to do business jointly- he admitted that a family settlement had taken place between the plaintiff and defendant no. 2 after which defendant no. 2 started business in the suit land - plaintiff shifted to Lower Bazaar, Solan and started his work in the shop of Sanatan Dharam Sabha- settlement was never challenged by the plaintiff- an adverse inference has to be drawn against the plaintiff for non-appearance in the witness box - suit was rightly dismissed by the trial Court- further, findings recorded by the appellate court regarding tenancy reversed. (Para-8 to 40)

Cases referred:

Krishan Chand Vs. Bihari Lal and others AIR 1999, H.P. 68
V. Sidharthan Vs. Pattiori Ramadasan, AIR 1984 Ker 181.
Vannattankandy Ibrayi Vs. Kunhabdulla Hajee (2001) 1 SCC 564
T. Lakshmipathi Vs. R. Nithyananda Reddy (2003) 5 SCC 150
Shaha Ratansi Khimji and Sons Vs. Kumbhar Sons Hotel Private Limited and others, (2014) 14 SCC 1.
Samriti Gupta and another Vs. State of H.P. and others, Latest H.L.J. 2016 (HP) 191,
S. Kesari Hanuman Goud Vs. Anjum Jehan and others (2013) 12 SCC 64:

For the Appellant: Mr. Anand Sharma, Advocate.
For the Respondents: Mr. Anshul Bansal, Advocate, for respondent No. 1.
Mr.Dinesh Bhanot, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J.

The appellant/plaintiff has filed this Regular Second Appeal against the judgment and decree dated 26.3.2007, passed by learned District Judge, Solan, H.P., whereby he affirmed the findings of Civil Judge (Senior Division), Kandaghat, District Solan, H.P.

The facts of the case may be noticed as follows:-

2. The appellant filed a suit for permanent prohibitory and mandatory injunction restraining respondent No. 1 and through its agents from handing over the stall cum shop to be built up over the land comprised in Khasra No. 269 measuring 6 Sq. meters (herein after referred to as the suit property) to respondent No. 2 and from restraining respondent No. 2 from occupying and possessing the stall cum shop to the built up by respondent No. 1 and hindering the process of delivering the possession of the shop or causing any type of interference over the suit land. It was pleaded that the appellant had been a tenant over the suit property situated at Mauza Lower Bazar, Solan under respondent No. 1, since 1961. The monthly rent of the suit property at present was Rs.220/-. This stall had been constructed by the appellant at his own cost after obtaining necessary sanction of site plan etc. from respondent No. 1. It was alleged that the tenancy has always been with the appellant, but on account of some arrangement, respondent No. 2 was allowed to carry on the business in the said stall by the appellant. Respondent No. 1 had decided to demolish the wooden stalls and converted them into pucca building on the terms and conditions settled by respondent No. 1. The appellant who is the tenant had constructed the stall and had been paying rent till date and had every legal right to possess and occupy the newly constructed pucca stall in view of the old stall cum shop. It was specifically averred that the old stall was never ever transferred by the appellant to respondent No. 2 and that the appellant was ready and willing to pay all the consideration which respondent No. 1 has decided to charge from the old tenants and is legally entitled to get the possession and occupation of the stall. It was further alleged that respondent No. 2 was threatening to occupy and possess the stall by misrepresenting the facts because respondent No. 2 had no right, title or interest to do so. It was lastly alleged that respondent No. 2 during the last week of March, 2000 had forcibly occupied the said stall and respondent No. 1 had reported the matter to police on 25.3.2000. Respondent No. 2 had occupied the stall by violating the injunction order dated 21.12.1999. The appellant had also sought decree of mandatory to hand over the possession of the said stall/suit property to him.

3. Respondent No. 1 contested the suit by filing written statement, where preliminary objections regarding estoppel, cause of action and maintainability of the suit were taken. On merits, respondent No. 1 admitted that the stall was allotted on lease to the appellant and he has carried out repairs therein in the year 1989. It was further averred that the appellant had parted with the possession of the suit property without obtaining prior permission from respondent No. 1 and, therefore, it was entitled to evict the appellant on the ground of sub-tenancy. It was also averred that respondent No. 2 had become unauthorized occupant of the stall. Lastly, it was alleged that the appellant as well as respondent No. 2 had been staking their claims for possession of the stall and the matter was pending decision before the Municipal Council, but in the mean time respondent No. 2 had forcibly occupied the tea stall constraining the municipal council to report the matter to the police on 27.3.2000. Respondent No. 1 was yet to decide on its level as to who is entitled to occupy the said stall.

4. Respondent No. 2 contested the suit by filing separate written statement, wherein preliminary objections regarding locus standi, maintainability, concealment of material facts and estoppel were taken. On merits, respondent No. 1 denied the averments made by the appellant in the plaint and pleaded that the appellant had concealed material facts from the Court. It was alleged that the replying respondent had constituted a joint family and co-ownership after they migrated from West Pakistan in 1947-48. The appellant being Karta was managing the joint business. The partition had been effected between the members of the joint Hindu family by meets and bounds in the year 1982 and the disputed shop was allotted to respondent No. 2 along with goods lying therein. It was averred that respondent No. 2 was running a business of electrical in the name of Sunny Electrical Works in the said stall and had also been paying rent, sanitation tax etc. It was further averred that respondent No.2 was a direct tenant of respondent No.1 as the shop license, CST/GST number, certificate of State Bank of Patiala through which rent and other taxes were being received by respondent No.1, were also

attached with the written statement. It was further pleaded that devastating fire had taken place in which the stall of the replying respondent along with other occupants suffered huge losses. However, the stall occupants continued to do their business from the burnt stalls and never parted with its possession at any point of time. It was further averred that the appellant had nothing to do with the stall nor was in possession of the same. It was further averred that when the partition of the family was effected, the appellant shifted his business to Lower Bazar Solan and his rights qua staff ceased. It was lastly averred that the officials of respondent No.1 had connived with the appellant in order to harass respondent No. 2 and give undue advantage to the appellant, the officials of respondent No.1might have made some false complaint for the police for creating false evidence. On these averments, dismissal of the suit has been prayed for.

5. The learned trial Court framed the following issues:-

"1. Whether the plaintiff had been a tenant in shop cum stall measuring 4'9" on the back side 7' in from and 9 feet on both sides measuring in all 6 Sq. meters of defendant No. 1 since 1961? OPP

2. Whether the said stall was constructed by the plaintiff at his own costs and the necessary site plan was sanctioned by defendant No. 1, as alleged? OPP

3. Whether tenancy has always been with the plaintiff but on account of some arrangement defendant No. 2 was allowed to carry on the business in the said stall by the plaintiff, as alleged? OPP

4. Whether the defendant No. 1 had decided to demolish the wooden stall on account of devastating fire in the area and convert it into pucca building, as alleged? OPP

5. Whether the defendant No. 1 in the last week of March, 2000, had forcibly occupied the said stall, as alleged? OPP

6. Whether the plaintiff has got no locus-standi to file and maintain the suit? OPD-2

7. Whether the suit of the plaintiff is not maintainable as no notice as required under H.P. Municipal Act has been served? OPD-2

8. Whether the plaintiff is estopped from filing the present suit on account of his act, conduct and acquiescences? OPDs

9. Whether the suit is not maintainable as the plaintiff is out of possession? OPDs

10. Whether the plaintiff has no cause of action against the defendant No. 1? OPD

11. Whether the defendant No. 2 is settled possession of the stall since 1982 as a direct tenant of defendant No. 1? OPD-2

12. Relief."

6. After recording evidence and evaluating the same, the learned trial Court dismissed the suit of the appellant, however findings on issue No. 1 were recorded in appellant's favour. Aggrieved by the judgment and decree passed by the learned trial Court who not only dismissed the appeal, but even reversed the findings on issue No. 1, constraining the appellant to file the instant appeal.

7. The appeal came to be admitted on the following substantial questions of law:-

"1. Whether the learned appellate Court was right in law in reversing the findings on issue No. 1 of tenancy decided in favour of the appellant which have not even been assailed by the defendant/respondent No. 2 and also not disputed by defendant No. 1?

2. *Whether the learned Courts below were right in concluding that respondent No. 2 was in legal possession more particularly when neither appellant nor respondent No. 1 who were the owners ever acknowledged or attorned to the possession of respondent No. 2?*
3. *Whether the learned appellate Court was right in holding that the premises having been destroyed in the fire, the tenancy had come to an end?*
4. *Whether the suit of the plaintiff should have been dismissed as he has not appeared in the witness box and no cause excusing his appearance had been brought on record?*

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

Question Nos. 1 and 3

8. As both these questions are intrinsically interlinked and interconnected, therefore, they are being taken up together for consideration. A perusal of the record reveals that the learned trial Court had rendered a finding of tenancy while deciding issue No. 1 in favour of the appellant. However, the said finding despite there being no challenge to the same was reversed by the learned lower appellate Court basing its decision on the judgment rendered by this Court in ***Krishan Chand Vs. Bihari Lal and others AIR 1999, H.P. 68.*** The decision in *Krishan Chand* case (supra) was rendered on 26.3.2007 after relying upon the judgment of Hon'ble Kerala High Court in ***V. Sidharthan Vs. Pattiori Ramadasan, AIR 1984 Ker 181***. However, the law has now undergone a sea change in as much as not only the aforesaid judgment of the Kerala High Court has been overruled, but even conflict noticed in the Hon'ble two Judges Bench decision in ***Vannattankandy Ibrayi Vs. Kunhabdulla Hajee (2001) 1 SCC 564*** and ***T. Lakshmipathi Vs. R. Nithyananda Reddy (2003) 5 SCC 150*** has been resolved by the Hon'ble three Judges Bench decision of Hon'ble Supreme Court in ***Shaha Ratansi Khimji and Sons Vs. Kumbhar Sons Hotel Private Limited and others, (2014) 14 SCC 1***.

9. In *Vannattankandy Ibrayi* case (supra), the Hon'ble Supreme Court had formulated two questions for consideration:

> *"(i) whether the tenancy in respect of the premises governed by the Kerala Buildings (Lease and Rent Control) Act (hereinafter referred to as 'the State Rent Act') is extinguished by destruction of the subject-matter of tenancy i.e. the premises by natural calamities, and*
>
> *(ii) on the destruction of property whether the civil court has jurisdiction to entertain and try the suit for recovery of possession of land brought by the landlord."*

Both the questions were answered in affirmative.

10. Whereas in *T. Lakshmipathi* case (supra), the Hon'ble Supreme Court held that the lease of a building includes the land on which the building stands. So even if the building is destroyed or demolished, the lease is not determined as long as the land beneath it continues to exist. It was further held that the doctrine of frustration cannot be invoked on destruction or demolition of a building under lease where not only privity of contract but privity of estate is also created.

11. The conflict in both these judgments was apparent and therefore, reference was made to the Bench of Hon'ble three Judges, which resolved the controversy and the view taken in *T. Lakshmipathi* case was affirmed and it was held:-

> *"28. In the present case, it is not in dispute that the respondent purchased the lessor's interest. The lease continued even thereafter and did not extinguish. The lease was subsisting when the shares of the land were purchased by the respondent. But the interest of the lessee was not purchased by the*

> *respondent. What has been purchased by the respondent is the right and interest of ownership of the property. The interest of the appellant as lessee has not been vested with the respondent. Therefore, we are of the view that the tenancy of the appellant cannot be said to have been determined consequent upon demolition and destruction of the tenanted premises."*

Therefore, the findings rendered by the learned first appellate Court, whereby the tenancy of the appellant came to an end on the basis of destruction of the premises in question, is clearly erroneous and illegal and therefore, cannot be sustained, particularly in light of the law laid down by the Hon'ble three Judges Bench in *Shaha Patansi Khimji and sons case (supra).*

12. In ordinary circumstances, the judgment rendered by this Court in *Krishan Chand* case (supra) would be binding upon this Court as having been rendered by a co-ordinate Bench of this Court, but the same being in direct conflict with the judgment rendered by the Hon'ble three Judges Bench of Hon'ble Supreme Court in *Shaha Patansi Khimji and sons* case is not binding on this Court and therefore, need not be referred to a larger Bench.

13. For drawing such conclusion reliance can conveniently be placed upon a Division Bench judgment of this Court, authored by me, in ***Samriti Gupta and another Vs. State of H.P. and others, Latest H.L.J. 2016 (HP) 191***, wherein it was held as follows:-

> *"**13.** Before parting, we may clarify that the judgment in Arti Gupta case (supra) was rendered by the Hon'ble Full Bench of this Court and would normally in absence of any judgment to the contrary by the Hon'ble Supreme Court be binding on this Bench and in case of any difference of opinion would be required to be referred to a larger Bench. However, no such reference is necessary if the Hon'ble Supreme Court has given a decision in the matter because as soon as the Hon'ble Supreme Court gives its decision all decisions of the High Court on the point are overruled. (Reference in this regard is given to D.D.Basu Commentary on the Constitution of India, 8th Edition and to the judgment of the Hon'ble Supreme Court in D.C.M. vs. Shambhu, AIR 1978 SC 8.)*
>
> ***14**. Even otherwise, Article 141 of the Constitution provides that the law declared by the Hon'ble Supreme Court shall be binding on all courts within the territory of India. Therefore, once the Hon'ble Supreme Court has decided the issue by passing a reasoned order, a fortiori, the ratio decidendi declared in the said decision would be binding on all the Courts in the Country for giving effect to it while deciding the lis of the same nature. All the Courts are under legal obligation to take note of the said decision and decide the lis in conformity with the law laid down therein."*

14. In light of the aforesaid observations, question Nos. 1 and 3 are answered in favour of the appellant and the appellant is held to be the tenant of the disputed premises.

Question No. 2.

15. It is vehemently argued by Mr. Anand Sharma, learned counsel for the appellant that once the appellant is held to be the lawful tenant, then it is more than settled that possession follows title and therefore, the lawful tenant could not have denied the prayer for injunction. In addition to the above, he further argued that neither the appellant nor respondent No. 1 had ever acknowledged or attorned to the possession of respondent No. 2, therefore, the same could not be ordered to be protected.

16. At the outset, it may be observed that the appellant did not enter in the witness box and it was only his son Gurmeet Singh who appeared and tendered in evidence his affidavit Ex. P-1 in support of his pleadings, wherein he reiterated the contents of the plaint. He also tendered in evidence letters, registered notice and receipt Ex. P-B to Ex. P-M. During his cross-examination by learned counsel for respondent No. 1, he admitted that the alleged disputed stall belongs to respondent No. 1 and the same was given on lease to the appellant in the year

1961. He also stated that till the stall was gutted in fire, his father remained in possession of the same. He denied that according the family arrangement his father i.e. the appellant had given the shop to respondent No. 2 for running his business. He feigned ignorance regarding his father having taken any permission from respondent No. 1, before handing over the possession to respondent No. 2. He further denied that the possession of the premises in dispute was given to respondent No. 2, but voluntarily stated that some time he used to open the shop and further stated that some time respondent No. 2 used to run business from the shop. Both the appellant and respondent No. 2 had one key each. He further stated that he had reported the matter to respondent No. 1 regarding the illegal possession taken by respondent No. 1, but respondent No. 2 had taken no steps to evict him.

17. In the course of cross-examination by respondent No. 2, the witness stated that Darshan Kaur was his mother. He admitted that appellant and respondent No. 2 had settled at Solan after migration from Pakistan. He feigned ignorance to the fact that respondent No. 2 was brought up by the appellant as respondent No. 2 was barely two years old at that time. He admitted that respondent No. 2 and appellant remained in one family and used to do business jointly. He admitted that the appellant had earlier been running the business from the disputed stall in the name and style of Sardar Electrical Works and at that time the General Sale Tax Licence and Central Sale Tax Licence (GST & CST) were in the name of Sardar Electrical Works. He admitted that there was a family settlement Ex. D-1 effected between the appellant and respondent No. 2. He further admitted the signatures of his father and respondent No. 2 over this document and further admitted that after family settlement Ex. D-1, the appellant had shifted his business to Lower Bazar, Solan and stated his business in the shop of Sanathan Dharam Sabha. He further admitted that the business in the disputed shop in terms of the family settlement was left to respondent No. 2. He further admitted that GST and CST numbers were changed in the name of appellant on the address of the shop at Sanathan Dharam Sabha, Lower Bazar Solan. He also admitted that the appellant never challenged the validity of family settlement in any Court, though denied that right from the year 1982, it was respondent No. 2, who was in possession of the disputed premises. He admitted that in the month of November, 1999, the shops were destroyed in fire, wherein the persons lost their stalls and shops and had lodged separate reports with the police, but admitted that the appellant had not lodged any such report.

18. PW-2, Akhil Kumar Photographer is running a shop at Lower Bazar and had proved the photographs Ex. PW-2/A and Ex. PW-2/B along with its negatives Ex. PW-2/C and Ex. PW-2/D and receipt Ex. Pw-2/E. During his cross-examination this witness admitted that his shop is in front of the shop of the appellant and stated that the appellant was dealing from this shop in electrical goods for the last 25 years.

19. PW-3, Balak Ram has proved that the electric meter was installed in the name of appellant and has further stated that he has working as a meter reader for Upper Bazar for the last 5-6 years, but he had not seen respondent No. 2 in the disputed premises.

20. PW-4, Rakesh Sharma, Clerk of Municipal Committee had proved receipt Ex. PW-4/A and site plan sanctioned by the Municipal Committee in the year 1961 Ex. PA. During his cross-examination, this witness admitted that the Committee does not inquire into the name and address of the person depositing the tax.

21. Respondent No. 2 in order to rebut the oral evidence tendered in evidence the affidavit of Asa Singh, Ex. D-1, who is the real brother of the appellant and affidavit of Satish Bhutani Ex. D-2 and his own affidavit Ex. D-3 in support of his pleadings.

22. Sardar Asa Singh, DW-1 has stated that he had seen respondent No. 2 in possession of the property since the year 1982. During his cross-examination, he stated that the family arrangement Ex. D-1 was prepared in the house of the appellant.

23. Satish Bhutani, DW-2 is running the business of Gift Emporium at Upper Bazar, Solan and has tendered his affidavit Ex. D-2 and also stated about the physical possession of respondent No. 2 over the disputed premises. During his cross-examination, this witness stated that respondent No. 2 had started his business at Solan in the year 1976 and prior to that the possession of the shop was with the appellant. He admitted that the dispute between the appellant and respondent No. 2 started when the original shop was destroyed in fire. He also admitted that both the parties had started to take the possession of the shop, but voluntarily stated that respondent No. 2 used to do business by placing table in front of the shop when the same was under construction.

24. Respondent No. 2 appeared as DW-3 and in his affidavit has re-iterated the contents of the written statement and also placed on record the payments made towards tax levied by respondent No. 1 i.e. sale tax etc. During his cross-examination he admitted that the disputed stall was not leased to him by respondent No. 1. He admitted that respondent No. 1 had constructed the stall after the same had been destroyed in fire. He feigned ignorance regarding the complaint having lodged by respondent No. 1 against him on 27.3.2000, regarding his forcible occupation of the disputed shop. During his cross-examination by learned counsel for the appellant, he admitted that he remained as member of joint family with the appellant till 1982 and admitted that the physical legal possession of the shop was not handed over to him by respondent No. 1. He further admitted that the police had not taken any action against him in view of the pendency of civil litigation.

25. DW-4, Vijay Verma had proved cheque number Ex. D-7 to Ex. D-18 issued by Sunny Electrical Works being run by respondent No. 2 in favour of respondent No. 1.

26. DW-5 Goverdhan Singh Senior Assistant, Excise and Taxation Department, Solan has proved the sale tax number Ex. D-21 of Sunny Electrical Works.

27. DW-7 Sunil Kumar, Clerk from the Taxation Department of Municipal Committee, Solan had tendered in evidence his affidavit Ex. DW-7/A, wherein he reiterated the contents of written statement filed by respondent No. 1. During his cross-examination by learned counsel for respondent No. 2, he has shown his ignorance to the fact whether the appellant was carrying on business from the disputed stall or not. During cross-examination by learned counsel for the appellant, he admitted Ex. P-1 to Ex. P-5.

28. This in entirety is the oral as well as documentary evidence led on the issue of possession by the parties to the lis.

29. Learned counsel for the appellant has vehemently argued that once this Court held the appellant to be the tenant, then the possession of respondent No. 2 cannot be protected, as the same is unlawful, apart from the same having been obtained forcibly. Though the submission appears to be attractive, but the same in teeth of agreement Ex. D-1 merits rejection.

30. As already observed earlier, the general power of attorney of the appellant, Gurmeet Singh while appearing as PW-1 has not only categorically admitted the family agreement Ex. D-1, but he further stated that in terms of the agreement, the appellant had shifted to Lower Bazar, Solan and started his work in the shop of Snatan Dharam Sabha. He had also shifted the CST and GST numbers to the said premises. Not only this, he further admitted that it was respondent No. 2, who was carrying on business in the premises in dispute by the name of Sunny Electricals.

31. At this stage, it shall be apt to reproduce the verbatim contents of the agreement, which reads thus:-

> *"THIS AGREEMENT made on this 10th day of September, 1982 BETWEEN Shri Thakur Singh son of Sardar Labh Singh, resident of Jawhar Park Solan Tehsil and District Solan (hereinafter called the first party) and Shri*

Amarjit Singh son of Sardar Balak Singh resident of Upper Bazar Solan (hereinafter called the party of the second part).

WHEREAS the parties came from West Pakistan after the partition of the country and at that time the second party was of the age about 2 years. His father had died during riots at West Pakistan and the first party took the second party under his protection and custody as guardian and brought him to India. The first party thereafter settled at Solan and he brought up and educated the second party and further married him at his own expenses and costs etc. The parties has been living as joint family having joint business at Solan and an electric shop (goods) is being runed by the parties jointly.

AND WHEREAS both the parties due to some family dispute and differences intends to severe from each other mutually from their business and the properties on the following terms and conditions:-

1. *That now the first party has given the said electric goods shop (business) situated at Upper Bazar Solan Tehsil and District Solan alongwith all goods and accounts etc; to the second party and henceforth the first party shall have no concern i.e. right or title & interest in that electric shop and its accounts etc; to which the second party shall be entirely owner and responsible for all profits and losses and other thing relating to said business of electric shop.*

2. *That the second party shall have no right, title or interests in the other immoveable properties previously owned and possessed by both the parties. The said properties are left to the first party out of said joint khata etc; by the second party and the same is no more joint as mutually agreed by both the parties. The first party shall now ownward shall be entirely responsible and owner of the said immoveable properties (i.e. land and constructed buildings etc.)*

3. *That now both the parties are no more joint in business, profit and loss and properties in view of the paras 1 and 2 above.*

4. *That the expression both the 'first' and the 'second' party shall include, legal representative, heirs, administrators, executors and assigns of the respective parties.*

IN WITNESS WHEREOF both the parties to this agreement have set and scribed their respective hands to this agreement in presence of marginal witnesses of the day, month and year first above written, at Solan.

Sd/-

1. Thakur Singh
first party

WITNESSES

Sd/-

1. S.Udham Singh S/o S. Avtar Singh
Arhrti Old Court Road, Solan.

Sd/-

2. S.Harbans Singh S/o Sh. Labh Singh
r/o Railway Workshop Jugadhry, Distt.
Ambala. (Haryana)"

2. Amarjit Singh
2nd party.

32. It would be noticed that the appellant and respondent No. 2 were members of same family in as much as respondent No. 2 was brought up by the appellant when they migrated from Pakistan to Solan in the year 1947. As per agreement Ex. D-1, respondent No. 2 was barely 2 years of age when they settled at Solan.

33. Notably, it has come in the statement of PW-1 that agreement Ex. D-1 was never challenged or denied by the appellant. The payment of tax etc. as per the recital of Ex. D-1 coupled with the bank account, clearly establishes beyond doubt that from the year 1982, it was respondent No. 2, who was in possession of the disputed shop, pursuant to family settlement/agreement Ex. D-1. Once this document has not been denied, then the Court cannot ignore the recital as contained therein regarding the appellant having relinquished his authority and power over the stall for all intends and purposes from the date of agreement after handing over the possession of the premises along with accounts, equipment and articles lying inside the shop to respondent No. 2. Thus the appellant cannot be heard to say that respondent No. 2 was simply allowed to carry out the business in the said premises.

34. It is further not in dispute that it is respondent No. 2, who even after the fire had broken out was in occupation of the premises. The appellant cannot wriggle out of the agreement Ex. D-1 and the same principle upon which he seeks to establish the continuance of tenancy by placing reliance upon the judgment of Hon'ble Supreme Court in *Shaha Ratansi Khimji and Sons case* (supra) is equally applicable to his case and the agreement Ex. D-1 would continue to bind the appellant. The question is accordingly answered against the appellant.

<u>Question No. 4</u>

35. It is vehemently argued by the learned counsel for the appellant that the learned trial Court could not have been drawn adverse inference and make it as one of the basis to dismiss the suit, as it is well settled legal proposition that the power of attorney can depose in place of the principal. In support of such submission reliance is placed upon the following observations from the judgment rendered by Hon'ble Supreme Court in ***S. Kesari Hanuman Goud Vs. Anjum Jehan and others (2013) 12 SCC 64***:

> *"23. It is settled legal proposition that the power-of-attorney holder cannot depose in place of the principal. The provisions of Order 3 Rule 1 and 2 CPC empower the holder of the power of attorney to "act" on behalf of the principal. The word "acts" employed therein is confined only to "acts" done by the power-of-attorney holder, in exercise of the power granted to him by virtue of the instrument. The term "acts", would not include deposing in place and instead of the principal. In other words, if the power-of-attorney holder has preferred any "acts" in pursuance of the power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for acts done by the principal, and not by him. Similarly, he cannot depose for the principal in respect of a matter, as regards which, only the principal can have personal knowledge and in respect of which, the principal is entitled (sic liable) to be cross-examined. (See Vidhyadhar Vs. Manikrao (1999) 3 SCC 573, Janki Vashdeo Bhojwani Vs. Indusind Bank Ltd (2005) 2 SCC 217, Shankar Finance and Investments Vs. State of A.P. (2008) 8 SCC 536 and Man Kaur Vs. Hartar Singh Sangha (2010) 10 SCC 512.)"*

36. There cannot be any quarrel with the aforesaid proposition of law laid down by the Hon'ble Supreme Court in the aforesaid case. But the moot question is as to whether PW-1 attorney of the appellant could have contradicted the terms of the agreement Ex.D-1 when the same was admittedly executed on 10th September, 1982, when the attorney Gurmeet Singh was hardly 14 years of age. This answer is itself contained in the aforesaid judgment, wherein the Hon'ble Supreme Court has categorically held that the provisions of Order 3 Rule 1 and 2 C.P.C. empower the holder of the power of attorney to "act" on behalf of the principal, which is confined only to the acts done by the power of attorney holder, in exercise of the power granted to him by virtue of the instrument. The term acts, would not include deposing in place and instead of the principal. Meaning thereby, that the power of attorney holder can only depose on behalf of the principal in respect of such acts which have been done by him in pursuance of the power of attorney, but he cannot depose for the principal for acts done by the principal and not by him. Similarly, he cannot also depose for the principal in respect of the matter, as regards which, only

the principal can have personal knowledge and in respect of which, the principal is entitled and liable to be cross-examined.

37. In such circumstances, no exception can be taken against the findings regarding adverse inference drawn by learned trial Court on account of non-examination of the appellant as his own witness.

38. Learned counsel for the appellant would further argue that it was on account of old age, infirmity and poor eye sight that necessitated the examination of the son of the appellant in place of the appellant.

39. Even this submission of the appeal cannot be accepted, as save and except for a bald statement of the power of attorney of PW-1, there is no material whatsoever placed on record to support such plea. That apart, the appellant could have conveniently moved an application for appointment of local commissioner for recording his statement. Having failed on all counts, I see no illegality committed by the learned trial Court, while drawing adverse inference against the appellant. The question of law is answered accordingly.

40. In view of the findings recorded herein above, the appeal is partly allowed and the appellant is held to be the tenant of the disputed premises. Whereas, on the remaining questions, the judgment and decree passed by the learned Courts below is affirmed.

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

Shyam Lal …Appellant.

Versus

Reeta Devi & ors …Respondents

FAO(MVA) No.135 of 2015

Date of decision: 27.7.2016.

Motor Vehicles Act, 1988- Section 149- Liability has been fastened upon the appellant on the ground that he was not holding valid and effective driving licence- insured contended that he had engaged a counsel to defend his case before the Tribunal- Counsel absented himself and he was proceeded exparte- held, that once a person engages a counsel, his botheration goes and it is the duty of the counsel to take care of the case - no client can be made to suffer for the fault of the counsel- applicant has filed an application for leading additional evidence, which prima facie shows that appellant had valid and effective driving licence and the vehicle was being driven with proper documents – appeal allowed and case remanded to the Tribunal with the direction to decide the liability to pay the award. (Para-3 to 9)

Cases referred:

Rafiq& anr Vs. Munshi Lal & anr, (1981) 2 SCC 778

Secretary, Department of Horticulture, Chandigarh & anr Vs. Raghu Raj, (2008) 13 SCC 395

For the Appellant:	Mr.Vijay Chaudhary, Advocate.
For the Respondents:	Mr. Tara Singh Chauhan, Advocate for respondents 1 to 3.
	Mr.Jagdish Thakur, Advocate for respondent No.4.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J (Oral):

The instant appeal under Section 173 of the Motor Vehicles Act is directed against the award passed by learned Motor Accident Claims Tribunal, whereby the claim petition filed by

the petitioners (hereinafter referred to as 'respondents 1 to 3') has been allowed and awarded a sum of Rs.8,83,000/- along with interest at the rate of 9% per annum.

2. The precise grievance of the appellant is that in terms of the aforesaid award, liability has been fastened upon him on the ground that he was not holding a valid and effective licence and that the vehicle, on the date of accident, i.e. 24.10.2011, was being driven without any valid documents. It has further been argued that the appellant had engaged a counsel to defend his case before the Tribunal and reply on his behalf was also filed. However, after the evidence of the claimants had been recorded, the case was listed on various dates for the evidence of the appellant, but counsel absented himself and even on 19.6.2014, counsel did not appear and consequently the appellant was proceeded ex parte and a colossal award of Rs.8,83,000/- alongwith 9% interest came to be fastened upon him.

I have heard the learned counsel for the parties and have gone through the material placed on record.

3. Taking into consideration the nature of the order I propose to pass, it is not at all necessary to delve into the facts of the case. Suffice it to say that it is more than settled that once a person engages a counsel, his botheration goes and it is the duty of the counsel to take care of the case.

4. Reference in this regard can conveniently be made to the judgment rendered by the Hon'ble Supreme Court in ***Rafiq& anr Vs. Munshi Lal & anr,*** **(1981) 2 SCC 778,** wherein it was held as follows:

> *"3. The disturbing feature of the case is that under our present adversary legal system where the parties generally appear through their advocates, the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then trust the learned advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge of the court's procedure. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. At the time of the hearing of the appeal, the personal appearance of the party is not only not required but hardly useful. Therefore, the party having done everything in his power to effectively participate in the proceedings can rest assured that he has neither to go to the High Court to inquire as to what is happening in the High Court with regard to his appeal nor is he to act as a watchdog of the advocate that the latter appears in the matter when it is listed. It is no part of his job….."*

5. At this stage, I may refer to another decision of the Hon'ble Supreme Court in ***Secretary, Department of Horticulture, Chandigarh & anr*** Vs. ***Raghu Raj***, **(2008) 13 SCC 395**, wherein it was observed as under:

> *"24. At the same time, however, when a party engages an advocate who is expected to appear at he time of hearing but fails to so appear, normally, a party should not suffer on account of default or non-appearance of the advocate".*

6. Applying the ratio of the aforesaid cases, it is absolutely clear that no client can be made to suffer for no fault of his, especially when he has engaged a counsel.

7. Apart from the above, it may be noticed that the appellant has moved an application under the provisions of order 41 Rule 27 CPC and along with the application, a number of documents have been filed to prima facie show that the appellant had a valid and effective driving licence and further the vehicle was being plied with proper documents.

8. However, without commenting upon the authenticity or veracity etc of the documents so annexed, I feel the interest of justice would be subserved in case the matter is sent back to the learned Tribunal with a direction to allow the appellant to place on record and prove the documents in accordance with law. Ordered accordingly.

9. However it is made clear that while taking into consideration these documents, only finding regarding liability to pay the award would be re-determined and all other issues including the quantum of compensation, already determined in favour of the claimants, would not be disturbed.

10. The parties, through their counsel are directed to appear before the Tribunal below on 16.8.2016.

11. Since the claim petition has been filed in the year 2012, the Tribunal below shall make all endeavours to decide the petition as expeditiously as possible and in no event later than 31st December, 2016.

The appeal is disposed of in the aforesaid terms leaving the parties to bear their cost.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

State of Himachal Pradesh …..Appellant.

Vs.

Sanjeevan Singh & others …..Respondents.

Cr. Appeal No.: 123 of 2009
Reserved on : 04.07.2016
Date of Decision: 27.07.2016

Indian Penal Code, 1860- Section 307, 333 read with Section 34- Informant was driving a bus- when bus reached village Khajjan, a tractor was parked on the road side and 2-3 persons were standing on the road- informant blew horn but the persons did not move- accused S and N caught the collar of the Uniform of the informant, dragged him to the road and started beating him- Conductor tried to intervene but he was also beaten- passengers were also beaten by the accused- accused were tried and acquitted by the trial Court- held, in appeal that recovery memo was suspicious and the recovery of weapon of offence was not proved- PW-1 was relative of the informant- no independent witness was associated- there are major contradictions and discrepancies in the testimonies of the prosecution witnesses- suspicion cannot take the place of proof – trial Court had rightly held that prosecution version was not proved and the accused was rightly acquitted by the trial Court- appeal dismissed. (Para-20 to 30)

For the appellant : Mr. V.S. Chauhan, Add. A.G. with Mr. Vikram Thakur and Mr. Puneet Rajta, Dy. A.Gs.

For the respondents: Mr. N.S. Chandel, Advocate, for respondents No. 1 and 3.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. :

By way of present appeal, the State has challenged the judgment passed by the Court of learned Additional Sessions Judge (II), Kangra at Dharamshala in Sessions Case No. 20-N/VII/2006 dated 25.09.2008 vide which, learned trial Court has acquitted the accused for commission of offence under Sections 307, 333 read with Section 34 of the Indian Penal Code.

2. During the pendency of the present appeal, accused No. 2 has died on 07.11.2012. As such, the appeal qua him stands abated.

3. The case of the prosecution was that on 10.10.2004, complainant Ravinder Singh reported that he was a driver in HRTC, Pathankot Depot and on the said day, he was driving bus bearing registration No. HP-38A-3721 on route from Shimla to Suliali alongwith conductor Bidhi Singh. When the said bus reached village Khajjan at around 9:20 p.m., there was a tractor parked on the road side and 2-3 persons were standing on the road. At that time, there were about five passengers in the bus. The complainant blew horn, however, the persons did not move from the road. Thereafter, he requested these persons to move away from the road, but in the meantime, Sanjeevan and Narinder, R/o Khajjan caught him from the collar of his uniform and dragged him to the road from the driver seat and started giving beatings to him. The buttons of his shirt were broken and the pockets were torn. Conductor Bidhi Singh came out from the bus to intervene and on hearing the noise, Shri Dev Raj, Roop Lal and Yogesh Kumar also came out but Narinder Pathania and Sanjeevan Pathania gave beatings to all of them and tractor driver Chaman Lal gave a blow on the head of Yogesh Kumar with an iron rod (Wheel Panna) and inflicted injuries on his head. As per the complainant, all the said three persons obstructed him in discharging his official duty by giving him beatings and tearing off his uniform. On the basis of the said complaint, FIR was lodged and medical examination of complainant as well as injured Yogesh Kumar was carried out. Yogesh Kumar was referred for skull X-ray and C.T. Scan to Dharamshala and thereafter to Shimla/Chandigarh and ultimately, he was referred to All India Institute of Medical Sciences, New Delhi and the doctor opined that the nature of injuries of the complainant were simple and of injured Yogesh Kumar were grievous and dangerous to life.

4. During the course of investigation, clothes of the complainant and injured Yogesh Kumar were taken into possession. On the basis of the disclosure statement of accused Chaman Lal, the weapon of offence, i.e. iron rod was also recovered. After completion of the investigation, challan was presented against the accused and as a prima facie case was found against the accused, they were charged for the commission of offence under Section 307 and 333 read with Section 34 of the Indian Penal Code. The accused pleaded not guilty and claimed trial

5. In order to substantiate its case, the prosecution examined 15 witnesses.

6. On the basis of material produced on record by the prosecution, learned trial Court came to the conclusion that the prosecution had failed to prove that on 10.10.2004 all the accused in furtherance of their common intention had inflicted injuries to the injured with intention and knowledge that such injuries would have caused death of the injured and further that the accused voluntarily caused hurt to complainant Ravinder Singh and prevented and deterred him from discharging his official duty. Accordingly, learned trial Court acquitted the accused from the charges which were framed against them on the ground that the prosecution had failed to prove the same.

7. Feeling aggrieved by the said judgment of acquittal, the State has filed the present appeal.

8. We have heard the learned counsel for the parties and also gone through the records of the case as well as the judgment passed by the learned trial Court.

9. In order to prove its case, the prosecution in all examined 15 witnesses, whereas one witness was examined by the defendant.

10. Injured Yogesh Kumar has entered the witness box as PW-1. He has stated that he was running a shop at Indora dealing with electric appliances and was a resident of Village Khajjan. On 10.10.2004, he was coming to his house in HRTC bus which was on route from Shimla to Suliali. When he was about to reach his destination, where there was a bus stop near his house, a tractor belonging to Narinder Pathania was parked on the road and Narinder Pathania was accompanied by Sanjeevan Pathania alongwith Chaman Lal and all of them were

standing on the road with their tractor. The driver of the bus blew horn, but neither the persons moved from the road nor they removed the tractor. When the driver asked the said person from his seat to move around, they started having altercation with the driver of the bus and pulled him down from his seat. In the meanwhile, Conductor of the bus and he also got down and saw that accused were giving beatings to the driver of the bus. He further deposed that when he tried to save the driver, accused Narinder asked Chaman Lal to beat him and Chaman Lal hit him on his head with iron rod. He also stated that he identified all the accused as they were from his village. He further deposed that he became unconscious as a result of the injury and regained his consciousness after his surgery at Delhi.

11. Ravinder Singh, complainant has entered the witness box as PW-2 and has reiterated his version as was contained in FIR which was lodged by him. He deposed that when the accused who was standing in the middle of the road did not budge despite his repeated blowing of horn, he asked them from his seat to remove the tractor from the road, on which, the accused pounced on him and dragged him outside the Bus. He has also deposed that in the meanwhile Conductor, Yogesh and other persons came out and intervened to save him. But, accused brought an iron rod and hit Yogesh on his head with the said rod, who sustained injury and fell down. He also deposed that buttons of his shirt were broken and his pockets were torn. He has also stated that he was conversant with the accused since he used to drive the bus on the same route.

12. PW-3 Bidhi Singh has stated that on 10.10.2004, he was Conductor on the bus in issue and he has also supported the case of the prosecution and narrated the happening of the events.

13. PW-4 Rajesh Kumar, R/o Village Khajjan has deposed that on 10.10.2004, he heard some noise out side the road as some one called to save him, so he went to the spot at around 9:30 p.m. and saw that the accused were having altercation with the driver of HRTC bus and Yogesh Kumar who tried to intervene in the matter to save the driver was hit with iron rod (wheel panna) on his head. Yogesh Kumar fell down and the accused ran away from the spot. Yogesh Kumar became unconscious and he was brought to Nurpur hospital from where he was referred to Dharamshala and from Dharamshala he was shifted to All India Institute of Medical Sciences, New Delhi. In his cross-examination, he has stated that Yogesh was his real brother and his house was at a distance of 10/12 meters from where the bus stopped.

14. Rajni Kiran has entered the witness box as PW-5 and stated that she was associated by the police during the course of investigation and that on 26.10.2004, she was associated during investigation when accused Chaman made a disclosure statement to the effect that he had concealed the weapon of offence, i.e. iron rod under the bushes in Khajjan village. She is also witness to the recovery memo vide which *wheel panna* was recovered, i.e. Ex. PW6/B.

15. PW-6 Vijay Kumar, PW-7 Surjit Kumar, PW-8 Shyam Sunder, PW-9 Manoj Kumar, PW-10 Ranjit Singh, PW-12 Kamaljit and PW-15 Inspector Nathu Ram are formal witnesses.

16. PW-11 Dr. Suman Suxena has deposed that on 10.10.2004, she was posted as Medical Officer at CHC Nurpur and she had examined Ravinder Singh whom she found to be having restricted movement of left index finger joint. She advised X-ray of left hand finger and after X-ray, no evidence of fracture was found and nature of injury found to be simple with hard and blunt weapon. She further deposed that on the same day Yogesh was also brought, who was disoriented and not responding to the questions asked. There were two lacerated wounds in the scalp. There was suspected depressed fracture of left parital bone. X-ray report revealed that there was depressed fracture of left parital bone and the injury was found to be grievous with blunt and hard weapon and the injury in issue could be caused by *wheel panna*. In her cross-examination, she admitted it to be correct that injuries on the person of Ravinder Singh could be caused in a fall and injuries on the person of Yogesh could be caused if a person while running,

strikes against a stationary vehicle having iron rods/pipes with the stairs on the rear side of the vehicle.

17. PW-13 Head Constable has deposed that file was handed over to him for investigation. Shirt of the complainant was taken into possession vide Ex. PW2/B. He also deposed that he recorded the supplementary statement of complainant Ravinder and he also recorded statement of PW-1 Sunil Kumar. He has also stated that he obtained copy of appointment letter and extract of duty register etc.

18. PW-14 Kishan Gopal has deposed that on 11.10.2004 file was handed over to him for investigation. On 20.10.2004, he moved an application to the doctor seeking opinion as to whether injury to the injured was dangerous to life. He has also stated that he arrested accused Chaman Lal and Sarjeevan. According to him, accused Chaman made a disclosure statement disclosing therein as to where he had thrown the *wheel panna* which was recorded in the presence of witnesses and which led to the recovery of weapon of offence. He also deposed that he recorded the statements of witnesses under Section 161 Cr. P.C.

19. The defence examined Vijay Kumar, Junior Engineer, IPH Sub Division, Nurpur as DW-1, who has deposed that on 10.10.2004, Narinder Singh, Pump Operator remained on duty at Pump House from 9 p.m. to 6.15 a.m. as per extract of log book Ex.-DW1/A.

20. We will first of all deal with the disclosure statement of Chaman Lal, which is on record as Ex. PW5/A. This disclosure statement is dated 26.10.2004. The statement is alleged to have been made before two witnesses, namely Rajni Kiran (PW-5) and Bashirdeen. It is mentioned in the disclosure statement which was given by the accused in the custody that he has hidden one iron panna below the road in village Khajjan, which he can get recovered after getting the place demarcated. PW-5 Rajni Kiran in her statement has deposed with regard to the said statement having been made in her presence by accused Chaman Lal. In her cross-examination, she has stated that on 26.10.2004, she went to the Police Station between 4-5 p.m. She has further deposed that when she had gone to the police, she was accompanied by one Narinder. She has also stated that on 26.10.2004, she signed both the memos at the same time. She further deposed that "**I signed both the memos on 26.10.2004 after the recovery of iron rod/panna, Ex. P-2. On 26.10.2004, I went to the spot all alone with the police and Nandu @ Narinder did not accompany me and there were no other person except police."** Incidentally, said Shri Narinder who allegedly accompanied Rajni Kiran to the Police Station is not a witness to the disclosure statement made by Chaman Lal. Recovery which has been effected on the basis of this disclosure statement has been made vide memo Ex. PW5/B. This recovery memo is signed by Rajni Kiran and Bashirdeen. However, as per the statement of Rajni Kiran, on 26.10.2004, she went to the spot alongwith with the police and she has **categorically stated that neither Narinder accompanied her nor there was any other person except police**. If that is correct, then recovery memo Ex. PW5/B becomes suspicious because as per said recovery memo, the recovery has been effected in the present of Rajni Kirin and Bashirdeen. Incidentally, Bashirdeen who was attesting witness both to the disclosure statement as well as recovery memo Ex. PW5/A and Ex. PW5/B has not been examined by the prosecution.

21. In our considered view, the discrepancies and contradictions in the statement of PW-5 vis-à-vis the recording of disclosure statement and recovery of weapon of offence on the basis of said disclosure statement cast grave and serious doubts about the disclosure statement having been made by accused Chaman in the mode and manner in which the prosecution wants us to believe and further with regard to the alleged recovery of the weapon of offence on the basis of the said disclosure statement.

22. Therefore, the deposition of PW-5 Rajni Kiran neither inspires confidence nor the same appears to be trustworthy so as to be made the basis of convicting the accused. Even otherwise, with regard to Section 27 of the Act, what is important is discovery of the material object at the disclosure of the accused but such disclosure alone would not automatically lead to the conclusion that the offence was also committed by the accused. The burden lies on the

prosecution to establish a close link between discovery of the material object and its use in the commission of the offence. What is admissible under Section 27 of the Act is the information leading to discovery and not any opinion formed on it by the prosecution.

23. At this stage, it is relevant to refer to the statements made by the accused under Section 313 Cr. P.C., wherein they have denied the allegations levelled upon them and in their defence have stated that they were going on the extreme left side of the road when the driver of the bus suddenly brought the bus on the extreme left side of the road and they had to jump to save their lives and when they asked the driver why he had suddenly brought the bus on extreme left side of the road without giving any signal, the driver started altercation without any cause and in the meantime Yogesh Kumar also came out hurriedly and in the process, he was struck with rods of the bus, as a result of which he sustained injuries.

24. In the backdrop of what has been observed above, now we will make a close scrutiny of the statements of prosecution witnesses. In the present case, driver of HRTC bus Ravinder Singh is the complainant and injured person is Yogesh Kumar. It is an admitted fact that the alleged incident has taken place just 7-8 meters away from the house of Yogesh Kumar. In his cross-examination, Yogesh Kumar (PW-1) has initially stated that PW-2 Ravinder Singh, driver of the bus was not related to him and thereafter he has admitted the suggestion that PW-2 Ravinder Singh was married to his cousin sister Reeta. Incidentally, it is apparent from the case of the prosecution that at the time when the alleged incident took place, there were about 5 passengers in the bus. However, no independent witness has been examined by the prosecution in the present case who was also travelling in the bus at the relevant time. In his cross-examination, Yogesh has admitted that Roop Lal and Dev Raj are his cousins and that the houses of these persons are also adjacent to his house in the village. He also admitted that the sound of stoppage of the bus was heard in the houses of these persons adjacent to the bus stoppage. He has also admitted that the house of Pancham Dutt Sharma is also adjacent to the road. Thus, it is apparent from his deposition that the place where the alleged incident took place is not a secluded place. Despite this, the prosecution has not associated any independent person from the nearby area. Besides the statements of driver, conductor and Yoresh Kumar, the prosecution has examined one Rajesh Kumar, who happens to be the real brother of injured Yogesh Kumar. In fact, a perusal of the records demonstrates that PWs. Dev Raj, Roop Lal, Kiran Kumari and Suman Kumari were given up as unnecessary. This witness has also admitted it to be correct in his cross-examination that there are shops on both sides of the road where bus was stopped.

25. Now, we will refer to the statement of the complainant (PW-2). This witness has deposed that when the bus driven by him reached near village Khajjan at about 8:20 p.m., there was a tractor parked in the middle of the road and three boys were standing by the side of the said tractor. He has further deposed that the bus reached near village Khajjan at around 8:20 p.m., however, a perusal of the contents of the FIR demonstrates that in the said FIR he has stated that the bus reached village Khajjan at 9:20 p.m. Another important contradiction in what is recorded in the FIR and what he has deposed in the Court is that in FIR it is mentioned that two three persons had parked the tractor on the side of the road and were standing in the middle of the road. When despite his blowing horn, the said persons did not vacate the road, he asked them to do so and on this, they got agitated and caught hold of him from his collar and dragged him down from the bus and started beating him. However, the version which he has given in the Court is totally different. In the Court, he has stated that the said persons had parked the tractor in the middle of the road and when he asked them to remove the same from the middle of the road, this agitated the accused and they pounced upon him and dragged him outside the bus. In his cross-examination, PW-2 has disclosed that Roop Lal, Dev Raj and Yogesh Kumar reached the spot from the house of his in-laws when the occurrence took place, alongwith Rajesh Kumar, who was his real brother-in-law. Incidentally, a perusal of the FIR demonstrates that it is not mentioned therein by the complainant that Yoresh Kumar was traveling in the bus as a passenger. On the contrary, what is recorded therein is that when the accused allegedly started

beating him, conductor of the bus got down in order to save him and in the meanwhile, on account of noise, Dev Raj, Roop Lal and Yogesh also came there.

26. In our considered view, this major contradiction and discrepancy in the case of the prosecution as to how Yogesh Kumar had actually reached the spot also shrouds the case of the prosecution with great suspicion. This is more so because of the reason that complainant Ravinder Singh and Yogesh Kumar are admittedly related to each other. Not only this, the alleged incident has taken place just 7-8 meters away from the house of Yogesh Kumar as well as in a very close vicinity of the house of the in-laws of the complainant. This is evident from the fact that PW-2 himself has disclosed that he was saved by one Rajesh Kumar who came to the spot after having heard the noise and who happened to be his real brother-in-law. From the above said facts, the factum of Rajesh Kumar travelling in the said bus in his capacity as a passenger and the bus having been stopped on the whistle of the conductor by the driver at the spot where the incident took place does not seem to be cogent and plausible.

27. At this stage, it is also relevant to refer to the deposition of Dr. Suman Suxena (PA-11), who has admitted in her cross-examination that injuries observed on the person of complainant Ravinder Singh could be caused as a result of fall and the injuries which were suffered by Yogesh could have been caused if a person while running strikes against a stationary vehicle having iron rods/pipes with the staircase on the rear side of the said vehicle.

28. It is settled position of law that howsoever strong suspicion is, it cannot become a substitute for proof. In the present case, it is evident that prosecution witnesses, i.e. PW-1 Yogesh Kumar, PW-2 Ravinder Singh and PW-4 Rajesh Kumar are close relatives. Whereas Yogesh Kumar and Rajesh Kumar are real brothers PW-2 Ravinder Singh is their brother in law. Even otherwise, the testimonies of PW-1 Yogesh Kumar and PW-2 Ravinder Singh are not trustworthy because there are too many contradictions, discrepancies and inconsistencies in them which have remained unexplained. Not only this, the defence has been able to impinge their credibility during the course of cross-examination. Similarly, PW-3 Bidhi Singh is also an interested witness because he happens to be a conductor of the bus, of which PW-2 is the driver. The story as put forth by the prosecution that Yogesh Kumar (PW-1) was a co-passenger in the bus does not seems to be probable. In the FIR it has not been so recorded that Yogesh Kumar was a co-passenger in the bus. On the other hand, what is recorded therein is that when the alleged scuffle took place between accused and PW-2, then on hearing noise three persons came out from the house of in-laws of PW-2 and one of them happened to be Yogesh Kumar. Not only this, the testimony of PW-5 Rajni Kiran also does not inspires any confidence as has already been discussed above. No other independent witness has been examined by the prosecution. According to the prosecution, there were five passengers in the bus when the incident took place, however, none of them who could be termed to be independent witness has been examined. Further, it has not come on record as to who were the other passengers who were travelling in the bus at the relevant time. No other independent witness belonging to the adjoining area where the incident took place has been examined by the prosecution, though it has come on record that there were houses and shops at the place where incident has taken place. Therefore, in these circumstances, it cannot be said that on the basis of material on record, the prosecution has been able to prove beyond reasonable doubt that the accused are guilty of offence which have been levelled against them.

29. Further, a perusal of the judgment passed by the learned trial Court reveals that all these aspects of the matter have been minutely gone into by the learned trial Court and thereafter on the basis of the appreciation of material on record, learned trial Court has come to the conclusion that the prosecution has not been able to establish its case against the accused. We do not find any perversity or infirmity with the findings so recorded by the learned trial Court. In our considered view also, on the basis of the material produced on record by the prosecution, it has not been able to prove beyond reasonable doubt that the accused were guilty of the offence alleged against them.

30. Therefore, in our considered view, the learned trial Court has rightly concluded that the prosecution has miserably failed to prove its against the accused and has rightly acquitted the accused of the offence alleged against them. We uphold the judgment passed by the learned trial Court and dismiss the present appeal being without any merit.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Bhardwaj Shikshan Sansthan, Karsog Through its Chairman/President. … Petitioner

Versus

State of Himachal Pradesh & others. …Respondents

CWP No. 3194 of 2015-J

Date of Decision : July 28 , 2016

Constitution of India, 1950- Article 226- Society was registered under Societies Registration Act, 1860 which Act came to be repealed by virtue of Section 58 of the Himachal Pradesh Societies Registration Act, 2006- Chairman and respondents No. 6 and 7 were primarily responsible for establishing the Society and for setting up an educational institution- dispute between them resulted into the matter being brought to the notice of statutory authorities- SDM constituted an inquiry – Tehsildar found that Chairman had forged the resolutions No. 2 and 6- a show cause notice was issued – chairman of the society explained the position clarifying that the persons mentioned in the resolution had participated in the proceedings of general house- students also lodged a complaint against chairman for collecting fee and issuing fake receipts - this fact was brought to the notice of the chairman - SDM ordered the removal of the chairman and deposit of Rs. 4,91,701/- into the account of the Society, appointment of an Administrator and convening of a meeting- this order was confirmed by Appellate/Revisional Authority- held that petitioner was aware of the allegations pending against him- SDM was competent authority to inquire into the allegations made against the chairman of the society and the chairman cannot raise any claim of violation of natural justice – Court cannot appreciate the evidence to disturb the finding of fact returned by the authorities- petition dismissed. (Para-4 to 22)

Cases referred:

Dharampal Satyapal Limited vs. Deputy Commissioner of Central Excise, Gauhati & others, (2015) 8 SCC 519

For the petitioner	:	Mr. Mohan Sharma, Advocate, for the petitioner.
For the respondent	:	Mr. R. S. Verma and Mr. Ram Murti Bisht, Addl. Advocate Generals for the State. Mr. Bipin C. Negi, Sr. Advocate, with Mr. Surinder Saklani, Advocate, for respondents No. 6 and 7.

The following judgment of the Court was delivered:

Sanjay Karol, J. (Oral)

Sh. Vivek Chauhan, Sub-Divisional Magistrate, Karsog and Sh. Santu Lal, Tehsildar (Retd.) are present in Court.

2. In this petition filed under Article 226 of the Constitution of India, petitioner invokes the equitable writ jurisdiction of this court in seeking quashing of order dated 20.9.2014 (Annexure P-17) passed by Sub-Divisional Magistrate-cum-Deputy Registrar of Societies, Karsog, Distt. Mandi, H.P. (hereinafter referred to as the S.D.M.) as affirmed by the Addl. Registrar Cooperative Societies-cum-Deputy Commissioner, Mandi vide order dated 10.2.2015 (Annexure

P-19) and Registrar of Societies, Himachal Pradesh in terms of order dated 26.5.2015 (Annexure P-20).

3. Challenge being primarily on the ground that the orders came to be passed contrary to the material on record and in violation of principles of natural justice.

4. It is a matter of record that a Society under the name of Bhardwaj Shikshan Sansthan (hereinafter referred to as the Society) came to be registered under the provisions of the Societies Registration Act, 1860, which Act came to be repealed by virtue of Section 58 of the Himachal Pradesh Societies Registration Act, 2006 (hereinafter referred to as the Act). Leela Dhar (Chairman of the petitioner Society) and Dharam Pal & Mitter Dev (private respondents No. 6 and 7 respectively) were primarily responsible for establishing the Society for the purpose of setting up of an educational institution in Tehsil Karsog, Distt. Mandi, H.P. *Inter se* dispute between them resulted into the matter being brought to the notice of the statutory authorities.

5. Based thereupon, the S.D.M. instituted an inquiry and the Tehsildar in terms of his report dated 9.06.2014 (Annexure P-14), inter alia, found Leela Dhar to have forged and fabricated the record of the Society, i.e. resolutions No. 2 and 6 dated 24.11.2013 and 8.12.2013 purportedly passed in the general house of the Society. Leela Dhar as Chairman of the Society was associated all throughout and afforded opportunity to put forward his case.

6. Based on the said inquiry report, the S.D.M. issued a show cause notice dated 27.6.2014 (Annexure P-15). Undisputedly notice pertained to the fabrication of record of resolutions No. 2 and 6. In response thereto, Leela Dhar in his capacity as Chairman of the Society explained the position, clarifying that the members of the Society had participated in the proceedings of the general house where after only, the resolutions in question came to be passed. The correctness and authenticity of such resolutions came to be pleaded by him.

7. Independently students of the educational institute, opened by the Society also lodged a complaint against Leela Dhar for having collected fee and issued fake receipts. The money was never accounted for in the records of the Society. The said complaint came to be independently inquired and both the Tehsildar and the Inspector Co-operative Society, Karsog, found it to be factually correct.

8. As such, during the pendency of the proceedings arising out of show cause notice dated 27.6.2014, the S.D.M. brought such fact to the notice of Leela Dhar. His statement dated 7.7.2014 so made before the Tehsildar, admitting receipt of the amount from the students which was to be accounted for, was brought to his notice. Significantly he also wrote to the Tehsildar that a sum of Rs.6,09,870/- stood received by him from the students as fee.

9. Based on the response filed by Leela Dhar and his admissions, the S.D.M. in terms of composite order dated 20.9.2014 (Annexure P-17), in exercise of his power under Section 41 of the Act ordered: (a) Removal of Leela Dhar from the governing body of the Society; (b) directed him to deposit an amount of Rs.4,95,701/- into the account of the Society; (c) appointed an Administrator to manage the affairs of the Society; and (d) directed convening of a meeting of the general house of the Society for conducting elections of the new governing body, in accordance with the provisions of the Act.

10. The said order, as already observed, came to be affirmed by the appellate/revisional authority(s).

11. Insofar as the question of violation of principles of natural justice is concerned, Sh. Bipin C. Negi, learned Senior Counsel, rightly invites attention of this Court to the principles of law laid down by the apex Court in *Dharampal Satyapal Limited vs. Deputy Commissioner of Central Excise, Gauhati & others,* (2015) 8 SCC 519, wherein the Court after considering its earlier decisions observed as under:

> "38 But that is not the end of the matter. While the law on the principle of *audi alteram partem* has progressed in the manner mentioned above, at the same

time, the Courts have also repeatedly remarked that the principles of natural justice are very flexible principles. They cannot be applied in any straightjacket formula. It all depends upon the kind of functions performed and to the extent to which a person is likely to be affected. For this reason, certain exceptions to the aforesaid principles have been invoked under certain circumstances. For example, the Courts have held that it would be sufficient to allow a person to make a representation and oral hearing may not be necessary in all cases, though in some matters, depending upon the nature of the case, not only full-fledged oral hearing but even cross-examination of witnesses is treated as necessary concomitant of the principles of natural justice. Likewise, in service matters relating to major punishment by way of disciplinary action, the requirement is very strict and full-fledged opportunity is envisaged under the statutory rules as well. On the other hand, in those cases where there is an admission of charge, even when no such formal inquiry is held, the punishment based on such admission is upheld. It is for this reason, in certain circumstances, even post-decisional hearing is held to be permissible. Further, the Courts have held that under certain circumstances principles of natural justice may even be excluded by reason of diverse factors like time, place, the apprehended danger and so on.

39. We are not concerned with these aspects in the present case as the issue relates to giving of notice before taking action. While emphasizing that the principles of natural justice cannot be applied in straight-jacket formula, the aforesaid instances are given. We have highlighted the jurisprudential basis of adhering to the principles of natural justice which are grounded on the doctrine of *procedural fairness*, accuracy of outcome leading to general social goals, etc. Nevertheless, there may be situations wherein for some reason – perhaps because the evidence against the individual is thought to be utterly compelling – it is felt that a fair hearing *'would make no difference'* meaning that a hearing would not change the ultimate conclusion reached by the decision-maker – then no legal duty to supply a hearing arises. Such an approach was endorsed by Lord Wilberforce in *Malloch v. Aberdeen Corporation*, (1971) 1 WLR 1578, who said that:

> "… a 'breach of procedure ... cannot give (rise to) a remedy in the courts, unless behind it there is something of substance which has been lost by the failure. The court does not act in vain".

Relying on these comments, Brandon L.J. opined in *Cinnamond v. British Airports Authority*, (1980) 1 WLR 582 that:

> "…no one can complain of not being given an opportunity to make representations if such an opportunity would have availed him nothing."

In such situations, fair procedures appear to serve no purpose since 'right' result can be secured without according such treatment to the individual."

…

…

"46 To recapitulate the events, the appellant was accorded certain benefits under the Notification dated July 08, 1999. This Notification stands nullified by Section 154 of the Act of 2003, which has been given retrospective effect. The legal consequence of the aforesaid statutory provision is that the amount with which the appellant was benefitted under the aforesaid Notification becomes refundable. Even after the notice is issued, the appellant cannot take any plea to retain the said amount on any ground whatsoever as it is bound by the dicta in *R.C. Tobacco (P) Ltd. v. Union of India,* (2005) 7 SCC 725.

> Likewise, even the officer who passed the order has no choice but to follow the dicta in *R.C. Tobacco* . It is important to note that as far as quantification of the amount is concerned, it is not disputed at all. In such a situation, issuance of notice would be an empty formality and we are of the firm opinion that the case stands covered by *'useless formality theory'*." [Emphasis supplied]

12. Now in the instant case, it cannot be disputed that show cause notice was confined to the fabrication of records of the meetings of the general house of the Society. But it is also a matter of record, as is evident from the proceedings conducted by the S.D.M., so made available in Court, as also petitioner's communication dated 20.2.2013 (Annexure P-18), that he was totally aware of the allegations against him as also the nature and the extent of the proceedings which were under inquiry by the concerned officer. Both were going on simultaneously in which petitioner was heard and afforded opportunity to put forward his case. Serious allegations of embezzlement of amount, that being, fee received from the students came to be made against Leela Dhar in his capacity as officiating Chairman of the Society. He himself was associated by the Tehsildar during the course of inquiry. Yes, it is true that no independent show cause notice came to be issued with respect thereto, but then he was fully aware of all that was happening in the proceedings pending before the S.D.M. He knew the issues and the very nature and the extent of the inquiry, which at one stage was clubbed and dealt with as such. He himself had subjected to the same.

13. It is not in dispute that the S.D.M. was otherwise authorized in law, more so, under Section 39 of the Act, to inquire into the allegations made against Leela Dhar who was officiating as the Chairman of the Society. It is in exercise of such power, as envisaged in law, that the S.D.M. passed the order of supersession of the governing body.

14. Record reveals that there were serious allegations and counter allegations made both against and by Leela Dhar and the private respondents. It is in this backdrop that the S.D.M. passed the order, superseding the governing body for ensuring that the democratic process and will of the members, as is the spirit of the Act, prevails in the management of the affairs of the Society.

15. Leela Dhar was fully aware of all that was happening in the proceedings pending against him. As such, in view of the ratio of law laid down by the apex Court in *Dharampal Satyapal (supra),* it would not be open for Leela Dhar to make out a grievance of violation of the principles of natural justice. Absence of another show cause notice in the aforesaid factual backdrop would also not vitiate the impugned order dated 20.9.2014 (Annexure P-17). No prejudice can be said to have been caused to the petitioner. The doctrine enunciated in *Malloch* and *Cinnamond* (supra) is clearly invokable and applicable in the instant case.

16. Can it be said that the impugned order is perverse and grossly disproportionate to the alleged act and conduct of Leela Dhar or the private respondents? Most certainly not. Serious allegation of embezzlement and misappropriation of fee and public money came to be made against Leela Dhar and as such in its wisdom, the concerned officer rightly passed an order superseding the governing body, more so, in the light of admitted facts.

17. It is contended by Leela Dhar that the amount in question can be reimbursed only when he receives the rent from the Society as his personal premises are being used to run the educational institute. This cannot be a ground for withholding the amount admittedly received by the petitioner. It is fee from the students. However it is always open for Leela Dhar to take appropriate action in accordance with law for such an issue cannot be adjudicated in the present proceedings.

18. As to whether the members participated in the meeting of the general house or not cannot be a subject matter of review in the present petition, for findings of fact cannot be said to be perverse or erroneous. Allegedly members of the Society have made mutually contradictory

statements of having participated in the proceedings of the general house. All this stands minutely examined by the authorities below, warranting no interference on the factual matrix.

19. This Court would not reappreciate the evidence to disturb the finding of fact returned by the authorities below. What is the scope of judicial review of an order passed by a quasi judicial authority is now well settled and how the order is illegal or perverse in the instant case, could not be pointed out.

20. Learned counsel representing the S.D.M. states that free and fair elections would positively be held within a period of one month.

21. In view of the aforesaid discussions, present petition, devoid of any merit, is dismissed. Interim orders stand vacated.

22. No other point urged.

Pending applications, if any, also stand disposed of accordingly.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Jagdish Ram. .....Petitioner.
Versus
Ved Prakash. ....Respondent.

CMPMO No. 25 of 2007
Reserved on: 19.07.2016
Decided on: 28.07.2016

Code of Civil Procedure, 1908- Order 39 Rule 2-A- Petitioner instituted a suit against the defendant seeking permanent prohibitory injunction and in the alternative mandatory injunction- the Court directed the respondent to remove iron stair with immediate effect- respondent filed an undertaking in the Court that he had removed the iron stair case and would not cause any hindrance on the disputed path till the disposal of the suit- however, defendant continued with the construction- Local Commissioner was appointed who submitted the report- Court directed the parties to maintain status quo but the defendant erected iron stair case and blocked the path of the petitioner in violation of the order of the Court- respondent denied the allegations- an appeal was preferred, which was allowed and the order was set aside- held, that appeal was allowed only on the ground that suit was dismissed but thereafter the suit had been decreed in the first appeal- therefore, case remanded to the Appellate Court to decide the same afresh in accordance with the law. (Para-5 to 6)

For the petitioner: Mr. K.D. Sood, Sr. Advocate, with Ms. Ranjana Chauhan, Advocate.
For the respondent: Mr. Bhupinder Gupta, Sr. Advocate,
with Mr. Neeraj Gupta and Mr. Janesh Gupta, Advocates.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present petition is maintained by the petitioner-plaintiff (hereinafter referred to as *'the petitioner'*) against the order of learned Additional District Judge, Fast Track Court, Kangra at Dharamshala, H.P. passed in CMA No. 15-G/2005/2004, dated 30.11.2006, whereby the order of learned Civil Judge (Junior Division), Court No. 2, Dehra, District Kangra, H.P.,

passed in application under Order 39, Rule 2-A CPC, with respect to removal of iron stairs by the respondent, was set aside.

2. Briefly stating the facts giving rise to the present petition are that the petitioner instituted a suit against the defendant (hereinafter referred to as 'the respondent') seeking permanent prohibitory injunction, wherein it was averred that defendant has raised construction by encroaching upon a common passage used for ingress and egress. The petitioner had also sought alternative relief of mandatory injunction, in case the defendant succeeds in raising the construction. The suit was filed alongwith application under Section 39, Rule 2-A CPC for interim stay order, wherein the learned Trial Court, vide order dated 30.09.2004, directed the respondents to remove the iron stairs with immediate effect and file an undertaking in the Court within 24 hours to the effect that he has removed the said iron stairs and further that he would not cause any hindrance on the disputed path till the disposal of the main suit. Despite the orders of the learned Trial Court, the defendant continued with the construction. The Local Commissioner also visited the spot and submitted the report. On the assurance of the parties, the learned Trial Court, vide order dated 30.12.1999, directed the parties to maintain status quo qua nature of the suit land and path. However, the defendant in the month of November, 2002, erected the iron stairs, blocking the path of the petitioner and also in utter disregard to the order of the learned Trial Court.

3. The respondent, by filing reply to the application, admitted that status quo order had been passed by the learned Trial Court. It is also averred that report of Shri V.S. Gill, Advocate, was improper. The defendant was not present in the village during third week of November, 2002, and his family members by supplanting old bamboo stairs, which got damaged, tethered iron stairs. The defendant has further averred that the stairs were not supplanted over the path (*deodi*) and the existence of *deodi* was to be decided in the civil suit. The defendant prayed for dismissal of the application.

4. Anchoring upon the pleadings of the parties, the learned Trial Court, vide order dated 01.07.2004, framed the following points for determination:

> **"1. Whether the respondent has disobeyed the order dated 30.12.1999, passed by this Court in CMA No. 32/99/98, titled as Jagdish Ram vs. Ved Parkash?**
>
> ***2.*** **Final order."**

5. The learned Trial Court directed the respondent to remove the iron stair case immediately and to file an undertaking in the Court within 24 hours to the effect that he has removed the said iron stairs. Thereafter, the learned First Appellate Court allowed the appeal and set-aside the order of the learned Trial Court. The learned senior counsel for the petitioner has argued that the learned First Appellate Court has committed illegality in allowing the appeal, as the proceedings under Order 39, Rule 2-A CPC are separate proceedings and has nothing to do with the Civil Suit. He has further argued that now the suit has been decreed and in view of this, the findings arrived at by the learned First Appellate Court, presuming that the suit is dismissed, are required to be reconsidered. On the other hand, the learned senior counsel for the respondent has argued that the present petition is not maintainable under Article 227 of the Constitution of India as the remedy is to file a revision petition and he has further argued that the findings given by the learned First Appellate Court are as per law. In rebuttal, the learned senior counsel for the petitioner has argued that the present petition is maintainable under Article 227 of the Constitution of India and to fortify his arguments he has relied upon order dated 12.05.2016, passed by Hon'ble Single Judge of this Court in ***CMP(M) No. 1656 of 2015 in RSA No. 110 of 2007,*** titled as ***Kaushalya Devi vs. Kaushalya Devi and others***, and argued that the proceedings under Order 39, Rule 2-A CPC are independent proceedings. This Hon'ble court in the case cited above has held as under:

> ***"13. It is more than settled that proceedings under Order 39 rule 2A are separate and distinct and in case the same have commenced***

> ***during the pendency of the suit or appeal, then the subsequent dismissal of the suit/appeal does not render the interim orders passed earlier as nonest or without jurisdiction. For that purpose, it has to be seen whether the order of injunction at the time when it was in force has been violated and disobeyed, because the person sought to be punished for disobedience or violation of interim orders is sought to be punished for such the time it was in operation or else in case such person goes unpunished only because either the order is subsequently vacated or main suit or appeal itself is dismissed, this would be subversive of rule of law and would seriously erode the dignity and the authority of the Courts."***

6. I have gone through the record in detail. It is clear that now in an appeal against the dismissal of the suit of the plaintiff, the First Appellate Court has decreed the suit. As now the situation has changed and also in view of the judgment of the Hon'ble Court, as discussed hereinabove, the petitioner under Article 227 of the Constitution of India has approached this Court in exercise of the supervisory powers, which is an extraordinary remedy and this court has the powers to exercise the jurisdiction to meet the ends of justice. Further it has been argued that as the learned First Appellate Court has set-aside the order of the learned Trial Court on the ground that the suit was dismissed and thereafter the suit was decreed, the only course now open to this Court is to remand the case back to the learned First Appellate Court to decide the same in accordance with law, in view of the changed circumstances. Accordingly, the present petition is allowed and the proceedings are ordered to be remanded back to the learned First Appellate Court to decide the same afresh in accordance with law. The parties to appear in the learned First Appellate Court on ***22nd August, 2016***.

7. In view of the above, the petition stands disposed of, as also the pending application(s), if any.

8. The Registry is directed to send the records of the learned Courts below forthwith so as to reach the learned Court well before the date fixed.

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

Mohan Lal …Appellant.
Versus
The Divisional Forest Officer, Chamba …Respondent.

LPA No. 181 of 2015
Decided on: 28.07.2016

Constitution of India, 1950- Article 226- Labour Court had examined the facts as well as law and had dismissed the reference- Writ Court also held that Labour Court had marshaled and thrashed the facts in right perspective- Writ Court cannot sit as an Appellate Court and set aside the award made by the Labour Court- findings of fact can be questioned if it is shown that Tribunal had erroneously refused to admit admissible and material evidence or has erroneously admitted inadmissible evidence – appeal dismissed. (Para-5 to 8)

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, ILR 2014 (V) HP 970

Gurcharan Singh (deceased) through his LRs Vs. State of Himachal Pradesh and others, ILR 2015 (VI) HP 938 (D.B.)

For the appellant:	Mr. Ashwani Pathak, Senior Advocate, with Mr. Sandeep K. Sharma, Advocate.
For the respondent:	Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan, Additional Advocate General, and Mr. J.K. Verma & Mr. Kush Sharma, Deputy Advocate Generals.

The following judgment of the Court was delivered:

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

This appeal is directed against the judgment, dated 15th May, 2015, made by the Writ Court in CWP No. 3396 of 2014, titled as Mohan Lal versus Divisional Forest Officer, Chamba, whereby the writ petition filed by the appellant-writ petitioner came to be dismissed (for short "the impugned judgment").

2. The subject matter of the writ petition was award, dated 13th November, 2013, made by the Labour Court, Dharamshala, while answering Reference No. 207/2012.

3. The Labour Court has examined the facts as well as law applicable and dismissed the reference. The Writ Court has also held that the Labour Court has marshalled out and thrashed the facts in its right perspective and no interference is required.

4. We have gone through the impugned judgment, is legal one, needs no interference for the following reasons:

5. 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.

6. 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."*

7. The same principle has been laid down by this Court in a batch of writ petitions, **CWP No. 4622 of 2013,** titled as **M/s Himachal Futuristic Communications Ltd. versus State of HP and another,** being the lead case, decided on 04.08.2014. It is worthwhile to reproduce para 13 of the judgment herein:

> *"13. Applying the test to the instant case, the question of fact determined by the Tribunal cannot be made subject matter of the writ petition and more so, when the writ petitioner(s) have failed to prove the defence raised, in answer to the references before the Tribunal. "*

8. This Court in a series of cases, being **CWP No. 4622 of 2013 (supra)**; **LPA No. 485 of 2012,** titled as **Arpana Kumari versus State of H.P. and others,** decided on 11th August, 2014; **LPA No. 23 of 2006,** titled as **Ajmer Singh versus State of H.P. and others,** decided on 21st August, 2014; **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 (deceased) 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.

9. Having said so, no case for interference is made out. However, we deem it proper to make an observation in the interest of the appellant-writ petitioner that in case the Government has to make new appointments at any time relating to the post concerned, the appellant-writ petitioner be given preference.

10. With these observations, the impugned award is upheld and the appeal is disposed of alongwith all pending applications.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

<u>CWP No.: 7396 of 2014 a/w</u>
<u>CWP No. 7407 of 2014 and</u>
<u>CWP No. 1242 of 2016</u>
<u>Reserved on: 21.07.2016</u>
<u>Date of Decision: 28.07.2016.</u>

<u>CWP No.: 7396 of 2014</u>

M/s. SPS Steel Rolling Mills Ltd. .....Petitioner.
Vs.
State of Himachal Pradesh and others .....Respondents.

<u>CWP No. 7407 of 2014</u>

M/s. Suraj Fabrics Industries Ltd. .....Petitioner.
Vs.
State of Himachal Pradesh and others .....Respondents.

<u>CWP No. 1242 of 2016</u>

M/s. Aditya Industries .....Petitioner.
Vs.
State of Himachal Pradesh and others .....Respondents.

Constitution of India, 1950- Article 226- Petitioners have set up unit in Himachal for manufacturing steel and other steel products- department of Industry had notified a policy for promoting the industrial activities- rules regarding grant of incentives, concessions and facilities to industrial units in H.P. 2004 were notified- according to petitioners, they are entitled for Power Concessions as per rules and policy- held, that Industrial Units of the petitioners are in the negative list - purpose of negative list is to dissuade entrepreneurs from setting up units mentioned in the negative list- authority had rightly held that industry in the negative list is not entitled to the benefit- petition dismissed. (Para-16 to 26)

For the petitioner(s): Mr. Ajay Vaidya Advocate..
For the respondents: Mr. V.S. Chauhan, Additional Advocate General, for respondent-State.

Mr. Vivek Sharma, Advocate, vice Mr. Satyen Vaidya, Advocate, for respondent-HPSEB Ltd.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. :

All these writ petitions involve common questions of law, accordingly they are being disposed of by a common judgment.

2. Issue involved in these petitions is whether the petitioner-industries are entitled to power concessions as are envisaged in Clause 9.1 of Industrial Policy, 2004 notified by the Department of Industries vide notification dated 30th December, 2004.

3. M/s. SPS Steel Rolling Mills Ltd., petitioner-company in CWP No. 7396 of 2014 has set up its Unit at Goalthai in District Bilaspur for manufacturing and trading of MS Billets & TMT bars and other steel products. The connected load of the said Unit is 21996.660 KW. Said industry commenced commercial production w.e.f. 30.11.2007.

4. M/s. Suraj Fabrics Industries Ltd., petitioner-company in CWP No. 7407 of 2014 has set up its Unit at Goalthai in District Bilaspur for manufacturing and trading of MS Billets & TMT bars and other steel products. The connected load of the said Unit is 14931.118 KW. Said industry has commenced commercial production w.e.f. 12.04.2006.

5. M/s. Aditya Industries, petitioner-company in CWP No. 1242 of 2016 has set up its Unit at Village Rampur Jattan, Kala Amb for manufacturing steel and other steel products (wrongly mentioned in the writ petition as a company having its Unit at Golthai). The connected load of the said Unit is 3500 KW (Annexure P-3). The said industry has commenced commercial production w.e.f. 07.09.2005.

6. In this regard, the petitioner-companies in CWP No. 7396 of 2014 and CWP No. 7407 of 2014 had earlier also filed writ petitions which were disposed of by this Court by holding the said petitions to be premature (as the petitioner's request for rebate of electricity duty for the period commencing from 2006-2007 to 2010-2011 made vide communication dated 24.11.2011 was still pending with the respondent-authorities) with a direction to the authorities to take decision considering the Industrial Policy, 2004. The competent authority vide order dated 19.07.2014 has rejected the claim of the said petitioner-companies *inter alia* on the ground that the petitioners were not entitled to exemption/rebate of electricity duty as they were in the Negative List. Another ground on which the competent authority rejected the claim of the petitioner-companies was that in the absence of a notification issued by the Department of MPP & Power under the relevant statute/law, the provisions of the Rules cannot be made effective *ipso facto*. Said order passed by the competent authority is under challenge in CWP No. 7396 of 2014 and CWP No. 7407 of 2014.

7. As far as CWP No. 1242 of 2014 is concerned, the petitioner has approached this Court praying for similar relief as has been prayed in the abovementioned two writ petitions without there being an adjudication on his rights by the competent authority. However, keeping in view the fact that the legal issue involved in this petition is also same and similar as involved in the other two petitions, therefore, this case has also been heard alongwith the abovementioned two petitions. All the parties to the said three petitions have stated that replies and rejoinders filed in CWP No. 7396 of 2014 be also treated as replies and rejoinders of the respective parties in other petitions wherein replies and rejoinders have not been filed.

8. Department of Industries, Government of Himachal Pradesh notified a policy vide Notification dated 30th December, 2004, i.e. "Industrial Policy Rules Regarding Grant of Incentives, Concessions and Facilities to Industrial Units in H.P. 2004 and H.P. –Industrial Renewal and Revival Scheme, 2004." This policy was introduced by the Government of Himachal

Pradesh in recognition of the importance of an emphatic Industrial Policy statement as an extremely effective instrument to boost the confidence of investors and catalyze industrial expansion in the State of Himachal Pradesh. The policy was intended to lucidly express the State Government's vision and approach towards industrial sector. The policy statement intended to focus on specific micro factors affecting the overall investment climate in the State, such as technology upgradation, quality improvement and productivity, so that Industrial Units set up in the State can effectively compete and keep pace with global standards. According to the Government, the policy statement was a reflection of its commitment to overall economic development of the State by continuously responding to the dynamic economic forces and carving out a niche in the national economy by responding to changing times and needs. The objective and aims of the policy as contemplated in Clase-2 were as under:

"2. OBJECTIVE AND AIMS OF THE POLICY:

2.1 This policy intends to:

- *Serve as a guideline for achieving the objective of uniform growth of industry and service sector throughout the State.*
- *Disperse Industries and service sector activities.*
- *Cull together ingredients of a Industrial Policy so as to facilitate generation of employment opportunities for local resource owners and stakeholders.*
- *Clearly State Government's commitment and approach to the development of key infrastructural sector like Power, Housing, Social Infrastructure Development, Human Resource Development and Vocational Education so as to create a congenial investment climate for existing industry to grow as well as attract further investments in the State.*
- *Clearly spell out industrial incentives of fiscal nature.*
- *Specifically address the issues impeding industrial growth such as procedures for setting up industry, obtaining permissions required under various Labour Laws, addressing issues related Transportation of industrial produce so as to lay the foundation of strong and consistent growth of industrial sector."*

9. The Rules Regarding Grant of Incentives, Concessions and Facilities to Industrial Units in Himachal Pradesh, 2004 (hereafter referred to as '2004 Rules') were to come into force w.e.f. 31.12.2004, which was the 'appointed day'.

10. Rule 9 of the same deals with Power Concessions. This rule provided as under:

"**9. <u>POWER CONCESSIONS</u>**:

Power:

Power will be made available to industrial units only as long as they satisfy the eligibility criterion as laid down under Rule 4 of these Rules, specifically Rule 4.1(c) and are also approved and registered with the Department of Industries as also fulfill the other eligibility conditions laid down for availing incentives under these Rules.

9.1 All New industrial units including EOUS/Specified Category of Activities/Thrust Industries/ setting up of state of the art computerized auction houses and quality certifying agencies etc., but excluding those units listed in Annexure-III with a connected load not exceeding 100KW, shall be charged a concessional rate of Electricity Duty at the rate of 10 paisa per unit for a period of 5 years from the date of commencement of commercial production in category B and C areas only. This concession would be effective from the date of notification by the Department of MPP & Power.

9.2 The existing unit(s) already availing this incentive under the previously applicable incentive Rules (1999 incentive rules) shall continue to avail those incentives, only for the unexpired period of its/their eligibility.

9.3 No electricity duty will be charged from any New Industrial unit or Existing Industrial Unit, on the power generated from their captive power generation sets from the appointed day.

9.4 Out of turn preference and top priority would be given to sanction power connections to 100%Export Oriented Units, Export oriented units, Information Technology projects, Bio Technology projects, and projects involving Foreign Direct Investments.

9.5 Industrial Units (except those listed in the negative list-Annexure-III), which involve continuous process, and are registered as export oriented units and food processing industry will be exempted from power load cuts depending upon the system constraints."

11. As per petitioner-Industrial Units, they are eligible for power concessions as are contemplated in Clause 9.1. Their grievance is that their rights which are crystallized under Clause 9.1 of the Industrial Policy and Rules framed thereunder are not being honoured by the Government. In other words, the incentives to which the said industrial units are entitled to under Clause 9.1 of the Rules (supra) are being denied to them arbitrarily by the respondent-State.

12. According to Mr. Ajay Vaidya, learned counsel for the petitioners, Rule 9.1 envisages that all new industrial units excluding those units listed in Annexure-III with a connected load not exceeding 100 KW shall be charged a concessional rate of electricity duty at the rate of 10 paisa per unit for a period of five years from the date of commencement of commercial production in category B and C area only. His argument is that the Units which have been excluded under Clause 9.1 are those Units which are listed in Annexure-III and have a connected load not exceeding 100 KW. According to Mr. Vaidya though the petitioner-Units (including the petitioner-unit in CWP No. 1242 of 2016, i.e. M/s. Aditya Industries) are units listed in Annexure-III appended with the Rules, which specifies the units mentioned in negative list, but because their connected load capacity is more than 100 KW, therefore, these units are entitled to Concessional Rate of Electricity Duty as contemplated in Clause 9.1.

13. On the other hand, Mr. V.S. Chauhan, learned Additional Advocate General has argued that interpretation being given to the said Rule by Mr. Vaidya is totally misplaced. As per Mr. Chauhan, what Rule 9.1 contemplates is that all new industrial units with a connected load not exceeding 100 KW, but excluding those units listed in Annexure-III shall be charged concessional rate on electricity duty at the rate of 10 paisa per unit for a period of five years from the date of commencement of commercial production in category B and C areas only. Therefore, according to him, the contention of the petitioners is totally misplaced and there is no merit in the writ petitions.

14. I have heard the learned counsel for the parties and also gone through the pleadings on record.

15. Rule 9.1 of 2004 Rules reads as under:

9.1 All New industrial units including EOUS/Specified Category of Activities/Thrust Industries/ setting up of state of the art computerized auction houses and quality certifying agencies etc., but excluding those units listed in Annexure-III with a connected load not exceeding 100KW, shall be charged a concessional rate of Electricity Duty at the rate of 10 paisa per unit for a period of 5 years from the date of commencement of commercial production in category B and C areas only. This concession would be effective from the date of notification by the Department of MPP & Power."

16. Annexure-III appended with the said Rules contains the names of those industrial units which are reflected as Units in the Negative List as per Government of India, Ministry of Industry and Commerce O.M. dated 07.01.2004 and as defined by the Government of India from time to time. It is not disputed that the petitioner-Industrial Units are in the Negative List.

17. In my considered view, a harmonious reading of the Industrial Policy, 2004 of the Government of Himachal Pradesh and the Rules framed thereunder envisage that power concessions are to be granted to all new industrial units including EOUS/Specified Category of Activities/Thrust Industries/setting up of State of the art computerized auction houses and quality certifying agencies etc. with a connected load not exceeding 100 KW and shall be charged a concessional rate of electricity duty as provided in Rule 9.1 for a period of 5 years from the date of commencement of commercial production in categories B and C. However, units listed in Annexure-III are excluded from the conferment of the said power concessions.

18. In other words, what Rule 9.1 envisages is that those units which are listed in Annexure-III and are having connected load capacity not exceeding 100 KW are not entitled for concessional rate of electricity duty as is provided in Rule 9.1.

19. This Rule does not contemplate that a new industrial unit which finds mention in Annexure-III (negative list) but has a connected load capacity of more than 100 KW is also entitled for Concessional Rate of electricity duty as contemplated in the said Rules. Such an interpretation, if given to Rule 9.1 will frustrate the very purpose for which the said Rule has been framed. Obviously, the purpose of leaving out the negative list of units from being conferred a concessional rate of electricity duty is to dissuade entrepreneurs from setting up units mentioned in the negative list.

20. Even otherwise, the interpretation being given to Rule 9.1 by Mr. Vaidya does not seem to be prudent. According to him, Rule 9.1 bars only those Industrial Units which though find mention in Annexure-III, but are having a load capacity of less than 100 KW. Therefore, Mr. Vaidya contends that as the petitioner-Units have the load capacity exceeding 100 KW, the rider contained in Rule 9.1 does not apply to them.

21. In my considered view, this interpretation being given by Mr. Vaidya to Rule 9.1 is totally incorrect. A perusal of Rule 9.1 clearly demonstrates that the said power concession even otherwise is confined to new industrial units with a connected load not exceeding 100 KW, meaning thereby, that even those industrial units which are not listed in Annexure –III, but are having connected load exceeding 100 KW are not entitled to power concessions contemplated in Rule 9.1. Admittedly, all the industrial units subject matter of the present writ petitions are with connected load in excess of 100 KW. In this view of the matter also, *de hors* the fact as to whether petitioner-Industrial Units are listed in Annexure-III or not, they are not entitled to power concession as contemplated in Rule 9.1 of 2004 Policy. Even otherwise, keeping in view the importance and object of the Policy in issue, it seems to be totally irrational that the Policy will contemplate that an Industrial Unit which finds mention in the Negative List but has a connected load exceeding 100 KW will be eligible for the benefit of Power Concession, whereas a similar Unit having connected load not exceeding 100 KW will not be eligible.

22. The Competent Authority vide its order dated 19.07.2014 in CWP No. 7396 of 2014 and CWP No. 7407 of 2014 has also held that it is admitted case of the petitioner therein that its Industrial Unit is included in the negative list of industries, which effectually means that the unit is not entitled to the power incentives, otherwise specified in Para 9.1 of the incentive Rules, 2004. The said authority has held that when Incentive Rules, 2004 clearly deny the specified incentive of concessional rate electricity duty to industries listed in negative list (Annexure-III) appended to these Rules, the documents being relied upon by the petitioners to advance their case are liable to be rejected.

23. In my considered view, there is merit in the findings returned by the competent authority. During the course of arguments, Mr. Vaidya has relied upon certificate issued by Member Secretary, SWCA, Goalthai dated 14.09.2010 (Annexure P-2) (in CWP No. 7396 of 2014 and CWP No. 7407 of 2014) to advance his case. I am afraid that the reliance placed upon the said certificate is totally misplaced. This certificate refers to concessional rate of CST @ 1% on the goods manufactured as contemplated in Rule 10.3 of Industrial Policy, 2004, which deals with sales tax concessions. Present case pertains to power concessions. This Court is not adjudicating on this aspect of the matter as to whether the petitioners have been rightly conferred the benefits as is contemplated in Rule 10.3 of 2004 Rules nor it is upholding the benefits, if any, given to the petitioners under Rule 10.3 of 2004 Rules because that is not the subject matter of the dispute here. In the present case, this Court is concerned with the interpretation of Rule 9.1 and in my considered view, the said Rule in unambiguous terms restricts the power concessions only to all new industrial units with a connected load not exceeding 100 KW excluding those units which are listed in Annexure A-III appended with the said Rules.

24. Therefore, the only inference which can be drawn is that as per Rule 9.1 of the 2004 Policy:

(a) All New Industrial Units with a connected load not exceeding 100 KW which fulfill the criteria provided in the said Rule are entitled for power concession.

(b) Only exception to this is those Industrial Units which find mention in Annexure-III appended with the said Rules, though their connected load also does not exceed 100 KW.

(c) It is evident that Rule 9.1 does not confer the benefit of power concession to new Industrial Units whether or not the same are listed in Annexure-III appended with the said Rules, if their connected load capacity exceeds 100 KW.

25. In view of what has been held above, it cannot be said that the petitioner-Industrial Units are entitled to power concessions as envisaged in Rule 9.1 of the 2004 Policy. The contention of learned counsel for the petitioners to this effect is rejected.

26. Keeping in view the fact that this Court has not found merit in the contentions raised by learned counsel for the petitioner that the petitioner-Units were entitled for power concessions as are contemplated in Rule 9.1 of the 2004 Rules, therefore, the second point adjudicated by the competent authority with regard to interpretation of Rule 4.1(e) of 2004 Rules is left open.

27. Accordingly, in view of what has been discussed above, there is no merit in the writ petitions and the same are dismissed. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Ram Kishan. .....Petitioner.

Versus

State of Himachal Pradesh & others. ......Respondents.

CWP No. 9401 of 2012
Reserved on: 26.07.2016
Decided on: 28.07.2016

Constitution of India, 1950- Article 226- Consolidation of land started- a scheme was prepared for repartition - every right holder was given right to reserve particular portion of the land upon which the Act will not be applicable and whose possession will remain with the right holder- some

land was deducted for common purposes- petitioner and predecessor-in-interest of the respondent agreed that Khasra No. 307/276/197 and Khasra No. 264/169 would remain with the right holders vide Resolution No. 24 dated 24.03.1989- subsequently, predecessor-in-interest of the respondent filed objection before the Consolidation Authority seeking cancellation of resolution No. 24 – resolution was revoked and land was distributed- an appeal was preferred, which was dismissed- further appeal was preferred, which was accepted- revision was preferred - held, that predecessor–in-interest of the respondents No. 3 to 16 had agreed to give his 7-3 kanals of land to the petitioners in lieu of 2-18 kanals of land- he was 87 years of age- he had objected to the resolution immediately after its passing- resolution of exchange was found to be unreasonable by the Revenue Authorities- no interference is required with the same- petition dismissed. (Para-8 to 11)

Cases referred:
Bhagat Raja vs. Union of India and others, AIR 1967 Supreme Court 1606
Central Excise, Customs, Rajkot vs. Amul Industries Private Limited, (2010) 15 SCC 101
Raja vs. Union of India and others, AIR 1967 Supreme Court 1606
Rajkot vs. Amul Industries Private Limited, (2010) 15 SCC 101

For the petitioner: Mr. H.K. Bhardwaj, Advocate.
For the respondents: Mr. Virender K. Verma, Addl. AG,with Mr. Pushpinder Jaswal, Dy. AG, for respondents No. 1 & 2.
Mr. Rajesh Kumar, Advocate, for respondents No. 3 to 10.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present writ petition is maintained by the petitioner under Articles 226 and 227 of the Constitution of India laying challenge to the order dated 09.03.2011, passed by learned Divisional Commissioner Mandi, while exercising the powers under Section 54 of Himachal Pradesh Holdings (Consolidation and Prevention of Fragmentation) Act, 1971 (for short "the Act") in Case No. 715 of 2009, with prayer to quash the order and restore the order passed by the Additional Director Consolidation under Section 30(4) of the Act.

2. Precisely, the facts of the case, as projected by the petitioner, are that consolidation of land started in Hamirpur District of H.P. and during the proceedings scheme was prepared for re-partition. During the preparation of the scheme, every right holder was given right to reserve particular portion of the land upon which the Act would not be applicable and possession thereof would remain with the right holder. In the consolidation, as aforesaid, whole land of the village was consolidated and distributed according to value of the land. However, some land of each right holder was deducted for common purposes in the village. When the above incorporation was taking place in the Scheme, the petitioner and predecessor-in-interest (Shri Kanshi Ram) of the respondents mutually agreed that Khasra No. 307/276/197 and Khasra No. 264/169 would remain with the right holders possessing the same before consolidation. The mutual agreement *inter se* the parties, i.e., petitioner and the predecessor-in-interest of the respondents, was effected vide Resolution No. 24, dated 24.03.1989 and the same was incorporated by the consolidation authorities and the possession of the respective parties was kept intact. Later on, the predecessor-in-interest of the respondents was stirred up by his family members and other persons and resultantly he filed objections before the Consolidation Authorities alleging therein that Resolution/compromise is not acceptable to him and the same be cancelled. Consequently, Resolutation No. 24 was repudiated and the land was re-distributed and Objections were registered as Case No. 1143/93 and the same were accepted on 07.10.1993.

3. Feeling disgruntled, the petitioner herein preferred an appeal under Section 30(3) before the Settlement Officer. However, the same was dismissed without giving reasons, vide order dated 21.12.1999 in Case No. 117/94. As per the petitioner, objections were not maintainable before the Consolidation Officer and decision by Consolidation Officer on the Objections is also without jurisdiction. The petitioner preferred appeal assailing the order of Settlement Officer before the Joint Director (Consolidation) under Section 30(4) of the Act. The appeal was accepted on 28.04.2007 and the decision of the Consolidation Officer, Hamirpur, in Case No. 1143 of 1993, dated 07.10.1993 was set aside and amendment was made in both the decisions. Subsequently, Smt. Sanehroo Devi and others preferred a Revision Petition under Section 54 before the learned Divisional Commissioner, exercising the power under Section 54 of the Act, the same was accepted without reasons and speaking order. As per the petitioner, he is laying challenge to the order of learned Divisional Commissioner, dated 09.03.2011, succinctly on the grounds that the same is illegal, without any reasons and the same is non-speaking, Objections were not maintainable before the Consolidation Officer and the order of Divisional Commissioner, Mandi Division, Mandi, H.P., exercising the power under Section 54 of H.P. Holdings (Consolidation and Prevention of Fragmentation) Act, 1971, deserves to be set aside.

4. Reply to the writ petition was filed by respondents No. 1 and 2, wherein it is averred that the petition not maintainable as the order passed by the learned Divisional Commissioner was speaking order and as per law.

5. Heard. The learned counsel for the petitioner has argued that the order passed by the Divisional Commissioner, Mandi Division, Mandi, H.P., exercising the power under Section 54 of H.P. Holdings (Consolidation and Prevention of Fragmentation) Act, 1971, was not sustainable as the Resolution No. 24, dated 24.03.1989, was passed with the consent of the parties and it cannot be challenged. Further, it has been argued that the order passed by the Divisional Commissioner is not a speaking order and the same is liable to be set aside. To support his arguments, the learned counsel for the petitioner has relied upon judgments rendered in ***Bhagat Raja vs. Union of India and others, AIR 1967 Supreme Court 1606*** and ***Commissioner of Central Excise, Customs, Rajkot vs. Amul Industries Private Limited, (2010) 15 SCC 101.***

6. Conversely, the learned Additional Advocate General has argued that the order passed by the Divisional Commissioner, Mandi Division, Mandi, H.P., exercising the power under Section 54 of H.P. Holdings (Consolidation and Prevention of Fragmentation) Act, 1971, is reasoned and after appreciating the facts in their true perspective and the present petition is devoid of merit and needs dismissal.

7. Learned counsel appearing on behalf of respondents No. 3 to 10 has argued that the Resolution No. 24 was passed without free consent, making the predecessor of respondents No. 3 to 16 to believe something which was not, in fact, there. Therefore, Resolution cannot be said to be passed with consent of the parties. He has further argued that the order passed by the learned Divisional Commission is reasoned order.

8. To appreciate the arguments of the learned counsel for the parties, I have gone through the record in detail. From the record, at the first instance, it seems that Resolution No. 24 was passed with the consent of the parties, but on minute checking of the record, it seems that Shri Kanshi Ram, predecessor-in-interest of the respondents No. 3 to 16 had agreed to give his 7-3 kanals of land to the petitioners in lieu of 2-18 kanals of land. The value of two lands was nearly the same. On appreciation of arguments of learned counsel for respondents No. 3 to 10, I have reasons to conclude that as the predecessor-in-interest of the respondents was at that time 87 years of age and immediately after Resolution No. 24, he objected to the same, it cannot be said that the Resolution No. 24 was passed with the consent of the parties, when it was objected to immediately.

9. Now coming to the arguments of the learned counsel for the petitioner that the order passed by the Divisional Commissioner is without reasons. I have considered the law as

cited by the learned counsel for the petitioner. In Bhagat ***Raja vs. Union of India and others, AIR 1967 Supreme Court 1606,*** the Hon'ble Apex Court has held as under:

> ***"9. Let us now examine the question as to whether it was incumbent on the Central Government to give any reasons for its decision on review. It was argued that the very exercise of judicial or quasi judicial powers in the case of a tribunal entailed upon it an obligation to give reasons for arriving at a decision for or against a party. The decisions of tribunals in India are subject to the supervisory powers of the High Courts under Article 227 of the Constitution and of appellate powers of this Court under Article 136. It goes without saying that both the High Court and this Court*** **are placed under a great disadvantage if no reasons are given and the revision is dismissed curtly by the use of the single word "rejected". Or "dismissed". In such a case, this Court can probably only exercise its appellate jurisdiction satisfactorily by examining the entire records of the case and after giving a hearing come to its conclusion on the merits of the appeal. This will certainly be a very unsatisfactory method of dealing with the appeal. Ordinarily, in a case like this, if the State Government gives sufficient reasons for accepting the application of one party and rejecting that of the others, as it must, and the Central Government adopts the reasoning of the State Government, this Court may proceed to examine whether the reasons given are sufficient for the purpose of upholding the decision. But, when the reasons given in the order of the State Government are scrappy or nebulous and the Central Government makes no attempt to clarify the same, this Court, in appeal may have to examine the case de novo without anybody being the wiser for the review by the Central Government. If the State Government gives a number of reasons some of which are good and some are not, and the Central Government merely endorses the order or the State Government without specifying those reasons which according to it are sufficient to uphold the order of the State Government, this Court, in appeal, may find it difficult to ascertain which are the grounds which weighed with the Central Government in upholding the order of the State Government. In such circumstances, what is known as a "speaking order" is called for.**

In the present case, the order passed is not a single word order, but the order contains the reasons in para 22, though not written in detail, but in summarized manner. The learned Divisional Commissioner has concluded that pursuant to Resolution No. 24, dated 24.03.1989, exchange was neither made corresponding with standard area nor simple area. So, this exchange was found to be unreasonable by the Court below by giving reasons and in this way the judgment cited by the learned counsel for the petitioner is not applicable to the facts of the case in hand.

10. The Hon'ble Supreme Courtin ***Rajkot vs. Amul Industries Private Limited, (2010) 15 SCC 101,*** has held as under:

> ***"3. We have gone through the judgment of the High Court very carefully and on consideration thereof, we are fully satisfied that the same is devoid of any reason. There is no discussion on the issues involved. A bare perusal of the said order would indicate that there is no discussion at all on the issues involved and the entire appeal was disposed of only by recording the following:***
>
> ***"The counsel for the appellant has failed to show us that for eligibility to avail credit of duty, it is necessary that the assessee***

> ***should have its own plant and machinery. In absence of that, we see no merit in this appeal.***
>
> ***The appeal stands dismissed at admission stage.""***

But in the present case, the learned Divisional Commissioner has given the findings that pursuant to Resolution No. 24, dated 24.03.1989, exchange was neither made corresponding with standard area nor simple area. So, this exchange was found to be unreasonable by the Court below by giving reasons. Therefore, the judgment, as above, cited by the learned counsel for the petitioner is not applicable to the facts of the present case.

11. In a nut shell, as a result of the above discussion, the order passed by the learned Divisional Commissioner, Mandi Division, Mandi, H.P., exercising the power under Section 54 of H.P. Holdings (Consolidation and Prevention of Fragmentation) Act, 1971, is as per law and no interference is required, as the Resolution No. 24 was objected to by Shri Kanshi Ram, predecessor-in-interest of respondent, and as it seems to be unreasonable as the 7-3 kanals of land of nearly same value was consented to be exchanged for 2-18 kanals land of the petitioner of same value, so as the exchange was neither made which corresponds to standard area or simple area, no interference with the order passed under Section 54 of the Act is allowed. The petition, being devoid of merits, deserves dismissal and is accordingly dismissed. However, the parties are left to bear their own costs.

12. In view of the above, the petition, as also pending application(s), if any, shall stand(s) disposed of.

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

Sohan Lal ...Revisionist.
Versus
State of Himachal Pradesh ...Respondent.

Cr. Revision No.: 117 of 2009.
Reserved on: 20/07/2016
Date of Decision: 28.07.2016

Indian Penal Code, 1860- Section 279, 337 and 338- Accused was driving a truck in a fast speed- he could not control the truck and hit the informant and S- accused was tried and convicted by the trial Court- an appeal was preferred, which was dismissed- held, in revision that medical officer had noticed the injuries on the legs of the victims- PW-5 admitted in the cross-examination that they were perched on the stone, which was within the expanse of the road - they had alighted the stones on seeing the vehicle and were hit by the same - this shows that the misfeasance of the informant had led to the accident- stone was not shown by Investigating Officer, which shows that investigation was not fair - prosecution version was not proved beyond reasonable doubt and the accused was wrongly convicted by the trial Court- revision accepted.
(Para-10 to 14)

For the Appellant: Ms. Rita Goswami, Advocate.
For the respondent: Mr. R.S.Thakur, Additional Advocate General.

The following judgment of the Court was delivered:

<u>Sureshwar Thakur, Judge</u>

The instant revision petition stands directed against the concurrently recorded findings of conviction and consequent sentence imposed upon the accused/convict/revisionist by both the Courts below.

2. The prosecution story, in brief, is that complainant Lal Dass lodged statement with the Investigating Officer on 31.3.2007 that on that date he and Sanjay Kumar were sitting on a stone at Jugnu Mor Brow then a truck No. HR-37-A-6567 came from Brow side proceeding towards Bazir Bawri being driven in a fast speed by the driver who could not control such truck and drove it on them. It was alleged that due to his rash and negligent driving they sustained injuries on their person. The Investigating Officer conducted the investigation by preparing site plan and also seized documents of the vehicle. On completion of investigation into the offences allegedly committed by the accused a report under Section 173 Cr.P.C. stood prepared and filed in the competent Court.

3. Notice of accusation stood put to the accused/revisionist by the learned trial Court for his committing offences punishable under Sections 279, 337 and 338 IPC to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 7 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 did not chose to lead evidence.

5. The accused stands aggrieved by the concurrently recorded judgments of conviction and sentence recorded by both the Courts below. Ms. Rita Goswami, learned counsel for the revisionist has concerted to vigorously contend before this Court qua the findings of conviction, recorded by the learned trial Court, standing not anvilled on a proper appreciation by it of evidence on record, rather theirs standing sequelled by gross mis-appreciation of material on record. Hence, she contends qua the findings of conviction being reversed by this Court, in the exercise of its revisional jurisdiction and theirs being replaced by findings of acquittal.

6. On the other hand, the learned Additional Advocate General appearing for the State has with considerable force and vigour contended qua the findings of conviction recorded by the both the Courts below being based on a mature and balanced appreciation of evidence on record and theirs not necessitating any interference rather meriting vindication.

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

8. The accused/convict while at the relevant site of occurrence driving his vehicle bearing No. HR-37-A-6567, his purported negligent manner of driving it sequelled its striking besides plying upon the legs of the victims. PW-4, who held the medical examination of the victims Sanjay Kumar and Lal Dass, prepared qua them MLCs, which respectively stand borne on Ext.PW-4/A and Ext.PW-4/B. He voices therein of the injuries depicted therein standing begotten on the relevant portions of the bodies of the victims/injured within less than six hours elapsing since his holding their medical examination. Consequently, the injuries manifested in the aforesaid MLCs stand connected with the timings of the relevant enunciations occurring in F.I.R Ext.7/C besides with MLCs aforesaid holding congruity vis-à-vis unfoldments occurring in Ext.PW-7/C hence with omnibus concurrence therein erupting qua the facets aforesaid beget an inference of the manifestations in Ext.PW-7/C holding tenacity qua the ascription therein of an incriminatory role to the accused.

9. Be that as it may, with Ext.PW-4/A and Ext.PW-4/B holding congruity with the manifestations occurring in the apposite F.I.R. lodged qua the occurrence also with the eye witnesses thereto unequivocally testifying qua the vehicle driven by the accused/convict standing negligently driven by him negligence whereof stands imputed by them to the accused given his driving the apposite vehicle at a brazen pace, may hence constrain this Court to sustain the concurrently recorded findings of conviction against the accused/convict by both the Courts below. However, for the depositions of the eye witnesses to the occurrence being construable to be creditworthy they stand enjoined to be read in a wholesome manner rather than in a piecemeal besides fragmentary manner. Only on the testimonies of the respective eye witnesses to the

occurrences embodied both in their respective examinations in chief and in their cross-examinations standing piercingly read would constitute their reading besides their appraisal being done in the apt wholesome manner whereupon hence the truth qua the occurrence would stand unraveled. Contrarily any piecemeal reading of their depositions would not unfold the truth qua the occurrence. Even though each of the eye witnesses to the occurrence in their respective depositions embodied in their respective examinations in chief besides in their cross-examinations attribute negligence to the accused/convict sprouting from his driving his vehicle at the relevant site of occurrence at a brazen pace yet the pronouncement made respectively by them in their respective testifications of theirs occupying a stone located on the side of the road pronouncement whereof by them stands succored by photographs Ext.P-2 and Ext. P-3 also with PW-1 in his cross-examination unveiling therein of on either side of the road there existing a drain in vicinity of the Kacha Gola at the relevant site does sustain the defence of the accused of the victims falling thereinto whereupon injuries stood entailed upon their respective person(s) also with PW-4 in his cross-examination acquiescing to the suggestion put to him by the learned defence counsel of the victims falling thereinto whereafter theirs standing struck with the vehicle driven by the accused/convict moreso, when PW-4 in his cross-examination acquiesces to the suggestion in tandem therewith put to him by the learned defence counsel besides with PW-5 in his cross-examination conceding to the suggestion put to him by the learned defence counsel qua the stone whereon they stood perched holding facilitation to them to sight the vehicle driven by the accused/convict, all are material pieces of evidence warranting their probative value standing neither undermined nor standing discounted by this Court. Given the aforesaid acquiesces made in the testifications of the aforesaid eye witnesses to the ill-fated occurrence renders the trite attribution by each of negligence to the accused comprised in his driving his vehicle at the relevant time of occurrence at a brazen pace, negligent manner of driving whereof led its standing navigated thereat besides its standing maneuvered to the relevant site of occurrence, to be legally insufficient, to, constrain any inference of his thereupon abandoning adherence to the standards of due care and caution. Only on evident evidence in display of his abandoning adherence to the tenets of due care and caution while plying his vehicle at the relevant time would penal culpable negligence stand fastened qua him. Consequently, even if assumingly this Court holds of a accused/convict taking to drive his vehicle at the relevant site of occurrence at an excessive pace yet the aforesaid conclusion would not lead to a concomitant deduction of his driving it rashly and negligently. For determining whether the accused/convict drove his vehicle at the relevant site of occurrence in negation of the enjoined obligation upon him to drive it thereat in compliance with the standards of due care and caution, the vivid pronouncement occurring in the cross-examination of PW-1 of a drain existing in vicinity to the Kacha Gola located at the relevant site of occurrence, also the admission in the cross-examination of PW-5 wherein he acquiesces qua the visibility of the vehicle driven by the accused/convict from the stone whereon they stood perched cannot be undermined. With the injured/victims uncontrovertedly being perched on a stone also with the factum of its existence within the expanse of the road as stands depicted by photographs Ext.P-2 and P-3 also with a drain existing in vicinity to the relevant site of occurrence, read in coalescence with the pronouncements made by PW-5 in his cross-examination, of, the victims despite standing perched on the stone existing within the expanse of the road whereupon they held the capacity to sight the vehicle driven by the accused stems a deduction of theirs standing warranted, for, obviating the vehicle driven by the accused striking them especially when the stone whereon they stood perched stood located within the expanse of the road whereat alone vehicles were enjoined to ply, to alight therefrom on theirs sighting the vehicle driven by the accused. Apparently, it appears of the victims despite sighting the vehicle driven by the accused/convict theirs continuing to occupy the stone rather than alighting therefrom, though for obviating the truck driven by the accused colliding with their person(s) they were enjoined to alight therefrom. Consequently theirs misfeasance fosters an inference from this Court of theirs not adhering to the standards of due care and caution. Moreover when given theirs not alighting therefrom despite sighting the vehicle driven by the accused/convict they appear to palpably from their overt misfeasance suo moto rendered themselves susceptible to theirs standing struck by the vehicle driven by the convict, whereas in the event of theirs not

committing any palpable misfeasance, would have preempted the relevant vehicle striking their person(s). Contrarily negligence as stands ascribed by the eye witness to the accused/convict qua the ill fated occurrence stands mis-imputed to him. Prominently also with the acquiescence of PW-1 in his cross-examination of a drain occurring in close vicinity to relevant site of occurrence whereon the defence espouses of theirs falling thereinto whereafter their person stood accidently struck by the truck driven by the accused/convict whereupon they sustained injuries also attains succor from the deposition of the Medical Officer who deposed as PW-4. As a corollary, imminently when convincing evidence stands not adduced by the prosecution of the convict/accused while navigating his vehicle at the relevant site of occurrence his sighting the victims to fall into the drain fosters an inference of the accused accidently striking the victims/injured at the drain whereinto they accidently slipped into. In aftermath, the convict/accused cannot be construed to willfully depart from adhereing to the standards of due care and caution in his accidently striking the apposite vehicle with the person of the victims/injured.

10. Accentuated vigour to the aforesaid inference stands mobilized by the factum of the site plan comprised in Ext.PW-7/A not depicting therein the existence of a stone within the expanse of the road whereas photographs comprised in Ext.P-2 & Ext.P-3 connote its existence thereon. Non depiction by the Investigating Officer in site plan Ext.PW-7/A of existence of a stone within the expanse of the road appears to stand germinated by his holding a slanted besides a partisan investigation qua the offences constituted in F.I.R. Ext.PW-7/C also it palpably stands sprouted by his concerting to blunt the truth qua the cause of sustaining of injuries by the victims/injured. The concurrently recorded findings of conviction and sentence against the accused by both the Courts below stand founded upon theirs committing a gross illegality besides impropriety arising from theirs mis-appreciating the relevant evidence also on theirs omitting to appreciate the relevant and germane material.

11. 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 the evidence as done by the learned Courts below 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.

12. In view of above discussion, the appeal is allowed and the impugned judgments of conviction and sentence rendered by both the Courts below are set aside. The revisionist/accused is acquitted of the offences charged. The fine amount, if any, deposited by the accused is ordered to be refunded to him. Bail bonds furnished by the accused are discharged. Records be sent forthwith.

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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

Dev Raj …Respondent

Criminal Appeal No. 209 of 2010
Judgment Reserved on : 23.06.2016
Date of Decision : 28.07.2016

Indian Penal Code, 1860- Section 363 and 376- Accused had enticed away the prosecutrix with the promise to marry her but it was revealed that he was married and had two children- matter was reported to police- prosecutrix was recovered from the house of the accused- accused was

tried and acquitted by the trial Court- held, in appeal that prosecutrix had stated that no bad act was committed with her- she was declared hostile- she admitted during cross-examination that no bad act was done by the accused with her- she further admitted that she had left the Village and reached Tapri after travelling 50 k.m.- prosecutrix was not proved to be minor and the evidence in support of her date of birth was not satisfactory – prosecution version was not proved beyond reasonable doubt and the trial Court had rightly acquitted the accused- appeal dismissed.
(Para-5 to 10)

For the appellant : Mr. P.M. Negi Deputy Advocate General.
For the respondent : Mr. O.P. Negi, Advocate vice Mr. Vivek Darhel, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

Present appeal has been preferred by the State against acquittal of respondent vide judgment dated 19.09.2009 passed by learned Sessions Judge, Kinnaur, Sessions Division at Rampur Bushahr at Rampur in Sessions Trial No. 27 of 2008 in case FIR No. 56 of 2007, registered at Police Station, Bhabanagar, District Kinnaur, H.P. under Sections 363 and 376 of Indian penal Code.

2. Respondent was charge sheeted under Sections 363 and 376 of Indian Penal Code for enticing and taking away PW-8 prosecutrix on 24.08.2007 from lawful guardianship of her father from Tapri and committing rape with prosecutrix at different places during 24.08.2007 to 27.08.2007.

3. As per prosecution story, PW-8 prosecutrix was found missing since morning of 24.08.2007 and could not be traced anywhere by her parents. It is claimed that co-worker of accused-respondent had informed parents of prosecutrix that accused-respondent had taken her away. It is also claimed by PW-1 Rami Devi mother of prosecutrix that she was telephonically informed by prosecutrix that accused-respondent had enticed her away with promise to marry but it was revealed that respondent was already married and having two children and she was in the house of accused-respondent. Parents of prosecutrix had visited native village of respondent in District Kullu but accused-respondent and prosecutrix were not found there. Thereupon, father of prosecutrix (now deceased) had lodged report Ex.PW-1/B bearing No. 27 dated 28.08.2007 at Police Station Banjar District Kullu Ex.PW-1/B suspecting that respondent has kidnapped his minor daughter PW-8 prosecutrix with false assurance to solemnize marriage with her. Prosecutrix was recovered from house of accused-respondent and was brought to Bhabanagar and FIR Ex.PW-1/A was registered at Police Station, Bhabanagar at 5.40 PM on 29.08.2007.

4. After completion of investigation challan was put up in the Court. Accused-respondent was charge sheeted under Sections 363 and 376 of Indian Penal Code.

5. PW-8 prosecutrix is victim of offence committed by accused-respondent against her. Therefore statement of PW-8 prosecutrix is primary evidence against accused-respondent. However perusal of statement of PW-8 prosecutrix shatters whole prosecution story. As per her statement, she was called by accused-respondent at Tapri on 22.08.2007 and she went to Tapri on 23.08.2007 and stayed with her parents on that day. On next day, accused-respondent had met her at Tapri who had taken her to Rampur by telling that he will marry her. After staying for one night at Rampur they stayed at Ani on second day in house of maternal uncle of accused-respondent. On third day i.e. 26.08.2007 they went to Village Bathar i.e. native place of accused-respondent/prosecutrix came to know that accused-respondent is already married. On reaching house of accused-respondent prosecutrix came to know that accused –respondent is already married whereas accused-respondent was claiming himself to be unmarried. However, prosecutrix has specifically stated that accused-respondent had not committed any bad act with her when she remained with him. She was declared hostile and subjected to cross-examination

by Public Prosecutor but during cross- examination she has again denied that accused-respondent had committed bad act with her during period since 24.08.2007 to 27.08.2007. She has admitted that she had identified different places of her stay with respondent. During cross-examination on behalf of accused-respondent she had admitted that her sister Hira Devi is three years elder to her. She had further admitted that distance between Shango to Tapri is about 50 Kms., from Tapri to Rampur is about 70 Km and from Rampur to Bathar is more than 100 Km.

6. PW-8 prosecutrix was medically examined by PW-10 Dr. Sangeeta Uppal who had opined on the basis of physical examination and chemical examiners' report that possibility of rape could not be ruled out during period 24.08.2007 to 27.08.2007. However, said opinion is of no relevance as PW-8 prosecutrix has denied committing any bad act with her by accused-respondent during this period. Therefore, there is no evidence on record to infer that accused-respondent had committed an offence under Section 376 of Indian Penal Code as alleged.

7. So far as charge under Section 363 of Indian Penal Code is concerned, conduct and age of PW-8 prosecutrix is relevant to decide culpability of accused-respondent. So far as conduct of PW-8 prosecutrix is concerned, from evidence it is evident that she had left village Shango and reached Tapri to meet accused-respondent after traveling 50 Kms. and thereafter she was accompanying him for a distance of 170 (70 + 100) Kms., staying with him at different places, travelling in public transport with her free will and consent. It appears from the statement of PW-1 Rami Devi mother of prosecutrix PW-2 Bhajan Dev brother-in-law (Jija) of prosecutrix, PW-3 Hira Devi sister of prosecutrix and PW-4 Bharat Bhushan cousin of prosecutrix that leaving of house by PW-8 prosecutrix with her consent was in their knowledge. Therefore in the aforesaid facts and circumstance, conduct of leaving her village Shango by prosecutrix and traveling 50 kms. to Tapri to meet respondent and next day leaving parents house, staying with respondent at Rampur after traveling 70kms.and thereafter traveling 170 kms. to the native village of respondent after halting for night at Ani on the way reflects that she was accompanying respondent with her free will and consent. However, consent will be immaterial in case of prosecutrix is proved to be under 18 years of age.

8. PW-1 has admitted that no witness had informed her that accused-respondent had enticed away her daughter. She has deposed about telephonic call of prosecutrix and has stated that her daughter was not prepared to reside with accused-respondent as respondent-accused was already married and having two children from first wife. PW-2 Bhajan Dev has stated that he cannot say that prosecutrix had gone voluntarily or as a result of enticing by respondent. PW-3 Hira Devi sister of prosecutrix was also declared hostile when she deposed that she did not ask her sister(prosecutrix) as to where she had been and who had taken her away. However, in cross- examination she has admitted that she had informed police that respondent had enticed away her sister for purpose of marriage and had committed sexual intercourse with her But in cross examination she has stated that her mother had informed her that respondent had enticed away prosecutrix. PW-4 Bharat Bhushan has also deposed similarly. PW-4 has not lent any support to prosecution story and was declared hostile.

9. For proving age of prosecutrix, prosecution has relied upon date of birth certificate Ex. PW-5/A and copy of Parivar Register PW-5/B indicating date of birth of prosecutrix as 19.06.1992 by producing these document through PW-5 Prem Lal Kashyap, Secretary Gram Panchayat Kotgaon. But date of birth certificate has become doubtful as PW-5 Prem Lal Kashyap has admitted that entries in birth register were made on the basis of family registered and whose instance entry of birth was incorporated has not been mentioned in Parivar register.

10. PW-11 Dr. Ashwani Kumar Tomar had examined PW-8 prosecutrix for determining her estimated age after conducting her X-Ray. As per him age of prosecutrix was between 14½ to 15½ years. However, he has admitted that his observations are based on study conducted on Punjabi girl and there may be variation in Punjabi girl and Pahari girl. PW-3 Hira Devi is elder sister of prosecutrix. She has stated her age to be 23 years at the time of deposition in court on 21.04.2009. PW-1 mother of PW-8 prosecutrix has stated that PW-8 prosecutrix is younger to

Hira Devi by 3-4 years. PW-2 Bhajan Dev has also admitted that age of his wife i.e. PW-3 Hira Devi is 24-25 years in March, 2009 and PW-8 prosecutrix is younger by Hira Devi by four years. Family members are best persons to say about age of prosecutrix particularly when PW-3 Hira Devi was unable to deny that date of birth was not correctly reported to Gram Panchayat and same was reported by guess work.

11. Entries in birth register and Parivar Register are doubtful and therefore certificate Ex. PW-5/A and copy of Parivar register Ex. PW-5/B cannot be treated as a reliable evidence for determining age of prosecutrix. Opinion of PW-11 Dr. Ashwani Kumar Tomar is based upon study of Punjabi girl. In view of his admission his estimate of age of prosecutrix is neither conclusive nor reliable. Moreover, age estimation on the basis of Radiologist is also not conclusive proof of age of a person and it is also accepted principle that age estimated by Radiologist may have variation of 2 to 3 years. Therefore, age of prosecutrix determined by Radiologist may vary upto 18 ½ years. On the basis of statements of PW-1, PW-2 and PW-3 age of prosecutrix comes to be about 20 years in the year, 2009 and therefore, it can be inferred that at the time of incident in the year, 2007 prosecutrix was about 18 years of age. In view of this, it cannot be said that prosecution has proved beyond reasonable doubt that respondent had committed an offence under Section 363 of Indian Penal Code.

12. On the basis of evidence, it can safely be held that learned trial Court has rightly concluded that offence under Sections 363 and 376 of Indian Penal Code is not made out against accused. There is no perversity and infirmity in finding returned by the trial Court.

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

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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

Rakesh Kumar and another …Respondents

Criminal Appeal No. 484 of 2008
Judgment reserved on: 13.05.2016
Date of decision : 28.07.2016

N.D.P.S. Act, 1985- Section 20, 25 and 29- Police party was standing at D for patrolling- Motorcycle came which was being driven by respondent No. 1- respondent No. 2 had thrown a bag in khad which was seen by the police- motorcycle was stopped- driver disclosed his name as R and pillion rider disclosed his name as S – on inquiry pillion rider revealed that bag contained liquor and was thrown on seeing the police- bag was floating in the water- bag was taken out and checked – it was found to be containing 15.30 grams charas- accused were tried and acquitted by the trial court- held, in appeal that PW-1 and PW-2 corroborated the prosecution version regarding the presence of the accused on the spot, inquiry made from the accused, recovery of bag from khad, recovery of charas from the bag and other formalities- police officials also supported the version of the prosecution- no reason was assigned as to why the police would be deposing falsely- difference in time in the testimonies of the witnesses is minor and will not affect the prosecution case adversely- non production of original seal is not material - every procedural error or defect is not fatal to prosecution story unless it causes serious prejudice to accused- seals were found intact and non-production of original seal will not cause any prejudice- there are no major contradictions in the statements of official witnesses- they had no motive to depose

falsely against the accused- it was duly proved that accused were in possession of charas, which was being transported by them on a motorcycle- accused convicted and motorcycle ordered to be confiscated to the State. (Para-6 to 37)

For the appellant : Mr. Neeraj K. Sharma, Deputy Advocate General.
For the respondents : Mr. Lakshay Thakur, Advocate Legal Aid Counsel.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge.

Aggrieved by acquittal of respondents in Sessions trial No. 5/2008 vide judgment dated 30.04.2008, passed by special Judge, Presiding Officer, Fast Track Court, Mandi, District Mandi, HP under Sections 20, 25 and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985 registered in case FIR No.166/2007 at Police Station, Joginder Nagar, State of Himachal Pradesh has preferred present appeal.

2. As per prosecution story, on 21.08.2007 at about 5.00 PM PW-3 ASI Parmod Singh and PW-9 LHC Pawan Kumar were standing at Dhruni Bridge during their patrolling duty. At that time, respondent No.1 was coming from Banander side to Lad Bharol side alongwith pillion rider respondent No. 2 on Motor Cycle No. HP-29A-0840 owned and possessed by respondent No. 1. On noticing police personnel near bridge, respondent No.2 pillion rider had thrown a bag in khad which was seen by PW-3 ASI Parmod Singh, PW-9 Constable Pawan Kumar, PW-7 Sakin Singh, PW-8 Sanjeev Kumar and one Rajinder Kumar. On reaching near Police personnel, respondent No.1 stopped Motor Cycle on signal of police personnel. On inquiry, respondents disclosed their names as Rakesh Kumar driver owner of Motor Cycle and Sunil Kumar, pillion rider. On asking reason for throwing bag in Dhruni khad, respondent No. 2 had disclosed that there was liquor in bag and the same had been thrown on noticing police personnel. In the meanwhile, PW-1 Desh Raj and PW-2, Dan Singh had reached there who were on the way to Baijnath and Lad Bharol on their respective Motor Cycle and Scooter. On questioning by PW-1 Desh Raj, respondent No. 2 had disclosed that there were 7 bottles of liquor in bag. The bag was floating in water and therefore for verifying version of respondent No.2, PW-3 ASI Parmod Singh, PW-9 LHC Pawan Kumar alongwith PW-1 Desh Raj and PW-2, Dan Singh went to Khad. Respondents-accused were also with them. In the meanwhile, PW-3 ASI Parmod Singh had called PW-16 constable Sunil Kumar and water carrier Prakash Chand by telephonic call made to Police Post Lad-Bharol with direction to bring photographer from Lad-Bharol with them. Before reaching spot, PW-16 constable Sunil Kumar and water carrier Prakash Chand had also joined ASI Parmod Singh alongwith photographer PW-4 Bhagirath. On reaching in Khad, bag was found floating on water. Photographs of bag lying in the water were taken by PW-4 Bhagirath and bag was taken out by PW-1 and PW-2. After taking out bag, PW-3 ASI Parmod Singh had requested PW-1 Desh Raj and PW-2 Dan Singh to open bag. On opening bag, one more bag tied with sting was found inside it. On opening second bag, two plastic polythene envelopes having black sticks and round in it were found. On smelling and checking, it was found to be charas. PW-16 Sunil Kumar was sent for calling some shop keepers alongwith weight and measures for Lad-Bharol Bazar by issuing Hukamnama Ex.PW-3/A who had come back alongwith PW-5 Ashok Kumar, Gold Smith. The recovered contraband was taken into possession vide memo. Ex. PW-1/A and on weighing it with the help of weighing machine, brought by PW-5 Ashok Kumar, total weight of seized contravened was found 1530 gms. After taking four samples of 25 gram each, contraband and sample parcels were sealed by affixing seal 'T' on parcels. Specimen seal impression Ex.P-9 was taken on cloth. Memo of identification of contraband as charas Ex. PW-1/B was prepared in presence of witnesses. NCB form in triplicate Ex. PW-3/B was filled in on spot and seal impression 'T' was also appended on same. Motor Cycle was taken into possession vide Memo Ex. PW-1/C. Thereafter Rukka Ex. PW-3/C was sent to Police Station, Joginder Nagar through PW-16 Constable Sunil Kumar. Site plan Ex. PW-3/D

was prepared and statements of witnesses were recorded. Accused persons were arrested after giving notice of arrest in writing vide memo Ex. PW-1/D. Respondents-accused had supplied phone numbers for giving information of their arrest vide Memo. Ex. PW-1/E. In presence of witnesses, personal search (Jama-Talashi) of respondents was carried out vide memo Ex. PW-1/F and Ex. PW-1/G. Respondents were arrested at about 8.00 PM. On reaching Police Station, five parcels, sample seal, NCB form were handed over to SI PW-18 Kapoor Chand who had resealed contraband with seal 'K' and after taking specimen seal impression on cloth Ex.18/C and affixing impression of the said seal 'K' on NCB form filled columns 9 to 11 of NCB form, and handed over case property to MHC PW-13 Mangat Ram to deposit same in Malkhana who had entered the same in Malkhana Register. Extract of said Malakhana Register entry No. 800 is Ex.PW-13/A. Samples of contraband were sent to State FSL Junga through PW-15 Constable Roshan Lal vide RC-92/07, dated 24.08.2007 alongwith copies of FIR, Memo. NCB Form and sample seals which were deposited at State FLS Junga on 25.08.2007 against proper receipt on road Certificate Ex. PW-13/C. Report from State FSL, Junga Ex. PW-18/E confirms that seized contraband was charas. After completion of investigation, challan was put up in the Court.

3. Mr. Neeraj Kumar Sharma, Deputy Advocate General has vigorously argued that there is sufficient evidence on record proving that respondents were found in conscious and exclusive possession of contraband without any explanation and, therefore respondents be convicted under Sections 20, 25 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985.

4. Mr. Lakshay Thakur, counsel for respondents has supported judgment passed by learned trial Court stating that there is not even an iota of evidence to prove recovery of contraband from conscious and exclusive possession of respondents and he has prayed for dismissal of appeal.

5. We have heard learned counsel for parties and perused evidence on record.

6. Respondents were charged for having found in conscious and exclusive possession of 1530 gms. charas being transported in Motor cycle No.HP-29-A-0840 in furtherance of criminal conspiracy to commit an offence under Narcotic Drugs and Psychotropic Substances Act, 1985.

7. To bring home guilt of respondents accused, first ingredient to be proved by prosecution for rendering respondents liable for conviction under Sections 20, 25 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 is to prove recovery and seizure of contraband from conscious and exclusive possession of respondents. For that purpose prosecution has relied upon the statements of PW-3 ASI Parmod Singh, PW-9 LHC Pawan Kumar.

8. Independent witnesses PW-7 Sakin Singh and PW-8 Sanjeev Kumar have not supported prosecution case and have denied to have made statement to the effect that they had seen respondent No. 2 throwing a bag in khad on noticing police personnel on bridge. After declaring them hostile they were subjected to cross examine by learned Public Prosecutor but nothing material in favour of prosecution and against respondents was elucidated. No doubt, statements of hostile witnesses can be relied upon in favour of either party, if corroborated by other evidence on record. In present case, PW-7 and PW-8 have stated nothing incriminating against respondents so as to prove belonging of contraband recovered and seized from khad to respondents.

9. Another independent witness Rajinder Kumar has been given up declaring that he was won over by accused. It is strange that without examining PW Rajinder Kumar he has been declared to be won over by accused. There is no material on record on the basis of which learned Public Prosecutor had arrived at conclusion that PW Rajinder Kumar was won over by accused. Other two independent witnesses PW-7 Sakin Singh and PW-8 Sanjeev Kumar have not supported prosecution case. In such eventuality, best course available with prosecution was to

examine third material independent witness instead of withholding said witness from examining in the Court. In case of not lending support prosecution case, said witness may have been subjected to cross examine to elucidate truth. When two independent eye witnesses had turned hostile, withholding third eye witness was not warranted.

10. Before discussing evidence of official witnesses statements of other two independent witness PW-1 Desh Raj and PW-2 Dan Singh, who were also declared hostile are necessary to be evaluated as statement of hostile witnesses is not to be discarded in entirely but the same is to be considered and evaluated on the basis of other evidence on record. Despite having declared hostile, these witnesses, in their examination-in-chief have stated that on 21.08.2007 about 5.00 PM, they had reached at Dhrun Bridge on their respective vehicles i.e. motorcycle and scooter where police personnel and respondents were present besides other people standing at a distance and police personnel were inquiring from respondents with regard to one bag thrown in the Khad by respondent No.2 Both of them have admitted that they were requested to accompany the police during inquiry. Both of them have stated that photographs were taken at the instance of police. After seeing photographs in court file, they have verified that these photographs were taken on that day at the instance of police by photographer. They have stated that on request of police, bag was taken out from water by both of them in presence of respondents and on asking of police, they had opened bag in which one more bag of brown colour was found having Polythine envelopes and inside the Polythine envelopes dhoop like bundle and sticks were found. Both of them have further stated that police personnel have called PW-5 Ashok Soni alongwith weighing and measure who had brought electronic weighing machine on the spot. Both of them had stated that weighing capacity of electronic machine was 200 gms. and after weighing recovered charas, it was found to be 1530 gms. out of which four sample of 25 gms. each were drawn and packed in cloth parcel and were sealed with impression 'T'. They have further stated that residue charas was put into brown bag and thereafter in blue bag and then was packed in a cloth parcel which was sealed with seal impression 'T' and both of them have identified parcel Ex. P-1 containing blue bag Ex. P-2 brown bag Ex. P-3 polythine envelopes Ex. P-4 and Ex.P-5 charas Ex. P-6 and parcels of sample Ex. P-7 and Ex. P-8. PW-1 and PW-2 have identified Ex. P-2 to P-8 are same which were taken into possession by police on the spot. They had also identified their signatures on two parcels containing seal of FSL Junga as well as on the parcel Ex. P-1, Ex. P-7 and Ex. P-8. All these Exs. were found to be intact when produced in the court for identification and verification by these witnesses. During cross-examination both of them have admitted their signatures on seizure memo, Ex. PW-1/A, identification of contraband memo Ex. PW-1/B, memo taking into possession motorcycle alongwith documents Ex.PW-1/C, arrest memo Ex.PW-1/D and supply of mobile numbers by respondents vide memo Ex. PW-1/E. Both of them have admitted sealing of parcel on support with seal 'T'.

11. At first instance PW-1 had admitted signatures on parcel search memo (Jama-Talashi) Ex. PW-1/F to PW-1/G, but immediately he denied his signature on these memos alleging that his signatures on these memos are forged signatures. However, PW-2 Dan Singh had admitted that he had signed memo Ex. PW-1/F & PW-1/G.

12. PW-1 has admitted that he had appended his signatures after going through the contents of memo and he had signed the documents of his own and police had not applied any pressure. He has further admitted that respondents used to meet him and they belong to his Tehsil, running shops in their respective places. He had also stated in his cross-examination by learned defence counsel that parcels were stitched by police on the spot. PW-1 has not denied signing of memos by respondents but has stated that he does not remember as to whether respondents have appended their signatures or not. During the course of examination by learned defence counsel, he has stated that it is correct that accused persons have not signed documents in his presence.

13. PW-2 has stated in his examination-in-Chief that he, PW-1 Desh Raj and both accused have appended signatures on parcels Ex. P-1 containing residue and sample parcels Ex. P-7 and P-8. He has further stated that sample seal was taken on separate piece of cloth on

which both, he and PW-1 Desh Raj appended their respective signatures. PW-2 has also admitted that respondents are running Tea stall and Karyana shop and he used to meet them for purchase of articles from their shops on his visits to his house. In cross-examination by learned defence counsel, he has stated that respondents were interrogated in his presence regarding ownership and material contained in bag Ex.P-2.

14. From perusal of statements of PW-1 and PW-2, it is evident that these witnesses have duly corroborated prosecution's story with respect to presence of accused on spot being inquired by police about bag thrown in Khad, recovery of bag from Khad, recovery of charas from said bag, preparation of memos Ex. PW-1/A to Ex. PW-1/G, presence of PW-4 Bhagirath photographer on spot and photography by him, calling of PW-5 Ashok Kumar on the spot, weighing of recovered contraband on the spot, seizure and sealing residue contraband and sample parcels on the spot. Photographs of spot have also been verified by both of them.

15. Now, there are two official witnesses PW-3 ASI Parmod Singh, PW-9 Constable Pawan Kumar who have deposed that they had seen respondent No. 2 throwing bag in khad on noticing their presence on bridge. It is settled law that evidence of official witnesses is not to be disbelieved or discarded merely for reason that they are official witnesses. Statements of official witnesses can be basis for conviction of accused. However, before basing conviction on evidence of official witness, strict scrutiny with care and caution is required particularly when independent witnesses have turned hostile. In case evidence of official witnesses is found cogent, reliable and credible, the conviction can be based on evidence of official witnesses only.

16. There is no reason to disbelieve the version of PW-3 ASI Parmod Singh and PW-9 LHC Pawan Kumar regarding throwing of bag by respondent No. 2 in Khad on noticing police personnel. Defence taken by respondents is denial simplicitor and there is nothing placed on record or suggestion put to the witnesses assigning any reason for false implication of respondents in case. There is no enmity of official witnesses with the respondents for which the evidence of official witnesses is discarded and disbelieved.

17. PW-3 ASI Parmod Singh and PW-9 LHC Pawan Kumar have proved on record that during patrolling in Pandol area on 21.07.2007 at about 5.00 PM they had noticed respondent No.2 throwing a bag in water on noticing police and on inquiry, respondent No. 2 had disclosed that bag was thrown as there were liquor bottles in the same. These witnesses have further stated that in presence of PW-1, PW-2 and respondents bag was taken out from water and on opening the same one more bag was found in it containing polythene envelopes having charas in polythene envelope. They further stated that PW-16 Sunil Kumar and Parkash Chand were called from Police Post Lad Bharol, who had brought PW-4 Bhagirath photographer, PW-5 Ashok Gold Smith on the spot and spot photographs Exs. PW-4/A to Ex.4/A-12 were taken on the spot. They have further stated that on weighing machine brought by PW-5 Ashok Kumar contraband was found 1530 gms and the said contraband was seized by memo Ex. PW-1/A and was sealed in parcel Ex. P-1 after extracting four samples of 25 gms. each and these samples were also sealed in separate parcels affixing Seal 'T'. It has further come in their evidence that impression of seal 'T' was also taken on NCB form and on cloth Ex. P-9. Both of these witnesses have deposed regarding preparation of seizure memo Ex. PW-1/A, identification of contraband memo Ex. PW-1/B, memo taking motor cycle in custody by police Ex. PW-1/C, arrest memo Ex. PW-1/D, supply of mobile numbers Ex. PW-1/E, notice regarding arrest Ex. PW-1/D and preparation of Rukka Ex. PW-3/C filling up of NCB form in triplicate Ex. PW-3/B. PW-16 has also corroborated the statements of PW-3 and PW-9. He has further proved taking of Rukka to the Police Station, Joginder Nagar and registration of FIR on the basis of the same. In cross-examination nothing material affecting veracity of these witnesses could be extracted by defence counsel.

18. PW-3 ASI Parmod Singh PW-9 LHC Pawan Kumar and PW-16 constable Sunil Kumar have duly corroborated prosecution case which has also been substantiated from statements of PW-1 and PW-2.

19. PW-4 Bhagirath has proved that he was summoned by the police on the spot through Parkash Chand and respondents, police personnel and other persons were present on the spot. He has stated names of accused persons on spot as Rakesh Kumar and Suman Kumar. He has stated that on reaching spot on 21.08.2007 one bag was floating on the water and he has taken photographs on the spot. He has also stated that bag was checked and blue sticks were found in polythene envelopes which were found to be 1530 gms. on weighing. He had proved photographs Ex.PW-4/A to Ex. PW-4/A-12 alongwith negatives PW-4/A-13 to PW-4/A-24. PW-4 in cross- examination has stated that in his presence accused had not told to the police that bag belonged to them as no talks between accused person and police had taken place in his presence.

20. PW-5 Ashok Kumar Gold Smith has also proved that on 21.08.2007, he had gone to spot on summoning by police alongwith weighing machine. He has stated that after weighing charas was found 1530 gms. Thereafter, he had also weighed four sample of 25 gms. each and samples of bulk charas was packed in sealed parcels on the spot. In his cross-examination, he has stated that he did not know that material weighed by him was charas or anything else.

21. PW-13 HC Mangat Ram was MHC in Police Station, Joginder Nagar on 21.08.2007. He has stated that PW-16 Sunil Kumar has reached the Police Station at about 10.00 PM with Rukka written by PW-3 Parmod Singh and FIR was registered on the basis of said Rukka at the instance of SHO/SI Kapoor Chand and after registration of FIR, case file was handed over to Sunil Kumar to hand over it to PW-3 ASO Parmod Singh. He has further stated that on 22.08. 2007 at 12.20 AM SHO/SI Kapoor Chand after re-sealing case property with seal 'K' had handed over him four sample parcels of 25 gms each one big parcel weighing 1430 gms. alongwith NCB form in triplicate having sample seals 'T' and 'K' and other related documents which were deposited in Malkhana and entered in Register at serial No. 800 and had produced copy of Entry as Ex. PW-3/A.

22. On 24.08.2007 PW-13 MHC Mangat Ram had sent two sample parcels alongwith documents to FSL, Junga through PW-15 Roshan Lal vide RC No. 92/2007 Ex. PW-13/C after depositing the same in FSL, Junga. He has further stated that on 23.08.2007 PW-3 ASI Parmod Singh had handed over one Special Report to him for sending it to SDPO Sarkaghat which was sent by him through PW-14 HC Balwant Singh on 24.08.2007 in the morning.

23. PW-15 Constable Roshan Lal has corroborated the fact of depositing sample parcels in FLS Junga and has stated that as long as case property remained with him, he had not admitted the same.

24. PW-14 H.C. Balwant Singh had stated that after receiving Special Report from PW-13 HC. Mangat Ram, he had delivered the same in office of SDPO Sarkaghat to PW-10 Constable Suresh Kumar as DSP was not present in the office.

25. PW-10 HC Constable Suresh Kumar has stated that on 27.04.2007 PW-14 Constable Balwant Singh had handed over Special Report to him on which he had made endorsement Ex. PW-10/A under his signature and thereafter he had sent Special Report to DSP Sarkaghat to Pandol as he was at Pandol at that time in connection with recruitment of constables. Report was sent to Pandol through PW-11 Constable Ramesh Kumar. He has proved entry of Special Report at Sl. No. 4 at Page-19 in Special Report Register producing extract of Register Ex. PW-10/A.

26. PW-11 Constable Ramesh Kumar has proved the fact of delivery of Special Report to PW-12 DSP Surinder Sharma on 25.08.2007 PW-12 DSP Surinder Sharma has proved receipt of special report and his endorsement on the same.

27. PW-18 Kapoor Chand has proved his endorsement Ex. PW-18/A on Rukka after registration of FIR Ex. PW-18/B and resealing of case property with seal 'K'. He has also proved facsimile of seal 'K', taken on cloth as Ex. PW-18/C and also filling up of Columns No. 9 to 11 of

NCB form and affixation sample seal 'K' on NCB form and handing over case property to PW-13 HC Mangat Ram vide memo Ex. PW-18/D. He has further stated that after receiving report of FSL Junga Ex. PW-18/E, he had prepared challan and presented same in the Court. As per FSL report Ex. PW-18/E, samples of contraband were found to be of charas.

28. Learned counsel for respondents have pointed out that as per PW-3 ASI Parmod Singh, he remained on spot at 9.00 PM whereas PW-6 Bhim Singh has stated that on 21.08.2007 at about 8.30 PM he had dropped PW-3 ASI Parmod Singh on his request in his vehicle near huts of labourers working under PW-7 Sakin Singh and Rajender Kumar. It is corroboration of prosecution story rather than contradiction as it proves presence of police personnel on the spot making investigation from the concerned persons who were working on road on that day. Difference in time is minor and also PW-6 has not stated specific time but has stated about 8.30 PM.

29. It is also pointed out that as per PW-3 ASI Parmod Singh and SHO PW-18 Kapoor Chand, PW-3 Parmod Singh and other had reached in police station Joginder Nagar on 22.08.2007 at 12.10 AM in midnight and case property was deposited by SHO with MHC at 12.20 AM whereas PW-16 Sunil Kumar stated that PW-3 ASI Parmod Singh has also reached in Police Station Joginder Nagar at about 10.30 PM and after registration of FIR, he had not gone back to spot as by that time PW-3 ASI Parmod Kumar had also reached in police station and no spot proceedings were conducted after registration of FIR.

30. Learned counsel for respondents has stated that contradictions and discrepancies pointed out show that things had not happen as has been portrayed by prosuection and the prosecution story liable to be rejected. PW-3 ASI Parmod Singh has stated that at the time of going to khad he had asked telephonically MC Mohan Lal, Police Post, Lad Bharol to send Sunil Kumar and water carrier Prakash Chand on the spot alongwith private photographer from Lad Bharol Bazar before reaching in khad. PW-16 Constable Sunil Kumar, water carrier Prakash Chand and photographer PW-4, Bhagi Rath had joined them in mid-way and thereafter they reached on point where bag was lying in khad. In cross-examination also PW-3 has categorically stated that he had telephonically directed PW-17 MC Mohan Lal for sending photographer as he was suspecting that there might be bottles of liquor in bag. PW-17 MC Mohan Lal has also proved entry regarding this direction in Report No. 8 of Daily Diary dated 21.08.2007 Ex. PW-17/A where PW-1 Desh Raj has stated that one police personnel was sent by ASI to call photographer and PW-9 Constable Pawan Kumar has also stated that after reaching of PW-16 Constable Sunil Kumar and Prakash Chand on spot on call of ASI Parmod Singh, Prakash Chand was sent to Lad Bharol for bringing photographer and Constable Sunil Kumar for bringing weights and scale. PW-16 Constable Sunil Kumar has stated that on receiving telephonic message of PW-3, he and Prakash Chand had reached Dhruni Khad from where PW-3 ASI Parmod Singh issued a Hukamnama Ex.PW-3/A under Section 160 Cr.P.C. to bring weights and scale from Lad Bhoral Bazaar and he had brought PW-5 Ashok Kumar on the spot whereas Prakash Chand had brought PW-4 Bhagirath on the spot.

31. These are not contradictions but may be termed as discrepancies which do not go to the root of the case belying charge against accused regarding throwing of bag in Khad and recovery of contraband from said bag in presence of independent witnesses.

32. Purpose of sealing and resealing of seized substance, handing over of seal to witness after taking seal impressions on piece of cloth and on NCB form and production of original seal in the court, is to ensure that substance seized on the spot, deposited in Malkhana, sent to forensic lab and produced in the court is one and the same. Therefore, non-production of original seal is not fatal to prosecution cases in every case. It may be fatal in that cases where it leads to creating doubt linking accused with substance seized sent to forensic lab and produced in the Court. In case where prosecution has able to prove that substance recovered from accused, sent to forensic lab and produced in Court is one and the same, non-production of original seal is irrelevant. Every procedural error or defect is not fatal to prosecution story unless it causes

serious prejudice to accused. It is the case of prosecution that seal was handed over to PW-1 Desh Raj, whereas Desh Raj has stated that seal was not handed over to him. Same was kept by PW-3 ASI Parmod Singh. Keeping seal by PW-3 ASI Parmod Singh or handing over of the same to PW-1 Desh Raj has lost its relevance for reason that PW-1 Desh Raj as well as PW-2 Dan Singh have identified articles PW-2 blue bag, PW-3 brown bag, P-4 and P-5 Polythine and envelopes, P-6 charas and samples parcels P-7 and P-8. Facsimile of seal 'T' Ex. P-9 and seal 'K' Ex. 8/C have also been duly proved which were sufficient to compare with seal affixed on parcels of residue substance and samples. At the time of production of parcel P-1, P-7 and P-8 seals were found intact and there is no question raised on behalf of respondents-accused in this regard. Seal impression of 'T' and 'K' were also taken on NCB form for comparison in forensic lab. In chemical analysis report Ex. 18/E it has been mention as under :-

> 7. Description of parcel:- Two sealed parcels mark A/1 & A/2 bearing six seals of "T" and resealed with three seals of "K". The seals were found intact and tallied with the seal impression sent by the SHO on form NCB-I.
>
> (i) The same was kept in safe custody of the chemical examiner till the report of the same was signed & dispatched.

Therefore, in present case there is sufficient evidence on record to prove that substance sent to Forensic Lab and produced in the Court is one and same which was recovered and seized on the spot from khad. Therefore, non-production of original seals has not caused any prejudice to respondents and thus non production of these seals in Court is not fatal to prosecution in present case. These articles were the same which were recovered and taken into possession on the spot therefore, no prejudice has been caused to respondents on this count.

33. It is settled proposition that at the time of appreciation of the evidence of witnesses, minor discrepancies not affecting the case of prosecution may not be the basis of rejecting evidence in its entirety. Such discrepancies are bound to occur for the reason because of witnesses owing to common error in observations, due to lapse of time or errors owing to different mental capacity of reception, retention and narrations.

34. In the present case, there are no major contradictions in the statements of the official witnesses. There is nothing on record to suggest that there was enmity of the official witnesses with the respondent-accused or all official witnesses were interested to implicate respondents-accused for their benefit or otherwise for reasons other than their official duty. The official witnesses were not having any personal interest in implication and/or conviction of the respondent-accused. They have supported prosecution case. It is evident from RC Ex. P-10 of Motor Cycle No. HP-29A-0840 that it was owned and possessed by respondent No.1 and he was driving the same himself. There is no explanation or defence on behalf of respondent No. 1 that he was not having knowledge of contraband and being transported on his motorcycle by respondent No.2. On the basis of evidence on record, it has been proved that motorcycle in question owned and possessed by respondent No.2 was being used in carrying charas and, therefore, the same motorcycle is liable to be confiscated under Section 60 of Narcotic Drugs and Psychotropic Substances Act, 1985 and accordingly Motor Cycle is ordered to be confiscated by State.

35. Therefore it is clear that prosuection has able to prove that respondents were found in conscious and exclusive possession of 1530 gms. charas being transported on motorcycle No. HP-29-A-0840 with criminal conspiracy to commit an offence punishable under Sections 20, 25 and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985. Prosecution has proved its case beyond reasonable doubt that respondents were in conscious and exclusive possession of charas.

36. In view of the above discussion, presumption of Sections 35 and 54 of the NDPS Act is also attracted, there is no attempt on behalf of respondents to discharge their onus for rebutting presumptions under these sections.

37. Hence, the judgment passed by Lower Court is set aside. Respondents-accused are convicted for the offences under Sections 20, 25 and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985 for having found in conscious possession of 1530 gms. of charas.

The accused be produced for hearing on quantum of sentence on 05.08.2016. List on 05.08.2016. The registry is directed to prepare the production warrants.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Sunita Devi … Petitioner
Versus
Deep Chand & Ors. … Respondents

Cr. Revision No. 81 of 2009
Reserved on: 20.07.2016
Date of decision: 28.07.2016

Indian Penal Code, 1860- Section 147, 148, 149, 323, 324, 325, 452, 506 and 341- Accused formed a group to harass the complainant and her family members – accused D and S attacked K, brother of the complainant- when complainant rescued her brother, accused bit the finger of the brother and M due to which they suffered injuries- accused D inflicted a blow on the face of the complainant- accused followed the complainant to her house and threatened to kill her- accused pelted stones on the house causing damage - accused were tried and acquitted by the trial Court- an appeal was preferred, which was dismissed- held, in revision that complainant had presented an exaggerated version, which is not in accordance with initial version- medical evidence did not support the prosecution version- Appellate Court had agreed with the findings of the trial Court - it cannot be said that judgments of the Courts are perverse or the findings are not supported by the evidence- evidence of the complainant did not inspire confidence- High Court will not interfere and re-appreciate the evidence, unless there is perversity or the material evidence was overlooked- there is no infirmity or perversity with the judgments passed by the Courts- revision dismissed. (Para-8 to 17)

Cases referred:
Ram Briksh Singh and others Vs. Ambika Yadav and another, (2004) 7 Supreme Court Cases 665
K. Chinnaswamy Reddy Vs. State of Andhra Pradesh and another, AIR 1962 Supreme Court 1788

For the petitioner: M/s Dushyant Dadwal & Jai Prakash, Advocates.
For the respondents: Mr. G.S. Rathour, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.:

By way of the present revision petition, the petitioner has challenged the judgment passed by the Court of learned Sessions Judge, Hamirpur, in Criminal Appeal No. 88 of 2008 dated 14.05.2009, vide which, learned Appellate Court has upheld the judgment of acquittal passed by the Court of learned Chief Judicial Magistrate, Hamirpur, in Private Complaint No. 69-I of 2004/185-II of 2006 dated 01.09.2006.

2. Brief facts necessary for the adjudication of the present case are that complainant Smt. Sunita Devi filed a complaint under Sections 147, 148, 149, 323, 324, 325, 452, 506 and 341 I.P.C. on the ground that on 19.02.2004 at about 7.00 P.M. accused formed a group in order to harass the complainant and her family members and her brother Kishan

Chand, who was returning home at the relevant time after discharging his duties, was attacked near his home by accused Deep Chand and Suresh Kumar. As per the complainant, Maya Devi, Meera Devi and she went to the spot on hearing the noise and rescued their brother. Deep Chand had bitten the finger of Kishan Chand and Maya Devi, as a result of which they suffered injuries. Deep Chand also inflicted a blow on the face of the complainant as a result of which she lost her tooth. According to the complainant, when she went to her house, all the accused persons entered the house and started abusing the complainant and her family members and threatened to kill them. They pelted stones on their house causing damages to the doors, windows and walls. Deep Chand also caught her from her hair and dragged her causing injuries to her. This incident was witnessed by Balbir Singh and Mand Chand, who rescued the complainant from the accused persons. The factum of the incident was telephonically intimated by the complainant to the police. The matter was also reported to the police by the brother of the complainant but no action was taken by the police. She was also medically examined. As the Doctor did not issue correct certificate, a complaint in this regard was filed before the C.M.O., after which, fresh medical certificate was issued. As the police was not taking any action on the complaint filed by the brother of the complainant, hence she filed the private complaint. After the completion of preliminary evidence, as per learned trial Court sufficient reasons existed to summon the accused for the commission of offences punishable under Section 147, 323, 324, 341, 427, 506 read with Section 149 I.P.C.

3. Pre-charge evidence was led by the complainant and subsequently, charges were framed against the accused for the commission of offences punishable under Sections 341, 324, 323, 427, 506, 147 read with Section 149 I.P.C.

4. On the basis of the material produced on record by the complainant, learned trial Court came to the conclusion that the evidence led by the complainant was not such which could be said to be wholly reliable and it further held that it was extremely doubtful that the incident took place in the manner as was suggested by the complainant. Learned trial Court further held that the complainant had failed to prove her case beyond reasonable doubt against the accused. Hence, all of them were acquitted from the charges framed against them.

5. Feeling aggrieved by the said judgment passed by learned trial Court, the complainant filed an appeal, which was also dismissed by learned Appellate Court vide judgment dated 14.05.2009.

6. The findings so returned by both the learned Courts below have been assailed by way of the present revision petition.

7. I have heard learned counsel for the parties and have also gone through the records of the case as well as the judgments passed by both the learned Courts below.

8. A perusal of the judgment passed by learned trial Court demonstrates that on the basis of the appreciation of evidence on record by the complainant, it held that the whole of the complainant's case regarding causing injury by tooth bite, forming an unlawful assembly and committing mischief by damaging the property of the complainant could not be relied upon because the version of the incident which has been presented by the complainant in the Court is an exaggerated one and is not in consonance with the first version given by the complainant party. Learned trial Court held that initially as per the case set up by the complainant, allegations were against two persons only and there were no allegations against rest of the accused. It was not stated that any tooth bite was given or that the accused formed an unlawful assembly and had attacked the complainant party inside the house. Learned trial Court further held that the medical evidence also did not support the case of the prosecution as Dr. Chaman Kant who had conducted the dental examination had not supported the case of the complainant and had categorically stated that there was no fracture of the crown or root nor there was any injury on the upper as well as lower/inner side of the mouth. On these basis, learned trial Court held that this falsified the version of the complainant that her tooth was broken due to the fist blow. It further held that Dr. Anil Kaushal who had conducted medical examination of Kishan Chand

had found a lacerated wound on the right index finger, which was superficial in nature and no wound was found on the middle finger as was the case putforth by the complainant. After discussing the rest of the testimony of the said Doctor, learned trial Court concluded that the statement of the said Doctor also did not support the case of the complainant. Accordingly, learned trial Court held that the incident had been exaggerated by the complainant party and the complaint was highly rhetorical and did not contain the first version and further, testimony of CW-2 Salochna Devi in this regard also did not substantiate the case of the complainant. It further held that Pradhan, Gram Panchayat had no legal sanctity as Gram Panchayat was not authorized to visit the spot and to issue certificate regarding the spot position under H.P. Panchayati Raj Act, unless a case is pending before it. It was not so in the present matter. Learned trial Court also held that no independent witness was examined by the complainant to substantiate her case, though it is an admitted fact that village was having many houses. Accordingly, on these basis, learned trial Court held that the complainant had not been able to prove her case beyond reasonable doubt against the accused and in these circumstances, it acquitted the accused for the charges framed against them.

9. Learned Appellate Court vide its judgment dated 14.05.2009 upheld the said judgment of acquittal.

10. A perusal of the judgment passed by learned Appellate Court demonstrates that after appreciating the evidence on record and the judgment passed by learned trial Court, it concluded that there was no material on record to interfere with the impugned judgment of acquittal and this conclusion has been duly supported by reasonings which found mention in Paras 41 to 46 of the judgment passed by learned Appellate Court.

11. In my considered view, it cannot be said that the judgments of both the learned Courts below are either perverse or the findings which have been returned by both the learned Courts below are not borne out from the records. Learned counsel for the petitioner could not substantiate nor could he pin point as towhat was the perversity with the judgemntys passed by both the learned Courts below and what was that material evidence or fact which had been misread or mis-appreciated by both the learned Courts below. The arguments of the learned counsel for the petitioner that a perusal of the statement of the complainant witnesses leaves no room of doubt that the case of the complainant stood proved and it nailed the guilt of the accused is without any material. In my considered view, both the learned Courts below have rightly come to the conclusion that the case has been exaggerated by the complainant and the case as had been putforth by the complainant do not inspire confidence especially in view of the fact that the evidence produced on record by the complainant to substantiate her case does not prove beyond reasonable doubt that the accused only were guilty of the offences alleged against them.

12. The learned counsel for the petitioner has also not been able to point out any material particularly which has been over-looked by the learned Courts below.

13. It is well settled law that the jurisdiction of High Court in revision is severely restricted and it cannot embark upon re-appreciation of evidence. The High Court in revision cannot in absence of error on a point of law, re-appreciate evidence and reverse a finding of law. The object of the revisional jurisdiction was to confer power upon superior criminal Courts a kind of paternal or supervisory jurisdiction in order to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precaution or apparent harshness of treatment which has resulted on the one hand, or on the other hand in some undeserved hardship to individuals.

14. The Hon'ble Supreme Court in ***Ram Briksh Singh and others Vs. Ambika Yadav and another, (2004) 7 Supreme Court Cases 665,*** has held that Revisional Court can interfere with the findings of lower court where the Courts below have overlooked material evidence.

15. Even otherwise, it has been held by Hon'ble Supreme Court in ***K. Chinnaswamy Reddy Vs. State of Andhra Pradesh and another***, ***AIR 1962 Supreme Court 1788***, that this Court in exercise of its revisional power cannot set aside the acquittal even at the instance of private complaint except in exceptional cases.

16. Thus it can be safely inferred that this Court has to exercise its revisional powers sparingly. Though, this Court is not required to act as a Court of appeal, however, at the same time it is the duty of the Court to correct manifest illegality resulting in gross miscarriage of justice. However, I do not find any manifest illegality with the judgments passed by the learned Courts below in the present case.

17. In view of the above discussion, I am of the considered view that there is neither any infirmity nor any perversity with the judgments passed by the learned Courts below and there is no merit in the present petition and the same is accordingly dismissed.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Ved Prakash. .....Appellant.
Versus
Jagdish Ram. ......Respondent.

RSA No. 10 of 2008
Reserved on: 19.07.2016
Decided on: 28.07.2016

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit seeking permanent prohibitory injunction for restraining the defendant from changing the nature of the suit land, from raising construction on the same and encroaching upon the path, from removing chajja and the iron stairs raised over the suit path- it was pleaded that suit land is jointly owned and possessed by the parties- abadies have been constructed there on- path is being used for ingress and egress- defendant threatened to build his stair case on the path, which would constrict the path- defendant stated that plaintiff had re-constructed the house by exceeding his share- suit was dismissed by the trial Court- an appeal was preferred, which was allowed and suit was decreed – held, that land is jointly owned by the parties- Local Commissioner found that path was not blocked by any person and no deodi was found at the spot- defendant extended the chajja of his house towards the path during the pendency of the suit- stair case is causing obstruction to the use of path by co-owners- Appellate Court had considered all material aspects of the case documentary as well as oral evidence – construction was raised during the pendency of the suit and therefore, mandatory injunction was rightly granted- appeal dismissed. (Para-18 to 27)

Cases referred:

Ranjeet Khanna vs. Chiragu Deen & another, 2014(2) HLR 1209
Municipal Committee, Hoshiarpur vs. Punjab State Electricity Board, 2010(13) SCC 216
Basohli (deceased) vs. Bhagtu Ram & others, Latest HLJ 2015 (HP) 1037

For the appellant:	Mr. Bhupinder Gupta, Sr. Advocate, with Mr. Neeraj Gupta and Mr. Janesh Gupta, Advocates.
For the respondent:	Mr. K.D. Sood, Sr. Advocate, with Ms. Ranjana Chauhan, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present regular second appeal is maintained by the appellant/defendant (hereinafter called as "the defendant") against the respondent/plaintiff (hereinafter called as "the plaintiff") assailing the judgment and decree dated 27.10.2005, passed by learned District Judge, Kangra at Dharamshala, H.P. in Civil Appeal No. 50-G/XIII/2005, whereby the judgment and decree passed by learned Civil Judge (Junior Division) Court No. 2, Dehra, District Kangra, H.P. in Civil Suit No. 83/99/98, dated 30.03.2005, was set-aside by the learned District Judge, Kangra at Dharamshala, H.P., and the suit was decreed.

2. Briefly stating the facts giving rise to the present appeal are that the plaintiff filed a Civil Suit in the Court of first instance seeking permanent prohibitory injunction restraining the defendant from changing the nature of the suit land, raising new construction thereon and encroaching upon the path *('Deodi')*, depicted by letters ABCD in the site plan. As per jamabandi for the year 1995-96, the suit land is situated in Khata No. 17, min, Khatauni No. 62 min, Khasra No. 90, measuring 0-11-16 hectares, in Mohal Kaseli, Mauza Ghallour, Tehsil Dehra, District Kangra, H.P. The plaintiff has simultaneously claimed mandatory injunction directing the defendant to remove eave *('chajja'),* which is depicted in the site plan by letters AHIC and the iron stairs reared over the suit path. The plaintiff anchored his reliefs on the basis that the land is joint *inter se* the parties and over the suit land there exists their *abadies* (inhabitations). Since time immemorial the path (*Deodi*) is common and is in use by the parties for ingress and egress to their residences. However, the defendant, by encroaching upon the suit path, started construction and threatened to build his stair case thereon. The action of the defendant was likely to constrict the path (*deodi*) and during the pendency of the suit in the month of June, 1998, the defendant constructed eave (chajja) measuring 6 inches in width and 22 feet in length towards the suit path, which is demonstrated in the spot map by letters AHIC. Thereafter in third week of November, 2002, the defendant reared iron stairs over the suit path. Despite repeated requests, the defendants did not refrain from his unlawful acts and the plaintiff has no other alternative path to his residence.

3. Conversely, the defendants, by way of filing written statement to the amended plaint, controverted the pleadings made therein. The defendants raised preliminary objections qua cause of action, *locus standi*, estoppel, maintainability, valuation and description etc. On merits, the defendants averred that the parties to the suit have separate and independent houses and the share of the plaintiff comes to about three and one-fourth *marlas* in the suit land and the old house of the plaintiff is also on the suit land, which is on about two and half *marlas* of land. It is also averred that plaintiff, about 4 to 5 years back, reconstructed his new house where his old house existed by exceeding his share, the plaintiff covered 10 marlas of land. In the event of partition, the plaintiff has to cede his possession to the defendant and other co-sharers which is in excess. It is further averred that defendant did not raise any construction by encroaching upon the disputed common path and the construction was raised by his brother, Shri Vipin Kumar. The double storeyed old house with *veranda* was constructed by the father of the defendant, which collapsed 2 to 3 years back. The brother of the defendant raised construction over a part of the collapsed house and the foundations of the old house are still visible on the spot The new construction was not reared on the disputed path and the same is still in existence and the path has not been constricted at all. It is also denied that iron stairs were constructed over that path. It is also denied that plaintiff has no other alternative path and, in fact, plaintiff has access from all sides, which are in use by the parties and their family members. The defendants prayed for dismissal of the suit.

4. From the pleadings of the parties, the learned Trial Court framed the following issues:

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

2. Whether there is common passage to the residential house of the parties over the suit land? OPP

3. Whether the plaintiff is entitled to the relief of mandatory injunction? OPP

3-A. Whether the plaintiff is entitled to the relief of mandatory injunction, directing the defendant to remove iron stair erected on the path, shown in the site plan, dated 27.11.2002, as alleged? OPP.

4. Whether the plaintiff has no cause of action? OPD

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

6. Whether the suit is not maintainable in the present form? OPD

7. Relief."

5. The learned Trial Court below decided Issues No. 1 to 3-A, 5 and 6 against the plaintiff and issues No. 4 and 7 were decided in favour of the defendant and suit of the plaintiff was dismissed. Thereafter, appeal was maintained by the plaintiff against the judgment and decree passed by the learned Civil Judge (Junior Division), Court No. 2, Dehra, Kangra, H.P. before the learned District Judge, Kangra at Dharamshala and the same was accepted. The learned District Judge, vide impugned judgment dated 27.10.2005, set aside the decision of the learned Trial Court and decreed the suit of the plaintiff.

6. The present appeal was admitted for hearing on 05.05.2008, for determining the following substantial questions of law:

"1. Whether the Lower Appellate Court has committed grave error of law and jurisdiction in decreeing the suit of the plaintiff-respondent by relying upon inadmissible evidence especially Ex. P5, Ex. P6 and Ex. DX?

2. Whether Lower Appellate court has recorded erroneous and perverse findings by presuming the existence of common passage, when there was neither any pleadings or documentary evidence showing the ingress and egress of such common passage as well as the right on the basis of such claim was made in the plaint? Has not the Lower Appellate Court acted in excess for jurisdiction to grant the decree of permanent prohibitory injunction in favour of the plaintiff-respondent, when the Trial Court came to the conclusion that there does not exist any common path?

3. Whether the Lower Appellate Court has committed grave illegality in granting mandatory injunction to the plaintiff-respondent without precisely depicting the nature of encroachment and obstruction over the alleged common path, when the plaintiff did not place on record sufficient evidence showing the nature and extent of such action attributable to the defendant? Are not the findings recorded by the Lower Appellate Court opposed to the various provisions of Specific Relief Act?

4. Whether the Lower Appellate Court has committed grave illegality in not assigning any reason for not agreeing with the findings of the Trial Court and recording such findings which are based on no evidence? Was not it imperative for the Lower Appellate Court to have referred to the findings of the Trial Court and the reasons for not agreeing with the same while reversing the judgment and decree by the Trial Court?

7. The learned senior counsel for the defendant has argued that the Court below has wrongly relied upon the documents on record, including the report of the Local Commissioner and the spot maps, when they were not proved in accordance with law. He has further argued that the facts on record go to show that the defendant has raised the construction initially on the old lines where the house of his father was constructed. He has further argued that the construction was not raised by the defendant, but it was raised by his brother. These aspects were not considered by the Court below. He has further argued that the plaintiff has raised the construction on the land exceeding his share and with ulterior motive he has maintained the suit, so that the defendant may not be able to use his land. He has further argued that the iron stair case was put at the place where earlier there was a bamboo stair case. He has argued that the appeal be allowed and the suit may be dismissed.

8. On the other hand, the learned senior counsel for the plaintiff has argued that the stair case and *chajja* were raised by the defendant by encroaching upon the path and *deodi.* This is apparent from the report of the Local Commissioner as well as the site maps. The learned senior counsel for the plaintiff has further argued that there is no substantial question of law involved in the appeal and the appeal deserves dismissal. He has relied upon ***2014(2) HLR 1209, Ranjeet Khanna vs. Chiragu Deen & another*** and has argued that the Local Commissioner's report is a part of evidence and can be relied upon while discussing other evidence. The learned senior counsel for the plaintiff has further argued that in the first appeal, unless restricted by law, the Court below was bound to rehear the case and the learned First Appellate Court has committed no illegality in hearing the appeal in totality, on all aspects.

9. In rebuttal, the learned Senior Counsel has argued that though there involves substantial questions of law for determination in the present appeal and as the judgment of the Court below is vitiated for non-consideration of relevant evidence and is an erroneous approach to the matter, the findings are perverse, so the appeal is required to be allowed. To substantiate his arguments, he has relied upon ***2010(13) SCC 216, Municipal Committee, Hoshiarpur vs. Punjab State Electricity Board***.

10. To appreciate the arguments of the learned senior counsel for the parties, I have gone through the records in detail.

11. There is no dispute that the land comprised in Khasra No. 90 was *abadi (inhabitation)*, which is owned by the parties to the suit and other co-sharers. PW-1 Shri Gopal Dass, at the instance of the plaintiff, has prepared the spot map, Ex. PW-1/A. PW-2 Shri Krishan prepared the spot map, Ex. PW-2/A, depicting the path in dispute by letters ABCD. PW-3 Shri V.S. Gill, Advocate, was appointed as Local Commission under the orders of the Court and he has inspected the spot and submitted his report Ex. PW-3/A. As per his report, Ex. PW-3/A, there exists no *deodi* and there is a path, measuring 6 feet in width, leading to the *abadies (inhabitations)*. However, the same was not blocked by the defendant in any manner. This witness has also testified this fact as PW-3. In his cross-examination this witness has stated that path, measuring 6 feet in width, is there, which leads to the *abadies (inhabitations)* and the same is not blocked by the defendant. Therefore, it stands testified that there exists a path which is 6 feet in width and goes to the *abadies (inhabitations)* of the parties. Plaintiff, Shri Jagdish Ram, has himself stepped into the witness box as PW-4 and has testified the existence of common path on the spot and the same is being used since the time of their forefathers through *deodi,* but *deodi* is now not in existence. This witness has deposed that defendant after demolition of his old house started raising construction of his new house in the month of March, 1998, and in doing so he encroached upon the common path by erecting wall. He moved an application, Ex. P1 to the Panchayat, however, the same was returned to him for moving the same before the Court. PW-4 Jagdish Ram has further stated that Advocate V.S. Gill was appointed as Local Commissioner, who submitted his report after conducting the spot inspection. However, the defendant continued with the construction work. He has further stated that defendant constructed *chajja* over the common path. In his cross-examination he explicated that in between the cow-barn of Brahm Dutt and Ved Prakash there is common path (*deodi*) and then

there is a room of the defendant. He has further explicated that there were slates (roof tiles) on the *deodi* and he has denied that the houses alongwith *deodi* were slate-posh. This witness has also denied that Shri Vipin raised the construction. The construction was being raised by the defendant after demolishing/razing the old house.

12. PW-5 Shri Roshan Lal has completely corroborated the statement of PW-4 Jagdish Ram (plaintiff). This witness has also stated that there exists a common path leading to the *abadies (inhabitations)* of the parties to the suit and other co-sharers. He has specifically deposed that house of Brahman Dutt comes first and then the house of Ved Prakash and thereafter there is common path (*deodi*) and lastly comes the cow-barn of the defendant. The path (*deodi*) leads to the houses of plaintiff, Basant and Ved Prakash and same is the only path which is being used by them. PW-5 in his cross-examination has deposed that path in dispute is 6 to 7 feet in width and 9 feet in length and it has walls of the house of the defendant from both sides and it is common. He has denied the suggestion that there are other paths for the house of the plaintiff. He has deposed that the path (*deodi*) is in use since the time of their forefathers. PW-6, Shri Ram Lal, testified that the path leads to the houses of the parties through *deodi* and in marriages *Toran* (temporary gate) is embedded on the *deodi.* This witness has further deposed that he worked as carpenter in the house of the defendant. The path in dispute is being used by the plaintiff through *deodi* and no other path was in use. This witness, in his cross-examination, has stated that currently there is no *deodi* (gate/arch) as the same has been removed. He has denied that there was a single roof of the house and *deodi* and the roof of the *deodi* is at lower level. He has also denied that there is no other ingress to the house of the plaintiff, through the disputed common path.

13. After amending the plaint, plaintiff, Shri Jagdish Ram, re-examined himself as PW-7 and he has produced in evidence his affidavit, wherein he has testified that during the pendency of the suit, defendant tethered the iron stairs in the disputed path thereby creating obstruction in the use of common path and as the same was constricted. The defendant continued with his acts despite the *ad interim* injunction order of the Court. He has refuted that there is no path where iron stairs were placed. He has further deposed that compromise, Ex. PW-7/A, was entered at the instance of father of the defendant and as per the same, the parties have agreed to maintain the common path (*deodi*) in the same position, but with certain stipulations. He has denied that due to placing of iron stairs no obstruction is caused and one can pass freely without any difficulty. However, reply to the suggestion itself reveals that iron stairs were placed in the *deodi.*

14. PW-8, Shri Braham, who is one of the co-sharer in the *abadi (inhabitation)* alongwith other parties, through his evidence, testified his affidavit, Ex. PW-8/A. In his affidavit he has sworn that disputed path is common and in the month of November, 2002, the defendant placed iron stairs on it thereby obstructing the same. Local Commissioner also found this obstruction when he visited the spot. The plaintiff had also tendered in evidence copy of statement of defendant, Ex. DX, which reveals that initially he has denied the existence of placing of stair case on the disputed path, however, afterwards he deposed that stair case was not put by his brother, but by him. This statement fortifies that iron stair case has been placed on the *deodi.* Shri Vikram Sarmai, Advocate, through his statement, Ex. P5, deposed that he was appointed as Local Commissioner by the Court on 03.12.2002 and he visited the spot on the same day. In his cross-examination he has stated that on the day when he visited the spot, iron stair case was not affixed on the ground, however, the same was tethered over the path with the lintel of the house of the defendant. He has further stated that land under the stair case was vacant, but it was difficult to pass through that land. Ex P6, report of the Local Commissioner clearly depicts that during inspection, except iron stairs, no other obstruction was found on the disputed path, which leads to the joint *abadies (inhabitations)* and courtyard of the parties. Report also reveals that there exists a common path on the spot and stair case has been kept there on the path.

15. The defendant, in rebuttal, examined DW-1, Shri Hoshiar Singh, who testified his affidavit, Ex. DW-1/A, wherein he has stated that there is no *deodi,* however, the plaintiff has extended the construction of his house towards the courtyard and path and has also reared stairs. Path has been constricted due to the act of the plaintiff. In his cross-examination, this witness deposed that defendant did not construct the house and the same was constructed by Vipin. He has denied that the defendant has threatened to obstruct the path. Shri Bidhi Chand (DW-2) has also testified his affidavit, Ex. DW-2/A, wherein he has stated that he constructed the house of Vipin on the same land where the old house of the defendant was in existence. He has also testified that plaintiff has obstructed the path by raising construction. However, this witness could not clearly deny that the path, which leads to the house of the plaintiff, is in existence since the time of forefathers of the parties. DW-1, Shri Hoshiar Singh and DW-2, Shri Bidhi Chand, are residents of nearby village Balian and both these witnesses in their cross-examinations have stated that they are deposing at the instance of Shri Vipin. These witnesses could not depose that whether there is path through the *deodi* of the old house. They have denied that door is 6 feet and stated that it is 3 feet and there is no *deodi,* but a door. These witnesses have admitted that the plaintiff used to enter his house from the vacant land adjoining to the house of Braham Dutt.

16. Shri Thakur Dass (DW-3) has also testified his affidavit, Ex. DW-3/A and stated that he lives at a distance of 1½ or 2 kilometers. As per his version, there is no obstruction caused by the defendant in the path. In his cross-examination he has deposed that there is a door in the old house of the plaintiff, but he could not tell whether this door is being used by him or not.

17. Shri Ved Prakash (DW-4) has also testified his affidavit, Ex. DW-4/A and deposed that there was no *deodi* or path. He has also testified that the common path leads to the house of the plaintiff through Khasra No. 173 and claimed that Vipin has joint house. This witness, in his cross-examination, has stated that Sh. V.S. Gill, Local Commissioner, visited the spot and found that construction material of Vipin was lying there on the *deodi,* however, there was no projection of *chajja* during that time. Shri Sukhwant Singh (DW-6) has also testified his affidavit, Ex. DW-6/A, wherein he has deposed that at the instance of the defendant he has prepared the spot map depicting the iron stair case. In the spot map, Ex. DW-6/A, Shri Sukhwant Singh (DW-6) did not show disputed path, which is there in spot map, Ex. PW-1/A, and only a village path has been depicted in blue ink. The path has been shown from the other side. DW-6 has denied that a 6 feet path was in existence on the spot. He admits that in spot map, Ex. DW-6/A, at point marked as 'D', there is projection of *chajja,* however he could not tell that whether the said projection is of the house of the defendant. He has denied that path which leads to the house of the plaintiff goes through the place where the iron stair case has been tethered. Shri Satish Kumar, Pardhan (DW-7) has also testified his affidavit, wherein he has revealed that path, which leads to the house of the parties to the suit and other co-sharers, has been paved with Panchayat funds. In his cross-examination he has deposed that he resides at village which is at a distance of one kilometer and the path, which is paved, goes outside the *abadies (inhabitations)* of the parties to the suit.

18. As per the claim of the plaintiff, land depicted by letters ABCD is common path, which is also depicted in the spot maps Ex. P9, Ex. PW-1/A and Ex. PW-2/A, and he sought removal of projected *chajja,* which is depicted by letters AHIC as well as the stair case. Taking into consideration the evidence of the parties, it is apparent that parties to the suit are co-sharers and joint owners of the land and they have separate possession on their houses. As per the defendant, he has not constructed any house, but on the old foundations of the house his younger brother, Vipin, has constructed a house. It also appears that, as per the defendant, passage is still in existence on the spot and the same is in use and has not been constricted. Precisely, the defendant is trying to make out a case that neither he has constructed any house nor extended *chajja* of his house or tethered stair case on the path in question, thereby obstructing the same. Conversely, the defendant testified that owing to the construction of the

house by the plaintiff, the path in question has been constricted, however, said fact did not find mention in the written statement. The defendant also claimed that the path for general public passes through the land comprised in Khasra No. 173 and due to which the plaintiff is not entitled to claim the path through *deodi,* which is shown by letters ABCD. As per the learned senior counsel for the defendant, the plaintiff has failed to establish his right to use the path in question on the basis of easement of necessity or by way of prescription. On the other hand the plaintiff has to prove that he has acquired right of passage by way of necessity or by way of prescription, but in the present case the land comprised in Khasra No. 90, is joint land of the parties. It stands also established that path in dispute is in existence since time immemorial and since then the parties were using the same as common path, through *deodi. Deodi* is a common gate or entrance used by the residents of same *abadi (inhabitation).*

19. Ex. P6, i.e. report of the Local Commission, Shri V.S. Gill (PW-3) and statement, Ex. P5, of Shri Vikram Sermai, Advocate, go to establish that there was no obstruction in the path in question when the suit was instituted and during the pendency of the same the defendant, and not his younger brother Vipin, extended the *chajja* of his house towards the path, which is depicted by letters AHC and also tethered iron stair case over the path thereby causing obstruction to the path. As it also stands established that the path in question is common path denoted by letters ABCD and it is being used by the parties since time immemorial, the parties have right to use the same in future as well, as such, the defendant by no stretch of imagination has right to create any obstruction in the path in question and constricting the same.

20. In ***2014(2) HLR 1209, Ranjeet Khanna vs. Chiragu Deen & another,*** this Hon'ble Court has held as under:

> ***"30. While going through Order 26 Rule 10 CPC, one comes to inescapable conclusion that the Commissioner's report is a part of evidence, is admissible and can be relied upon while discussing the other evidence, in the given circumstances of the case."***

So, the report of the Local Commissioner is admissible and after taking into consideration the report of the Local Commissioner, this Court finds that as far as the house of the defendant is concerned, same has been raised on the old lines on which house of his father was existing, but as far as *chajja* is concerned, the same has been extended towards the main path. The stair case, which was put up by the defendant, on the common path, is definitely causing obstruction in using the common path by the co-sharers/co-owners. The rights of the co-sharers and co-owners have already been defined by this Court in ***Kewal Krishan and another vs. Amrit Lal***, ***RSA No. 575 of 2010,*** which are enumerated as under:

> ***"(a). A co-owner/co-sharer has an interest/right in the whole property, i.e., in every inch of it.***
>
> ***(b). Possession of joint property by one co-owner/co-sharer, is in the eye of law, possession of all even if all, except one are actually out of possession.***
>
> ***(c). A mere occupation of a larger portion or even of an entire joint property by one co-sharer/co-owner does not amount to ouster of the other, as the possession of one is deemed to be on behalf of all. This is subject to an exception when there is complete and conclusive ouster of a co-owner/co-sharer by another, but in order to negative the presumption of joint possession on behalf of all, on the ground of such ouster, the possession of a co-owner/co-sharer must not only be exclusive but also hostile to the knowledge of the other, i.e., when a co-owner openly asserts his own title and denies that of the other.***
>
> ***(d). Lapse of time does not extinguish the right of the co-owner/co-sharer, who has been out of possession of the joint property, except in the event of abandonment.***

(e). ***Every co-owner/co-sharer has a right to use the joint property in a husband like manner not inconsistent with similar rights of other co-owners/co-sharers.***

(f). ***Where a co-owner/co-sharer is in possession of separate parcels under an arrangement/consent by the other co-owners/co-sharer, it is not open to any co-sharer/co-owner to disturb the arrangement without the consent of others, except by way of partition.***

(g). ***Whenever there is severance of title and the parties have a long possession on the parcels of joint land, as far as possible, the partition is required to be made in a manner that party in occupation, as far as possible, be adjusted in that portion or part of that.***

(h). ***Co-sharers/co-owners are expected to respect the right of others even when they are in settled possession on specific portion of the land in a manner that the easementary rights of the others are not obstructed.***

(i). ***The co-sharers/co-owners are required to respect the sentiments of each other to maintain peace among themselves. This is not only a legal, but a moral duty as well, which is required to be followed by the co-sharers/co-owners and should be recognized as a right while adjudicating the rights of the parties, as the ultimate goal of the administration of justice is to maintain peace in the society, especially among the co-sharers/co-owners.***

(j) ***The eldest co-sharer/co-owner is duty bound to come forward and settle the dispute inter se any two or more co-sharers/co-owners after mediating. This is not only his duty as a co-sharer/co-owner being elder, but also his moral duty to spare some time, experience, mental faculties and the respect he command to mediate dispute(s) among the co-sharers/co-owners in order to achieve peace. The Courts can also make use of such process by taking help from the elder co-sharer/co-owner by asking him to mediate the matter, so that the peace is achieved among the co-shares/co-owners and ultimately in the society."***

21. The case of the defendant is that the stair case was tethered on the place where old bamboo stair case was in existence, however, the same is without any basis as he has failed to substantiate it by leading any evidence on record. At the same point of time, it is clear that the *deodi* and common path was being used since time immemorial, though the *deodi* was not in existence as the same stood demolished, but it is clear that the same was being used by all the land owners and the defendant has no right to obstruct the use of the *deodi* and the path being used by the plaintiff and other co-owners.

22. In ***Basohli (deceased) vs. Bhagtu Ram & others, Latest HLJ 2015 (HP) 1037,*** this Hon'ble Court has held that the First Appellate Court can decide the appeal on all the points. I have considered the arguments of the parties on all the aspects and also gone through the record of the case on each aspect, but no error is found in the findings arrived at by the Court below so the judgment cited by the learned senior counsel for the appellant is considered, but as there is no irregularity, illegality in the judgment of the learned Court below, the findings of the Court below are held to be as per law after appreciating the facts to its true perspective. As such substantial question of law No. 1 is answered accordingly.

23. I have considered the law cited by the learned senior counsel for the appellant in ***2010(13) SCC 216, Municipal Committee, Hoshiarpur vs. Punjab State Electricity Board,*** it is clear that the Hon'ble High Court in exercise of jurisdiction under Section 100 CPC can definitely go into the question whether the findings arrived at by the First Appellate Court and Trial Court are the result of erroneous approach and in case the findings are perverse, the appeal is maintainable, but in the present case the Court below has considered all the material aspects of the case, documentary as well as oral evidence led by the parties and the pleadings of the

parties are appreciated in their right perspective and the law has been applied correctly. So, the law cited by the learned senior counsel for the appellant (defendant) is not helpful to the appellant in this case and the substantial question No. 2 is answered holding that the findings recorded by the Court below are just, reasoned and after appreciating the evidence and pleadings in their true perspective.

24. As far as the grant of mandatory injunction is concerned, since the appellant has raised the obstruction on the joint land and has obstructed the right of the plaintiff, so the relief, as granted by the Court below to the plaintiff, is as per law and so substantial question No. 3 is answered accordingly.

25. The Lower Appellate Court has given findings considering whole of the evidence and by a detailed and reasoned order had decreed the suit of the plaintiff, as the findings of the Court below are reasoned one and the findings, as arrived at by the Trial Court, are set aside giving full reasons and after appreciating the facts and evidence in their true perspective, it is held that the Court below has rightly come to the conclusion with respect to the facts and law and the findings of the learned Lower Appellate Court requires no interference. Substantial question No. 4 is answered accordingly.

26. In a nutshell, as a result of the above discussion, the appeal is devoid of merits, hence dismissed.

27. In view of dismissal of the appeal, pending application(s), if any, shall also stand(s) disposed of. However, the parties are left to bear their own costs throughout.

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

FAOs No. 223, 246 of 2010
Decided on : 29.07.2016

1. **FAO No. 223 of 2010**
   Sh. Ashwani Narula ....Appellant
   Versus
   Smt. Anita Awasthi & others ...Respondents
2. **FAO No. 246 of 2010**
   Smt. Meena Kumari ....Appellant
   Versus
   Smt. Anita Awasthi & others ....Respondents.

Motor Vehicles Act, 1988- Section 149- Insurer contended that deceased was travelling as gratuitous passenger in the truck- deceased was a government official working as Assistant Development Officer (Agriculture) and had boarded the offending truck- he was accompanied by one R who appeared before the Tribunal as RW-1 and deposed that both of them had boarded the truck without any luggage- PW-2 also stated that no luggage/material was found on the spot- therefore, Tribunal had rightly recorded the findings that deceased was travelling in the truck as gratuitous passenger- appeal dismissed. (Para-15)

Cases referred:

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, ILR 2015 (III) HP 1149

FAO No. 223 of 2010

For the Appellant: Mr. B.C. Verma, Advocate.

For the respondents: Mr. Sandeep Chauhan, Advocate, for respondents No.1 to 3.
Mr. J.R. Poswal, Advocate, for respondent No.4.
Mr. B.M. Chauhan, Advocate, for respondent No.5.
Nemo for respondent No.6.
Mr. Ashwani K. Sharma, Senior Advocate, with Mr. Ishan Thakur, Advocate, for respondent No.7.

FAO No. 246 of 2010

For the Appellant: Mr. J.R. Poswal, Advocate.

For the respondents: Mr. Sandeep Chauhan, Advocate, for respondents No.1 to 3.
Mr. B.M. Chauhan, Advocate, for respondent No. 4.
Mr. B.C. Verma, Advocate, for respondent No.5.
Nemo for respondent No.6.
Mr. Ajay Chandel, Advocate, for respondent No.7.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Both these appeals are outcome of award dated 23.03.2010, passed by the Motor Accident Claims Tribunal (2) Kangra at Dharamshala, H.P. (hereinafter referred to as 'the Tribunal'), in M.A.C. Petition No.57/2002, whereby compensation to the tune of Rs.14,43,470/- with interest @ 7% per annum from the date of filing of the claim petition till its realization came to be awarded in favour of the claimants and the owners-insured of both the vehicles were saddled with liability in equal shares, (hereinafter referred to as 'the impugned award').

2. This judgment shall govern both the appeals.

Brief Facts:

3. The claimants had filed the claim petition before the Tribunal for grant of compensation to the tune of Rs.25,00,000/-, as per the break-ups given in the claim petition.

4. The claim petition was resisted by the respondents on the grounds taken in their memo of objections. During the pendency of the claim petition respondents No. 1 & 4 in the claim petition, i.e. Meena Kumari and Balwinder Singh were set ex-parte.

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

"1. Whether the deceased Ajay Kumar Awasthi was travelling in truck No.HP24-5675 owned by respondent no.1 on 16.7.2002 from Parara to Theog as alleged? OPP.

2. Whether the driver of truck No.HP 24- 5675 now deceased was driving this truck in a rash and negligent manner and had struck it against another offending vehicle HR 58-1212 owed by respondent no.3 and driven by respondent no.4 also in a rash and negligent manner and due to this collision of these offending vehicles the deceased Ajay Kumar Awasthi had died? OPP

3. *If issue no.2 is proved in affirmative to what amount of compensation the petitioners being legal heirs of the deceased are entitled to and from whom? OPP.*
4. *Whether the petition is not maintainable in the present form and the petitioners have no locus standi and cause of action to file this petition as alleged? OPR 1 & 3*
5. *Whether the petition is bad for non joinder and mis joinder of necessary parties as alleged? OPR1*
6. *Whether the accident had taken place due to the mechanical defect developed in the truck No. HP 24-5675 as alleged, if so, its effect? OPR1-2*
7. *Whether the driver of offending vehicle HP 24-5675 was not holding a valid and effective driving licence at the time of accident as alleged, if so its effect? OPR2*
8. *Whether the offending truck HP 24-5675 was being plied without valid documents, if so its effect? OPR2*
9. *Whether the deceased was a gratuitous passenger in the transport vehicle, if so its effect? OPR*
10. *Whether respondent no.4 was not holding valid and effective driving licence to drive the offending vehicle HR 58-1212 on the date of accident? OPR5*
11. *Whether the respondent 3 and 4 were plying the offending truck HR 58-1212 in violation of terms and conditions of insurance policy as alleged? OPR5*
12. *Whether the petitioners are not entitled to interest in view of the act and conduct of the petitioners as alleged? OPR5*
13. *Relief."*

6. Parties have led evidence. The Tribunal, after scanning the evidence, oral as well as documentary, held that the claimants have proved that the drivers of the offending vehicles, i.e. trucks bearing registration Nos. HP-24-5675 and HR-58-1212, had driven the said trucks, rashly and negligently and the accident was outcome of their contributory negligence, it has also held that Ajay Kumar deceased was travelling in the offending truck No. HP-24-5675.

7. The claimants, drivers and insurers of both the offending vehicles have not questioned the impugned award, on any count. Thus, it has attained finality, so far it relates to them.

Issues 1 & 2.

8. The insured-owners have questioned the findings returned by the Tribunal to the extent that the Tribunal has fallen in an error in saddling them with liability and in discharging the insurer. The findings recorded viz-a-viz Issues 1 & 2 are not, in fact, under challenge. Accordingly, the findings returned by the Tribunal on Issues 1 & 2 are upheld.

9. Before dealing with Issue No. 3, I deem it proper to deal with issues No. 4 to 12.

Issue No. 4.

10. It was for respondents No. 1 & 3 in the claim petition to prove issue No. 4, have not led any evidence, thus have failed to discharge the onus. The claimants are the victims of the accident, which fact stands proved. Accordingly, the findings returned by the Tribunal on Issue No. 4 are upheld.

Issue No. 5.

11. It was for respondent No. 1 in the claim petition to prove issue No. 5, has not led any evidence, thus has failed to discharge the onus. The claim petition was not bad for non-

joinder and mis-joinder of necessary parties. Accrordingly, the findings returned by the Tribunal on Issue No. 5 are upheld.

Issue No. 6.

12. The onus to prove this issue was on respondents No. 1 & 2 in the claim petition, have failed to do so. However, this issue is governed by the findings returned on issue No. 1. Accordingly, the findings returned by the Tribunal on Issue No. 6 are upheld.

Issue No. 7.

13. It was for respondent No. 2 in the claim petition, i.e. New India Insurance Company-insurer of truck No. HP-24-5675 to prove that the driver of the said truck was not having a valid and effective driving licence at the time of accident, has failed to lead any evidence. Accordingly, it is held that the Tribunal has rightly recorded the findings on Issue No. 7. Thus, the findings returned by the Tribunal on the said issue are upheld.

Issue No. 8.

14. The onus to prove this issue was on respondent No. 2-New India Insurance Company-insurer of truck No. HP-24-5675 that the said truck was being driven without valid documents, has failed to discharge the same. The findings returned by the Tribunal on Issue No. 8 are upheld.

Issue No. 9.

15. It was for the insurer, namely, New India Insurance Company Ltd. to plead and prove that deceased Ajay Kumar Awasthi was traveling as a gratuitous passenger in truck No. HP-24-5675. Admittedly, deceased was a government official as Assistant Development Officer (Agriculture) and had boarded the offending truck. He was accompanied by one Rajinder Singh, who appeared before the Tribunal as RW-1 and deposed that both of them had boarded the said truck without any luggage. The said evidence has remained unrebutted. However, it is corroborated by one Naresh Chauhan, who appeared before the Tribunal as PW-2 and deposed that he visited the spot and there was no luggage/material on the spot. Accordingly, I am of the considered view that the Tribunal has rightly recorded the finding that the deceased was travelling in truck No. HP-24-5675 as a gratuitous passenger. Thus, the findings returned by the Tribunal on Issue No. 9 are upheld.

Issue No. 10

16. The Tribunal has wrongly recorded that driver of truck No. HR-58-1212 was not having a valid and effective driving licence at the relevant time for the following reasons.

17. Learned Counsel for owner of truck No. HP-24-5675 has placed on record copy of the award dated 30.03.2006, passed by the Motor Accident Claims Tribunal (III), Shimla, in MACT No. 70-S/2 of 2005/02, titled as Smt. Neena Rani & another versus Sh. Ashwani Kumar & others, wherein it was held that driver of the offending vehicle was having a valid and effective driving licence. The insurer-Oriental Insurance Company has not questioned the said award. Thus, it has attained finality. The said claim petition was also outcome of the same accident which has given birth to the appeals in hand. Thus, the Oriental Insurance Company is estopped from pleading and proving that driver Balwinder Singh was not having a valid and effective driving licence, rather, is caught by the principle of *res judicata.* Accordingly, the findings returned by the Tribunal on Issue No. 10 are set aside and it is held that driver was having valid and effective driving licence.

Issue No. 11.

18. The onus to prove this issue was upon the insurer of truck No. HR-58-1212, i.e. Oriental Insurance Company, has not led any evidence, thus has failed to discharge the same. The findings returned by the Tribunal on issue No. 11 are upheld.

Issue No. 12.

19. The Tribunal has rightly decided this issue. Thus, the findings returned by the Tribunal on Issue No. 12 are upheld.

Issue No. 3.

20. The adequacy of compensation is not in dispute. However, I have perused the record and the impugned award and am of the considered view that the Tribunal has rightly made the assessment and it cannot be said that the compensation is excessive or meager, in any way. Accordingly, it is held that the just and appropriate compensation has been granted by the Tribunal.

21. The deceased was travelling in offending truck No. HP-24-5675 as a gratuitous passenger. The owner of said offending truck i.e. Smt. Meena Kumari-respondent No. 1 in the claim petition and the appellant in FAO No. 246 of 2010, had willful committed breach. Thus, it is held that she has to satisfy 50% of the award and rightly came to be saddled with liability.

22. The offending truck No. HR-58-1212 had hit the truck No. HP-24-5675 and the accident was outcome of contributory negligence of the drivers of both the vehicles. The owner of truck No. HR-58-1212 has not committed any willful breach. The willful breach committed by the owner of truck No. HP-24-5675, cannot be a ground for the insurer-Oriental Insurance Company to seek exoneration. The findings returned by the Tribunal in exonerating the insurer-Oriental Insurance Company, are set aside and it is held that the Oriental Insurance Company has to satisfy the impugned award to the extent of 50%.

23. It is the mandate of law that the insured-owner has to obtain insurance policy relating to the third party risk in order to protect and safeguard the rights and interests of third party. Keeping in view the mandate of Sections 146 to 149 of the Motor Vehicles Act, 1988, the insurer has to satisfy the impugned award to the extent of 50%, at the first instance, with right of recovery from owner-insured of truck No. HP-24-5675.

24. The Tribunal has also fallen in an error in awarding interest @ 7% per annum, which was to be awarded as per the prevailing rates.

25. 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.

26. Having said so, I deem it proper to enhance the rate of interest from 7% per annum to 7.5% per annum from the date of filing of the claim petition till its realization. Issue No. 3 is answered accordingly.

27. The statutory amount deposited by owners is awarded as costs in favour of the claimants.

28. The Registry is directed to release the compensation amount and the costs 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.

29. Viewed thus, the impugned award is modified, as indicated above, FAO No. 223 of 2010 is allowed and FAO No. 246 of 2010 is disposed of.

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

Bhartiya Govansh Rakshan Sanverdhan Parishad, H.P ……Petitioner.
Versus
The Union of India & ors. …..Respondents.

CWP No. 6631 of 2014.
Reserved on: 21.7.2016.
Decided on: 29.7.2016.

Constitution of India, 1950- Article 226- Petitioner, a registered organization to protect Cow and to preserve its varieties, sought complete ban on cow slaughter- held, that Constitution does not merely speak of protection of human rights but preservation and protection of man as well as animals, all creatures, plants, rivers, hills and environment – animals have freedom from hunger, thirst and malnutrition, freedom from fear and distress, freedom from physical and thermal discomfort, freedom from pain, injury and disease and freedom to express normal patterns of behavior- citizen must show compassion to the animal kingdom and animals have their own fundamental rights – affidavits have been filed by Superintendents of Police and Deputy Commissioners outlining the steps taken by them- further directions issued on the basis of affidavits - Chief Secretary has also filed an affidavit- direction issued to take up the matter for declaring MSP for 107 commodities- further directions issued to constitute the State Agriculture Commission and to implement Pradhan Mantri Fasal Bima Yojana (PMFBY) – direction issued to Union of India to enact a law prohibiting slaughtering of cow/calf, import or export of cow/calf, selling of beef or beef products and to ensure release of sufficient funds for the construction of gausadans. (Para-2 to 76)

Cases referred:

Haji Usmanbhai Qureshi and others vs. The State of Gujarat, AIR 1986 SC 1213
State of Gujarat vs. Mirzapur Moti Kureshi Kassab Jamat and others, (2005) 8 SCC 534
Ramlila Maidan Incident, in re, (2012) 5 SCC 1
Animal Welfare Board of India vs. A. Nagaraja and ors., (2014) 7 SCC 547,
Shakti Prasad Nayak vs. Union of India & ors., (2014) 15 SCC 514

For the petitioner(s): Mr. Varun Thakur, Advocate.
For the respondents: Mr. Ashok Sharma, ASGI with Mr. Nipun Sharma, Advocate, for respondents No. 1,2 & 10.
Mr. M.A.Khan, Addl. AG with Mr.P.M. Negi, Dy. AG and Mr. Neeraj K. Sharma, Dy. AG for respondents No. 3 to 7 & 9.

The following judgment of the Court was delivered:

Per Justice Rajiv Sharma, J.

In this petition, a question of vital public importance has been raised for the protection of cows. The petitioner is a registered organization. The aim and object of the

petitioner-organization is to protect Cows and to preserve its varieties. The petitioner has also sought complete ban on cow slaughter. There is no proper arrangement for food, medicine and infrastructure for the cows. The cows are found abandoned throughout the State of Himachal Pradesh. The cows are also transported outside the State brutally for slaughtering. The devotion of Indians towards worship of cows is an integral part of Hinduism. There is dire need to construct modern gaushallas/gausadans in the State of Himachal Pradesh to protect abandoned cows. There should be compulsory registration of the cattle as well as gausadans/gaushallas. The petitioner in fact has sought complete ban on cow slaughter in India.

2. The former President of India Dr. Radhakrishnan in his Speech on **"The Role of Cow in Indian Economy"** has addressed as follows:

> "There is a great deal of sentiment for the cow; but in our daily life the welfare of the cow has been sadly neglected. There is a tendency among our people to maintain large numbers of cattle and to take pride in them, but adequate attention is not paid to their being properly fed and cared for. The result has been that the average productivity of the cow has remained low. In the changing economy of the country, there is increasing need for more productive cattle for both milk and draught.
>
> There is a large scope for non-official organizations supplementing the efforts made by the governmental agencies for cattle and dairy development in the country. Special mention may be made of the traditional institutions of *gaushalas and pinjrapoles* spread all over the country which, I think, have to play an increasingly important role in the field of protection and development of cattle. The *gaushalas and pinjrapoles,* as voluntary public bodies, have the advantage of being in direct contact with the people. With the advancement of science and the spread of education in the country, our people are becoming increasingly conscious of the need to apply improved methods in all fields of development. The gaushalas, which are reorienting their outlook on scientific lines, can carry the message of scientific development of cattle to the general public. Schemes for the development and reorganization of *gaushalas and pinjrapoles* as cattle-breeding-cum-milk production centres have been included in the Third Five Year Plan, and it is noteworthy that these institutions are availing themselves increasingly of the assistance provided under various schemes."

3. In **"The Indian Constitution Cornerstone of a Nation**", the learned author Granville Austin, has observed that the provision pertaining to the improvement of agriculture and animal husbandry techniques and the prohibition of cow slaughter was added to the Directive Principles for a mixture of reasons. He made the following observations qua Article 48:

> "The need to improve agriculture was obvious, and cattle generally, the cow particularly, held a place of special reverence in Hindu thought. The religious aspect of cow protection had also long standing political ramifications. Indian Muslims killed cows both for food and as part of religious ceremonies. Hindus, of course, resented this; cow protection societies had existed for at least sixty years prior to the Assembly, and a religious difference had become a major political cause espoused by genuine believers and unscrupulous opportunists alike, for reasons both honourable and otherwise. In the days of the British Raj, many Hindu revivalists had promised themselves that with independence cow killing would stop. Those of this persuasion in the Assembly believed that the time for action was ripe and, as a result of agreement in the Congress Assembly Party meeting, the measure passed without opposition. No one would have quarreled with the need to modernize agriculture, but many may have found the reference to cow-killing distasteful. There is good evidence that Nehru did. Generally speaking, however, Hindu feeling ran high on the subject, and one may surmise that those who opposed the anti-cow-killing cause bent with the wind, believing

the issue not sufficiently important to warrant a firm stand against it. As various provisions of the Irish Constitution show that Ireland is a Roman Catholic nation, so Article 48 shows that Hindu sentiment predominated in the Constituent Assembly."

4. Pandit Thakur Dass Bhargava, the Hon'ble Member of the Constituent Assembly has eloquently debated the sensitive issue of "protection of cows" on 24th November, 1948 in the Constituent Assembly while seeking amendment in proposed Article 38-A at page 568 of the Constituent Assembly Debates (Vol. VII) as under:

"I wanted to speak in Hindi which is my own language about the cow and I would request you not to order me to speak in English. As the subject is a very important one, I would like to express myself in the way in which I can express myself with greater ease and facility. I would therefore request you kindly to allow me to speak in Hindi.

*[Mr. Vice-President, with regard to this amendment I would like to submit before the House that in fact this amendment like the other amendment, about which Dr. Ambedkar has stated, is his manufacture. Substantially there is no difference between the two amendments. In a way this is an agreed amendment. While moving this amendment, I have no hesitation in stating that for people like me and those that do not agree with the point of view of Dr. Ambedkar and others, this entails, in a way, a sort of sacrifice. Seth Govind Das had sent one such amendment to be included in the Fundamental Rights and other members also had sent similar amendments. To my mind it would have been much better if this could have been incorporated in the Fundamental Rights, but some of my Assembly friends differed and it is the desire of Dr. Ambedkar that this matter, instead of being included in Fundamental Rights should be incorporated in the Directive Principles. As a matter of fact, it is the agreed opinion of the Assembly that this problem should be solved in such a manner that the objective is gained without using any sort of coercion. I have purposely adopted this course, as to my mind, the amendment fulfils our object and is midway between the Directive Principles and the Fundamental Rights.

I do not want that due to its inclusion in the Fundamental Rights, non-Hindus should complain that they have been forced to accept a certain thing against their will. So far as the practical question is concerned, in my opinion, there will be absolutely no difference if the spirit of the amendment is worked out faithfully, wheresoever this amendment is placed. With regard to Article38 which the House has just passed, I would like to state that Article 38 is like a body without a soul. If you fail to pass Article 38-A which is the proposed amendment, then Article 38 will be meaningless. How can you improve your health and food position, if you do not produce full quota of cereals and milk?

This amendment is divided into three parts. Firstly, the agriculture should be improved on scientific and modern lines. Secondly, the cattle breed should be improved; and thirdly, the cow and other cattle should be protected from slaughter. To grow more food and to improve agriculture and the cattle breed are all inter-dependent and are two sides of the same coin. Today, we have to hang our head in shame, when we find that we have to import cereals from outside. I think our country is importing 46 million tons of cereals from outside. If we calculate the average of the last twelve years, namely, from 1935 to 1947, then it would be found that this country has produced 45 million tons of cereals every year. Therefore, it is certain that we are not only self-sufficient but can also export cereals from our country. If we utilize water properly, construct dams, and have proper change in the courses of rivers, use machines and tractors, make use of cropping and manuring, then surely the production will increase considerably. besides all these, the best way of increasing the production is to

improve the health of human beings and breed of cattle, whose milk and manure and labour are most essential for growing food. Thus the whole agricultural and food problem of this country is nothing but the problem of the improvement of cow and her breed. And therefore I would like to explain to you by quoting some figures, how far cattle-wealth has progressed and what is the position today.

In 1940, there were 11,56,00,960 oxen in India and in1945 only 11,19,00,000 were left. That is to say, during these five years, there was a decrease of 37 lacs in the number of oxen. Similarly the number of buffaloes in 1940,was 3,28,91,300 and in 1945, this figure was reduced to3,25,44,400. According to these figures, during these five years, their number was reduced by four lacs. Thus during these five years there was decrease of 41 lacs in the sum total of both the above figures taken together.

Besides this, if we see the figures of the slaughtered cattle in India we find that in 1944, 60,91,828 oxen were slaughtered, while in 1945 sixty five lacs were slaughtered i.e., four lakhs more. In the same year 7,27: 189 buffaloes were slaughtered. I do not want to take much of your time. If you wish to see latest figures then I have got them upto1945. You can see them. I have got figures for Bombay and Madras. A look at these figures will show that there has been no decrease in their slaughter, rather it is on the increase. Therefore, I want to submit before you that the slaughter of cattle should be banned here Ours is an agricultural country and the cow is `Kam-Dhenu' to us - fulfiller of all our wants. From both points of view, of agriculture and food, protection of the cow becomes necessary. Our ancient sages and Rishis, realising her importance, regarded her as very sacred. here, Lord Krishna, who served cows so devotedly that to this day, in affection he is known as "Makhan Chor". I would not relate to you the story of Dalip, how that Raja staked his own life for his cow. But I would like to tell you that even during the Muslim rule, Babar, Humayun, Akbar, Jahangir and even in the reign of Aurangzeb, cow slaughter was not practised in India; not because Muslims regarded it to be bad but because, from the economic point of view, it was unprofitable.

Similarly in every country, in China, cow-slaughter is a crime. It is banned in Afghanistan as well. A year ago, a similar law was passed in Burma, before that, under a certain law cattle only above fourteen years of age could be slaughtered. But eventually, the Burma Government realized that this partial ban on slaughter was not effective. On the pretext of useless cattle many useful cattle are slaughtered. I have read in newspapers that the Pakistan Government has decided to stop the export of cattle from Western Pakistan, and they too have enforced a partial ban on slaughter of animals. In the present conditions in our country, cow-breeding is necessary, not for milk supply alone, but also for the purposes of draught and transport. It is no wonder that people worship cow in this land. but I do not appeal to you in the name of religion; I ask you to consider it in the light of economic requirements of the country. In this connection I would like to tell you the opinion of the greatest leader of our country - the Father of the Nation – on the subject. You know the ideas of revered Mahatmaji on this topic. He never wanted to put any compulsion on Muslims or non-Hindus. He said, "I hold that the question of cow-slaughter is of great moment - in certain respects of even greater moment - than that of Swaraj. Cow-slaughter and manslaughter are, in my opinion, two sides of the same coin."

Leaving it aside, I want to draw your attention to the speech of our President, Dr. Rajendra Prasad. After this the Government of India, appointed a committee - an expert representative committee-to find out whether for the benefit of the country the number of cattle can be increased, and whether their slaughter can be stopped. The Committee has unanimously decided in its favour. Seth Govind Das

was also a member of the committee. The committee unanimously decided that cattle slaughter should be banned. Great minds were associated with the said committee. They examined the question from the economic view-point; they gave thought to the unproductive and unserviceable cattle also. After viewing the problem from all angles they came to the unanimous decision that slaughter of cattle should be stopped. That resolution relates not to cows alone. Slaughtering of buffaloes, which yield 50 per cent of our milk supply, and of the goats which yield 3 per cent of our milk supply, and also bring a profit of several crores, is as sinful as that of cows. In my district of Hariana, a goat yields 3 to 4 seers of milk. Perhaps a cow does not yield that much in other areas. Therefore I submit that we should consider it from an economic point of view. I also want to state that many of the cattle, which are generally regarded as useless, are not really so. Experts have made an estimate of that, and they came to the conclusion that the cattle which are regarded as useless are not really so, because we are in great need of manure. A cow, whether it be a milch-cow or not, is a moving manure factory and so, as far as cow is concerned, there can be no question of its being useless or useful. It can never be useless. In the case of cow there can be no dispute on the point.] (Hearing the bell being rung.) Am I to stop?

As the Vice-President has ordered me to finish off, I shall not go into the details; otherwise I can prove by figures that the value of the refuse and urine of a cow is greater than the cost of her maintenance. In the end, I would wind up by saying that there might be people, who regard the question of banning cow-slaughter as unimportant, but I would like to remind them that the average age in our country is 23 years, and that many children die under one year of age! The real cause of all this is shortage of milk and deficiency in diet. Its remedy lies in improving the breed of the cow, and by stopping its slaughter. I attach very great importance to this amendment, so much so that if on one side of the scale you were to put this amendment and on the other all these315 clauses of the draft, I would prefer the former. If this is accepted, the whole country would be, in a way, electrified. Therefore, I request you to accept this amendment unanimously with acclamation.

5. Seth Govind Das has debated at page 571 of Constituent Assembly Debates Vol. VII as under:

Mr. President, the amendment moved by Pandit Thakur Das Bhargava appears to be rather inadequate as a directive in its present form. I therefore move my amendment to his amendment. My amendment runs thus:

> "That in amendment No. 1002 of the list of Amendments in article 38-A the words and other useful cattle, specially milch cattle and of child bearing age, young stocks and draught cattle' be deleted and the following be added at the end:
>
> 'The word "cow' includes bulls, bullocks, young stock of genus cow'."

The object of the amendment is, I hope, quite clear from its words. The amendment moved by Pandit Bhargava prohibits the slaughter of cow and other useful cattle but according to it unfit or useless cows may be slaughtered .But the object of my amendment is, as far as cows are concerned, to prohibit the slaughter of any cow, be it useful or useless and in my amendment word 'cow' includes bulls, bullocks and calves all that are born of cows. As Pandit Thakur Das told you, I had submitted this earlier to be included in Fundamental Rights but I regret that it could not be so included. The reason given is that Fundamental Rights deal only with human beings and not animals. I had then stated that just as the practice of un touchability was going to be declared an offence so also we should declare the slaughter of cows to be an offence. But it

was said that while untouchability directly affected human beings the slaughter of cows affected the life of animals only – and that as the Fundamental Rights were for human beings this provision could not be included therein. Well, I did not protest against that view and thought it proper to include this provision in the Directive Principles. It will not be improper, Sir, if I mention here, that it is not for the first time that I am raising the question of cow protection. I have been a member of the Central Legislature for the last twenty-five years and I have always raised this question in the Assembly and in the Council of State. The protection of cow is a question of long standing in this country. Great importance has been attached to this question from the time of Lord Krishna. I belong to a family which worships Lord Krishna as "Ishtadev". I consider myself a religious minded person, and have no respect for those people of the present day society whose attitude towards religion and religious minded people is one of contempt. It is my firm belief that Dharma had never been uprooted from the world and nor can it be uprooted. There had been unbelievers like Charvaka in our country also but the creed of Charvaka could never flourish in this country. Now-a-days the Communist leaders of the West also and I may name among them Karl Marx, Lenin, Stalin, declare religion "the opium of the People". Russia recognised neither religion nor God but we have seen that in the last war the Russian people offered prayers to God in Churches to grant them victory. Thus it is plain from the history of ancient times as also from that of God-denying Russia that religion could not be uprooted.

Moreover, cow protection is not only a matter of religion with us; it is also a cultural and economic question. Culture is a gift of History. India is an ancient country; consequently no new culture can be imposed on it. Whosoever attempts to do so is bound to fail; he can never succeed. Ours is a culture that has gradually developed with our long history. Swaraj will have no meaning for our people in the absence of a culture. Great important cultural issues - for instance the question of the name of the country, question of National Language, question of National Script, question of the National Anthem and question of the prohibition of cow slaughter - are before this Assembly and unless the Constituent Assembly decides these questions according to the wishes of the people of the country, Swarajya will have no meaning to the common people of our country. I would like to submit, Sir, that a referendum be taken on these issues and the opinion of the people be ascertained. Again, cow protection is also a matter of great economic importance for us. Pandit Thakur Das Bhargava has shown to you by quoting statistic how the cattle wealth of the country is diminishing. This country is predominantly agricultural in character. I would give some figures here regarding the position of our cattle wealth. In 1935 there were one hundred nineteen million and four hundred ninety one thousand (11,94,91,000) heads of cattle. In 1940 their number came down to one hundred fifteen million and six hundred ten thousand, and in 1945 it further came down to

one hundred eleven million and 9hundred thousand. While on one side our population is increasing our cattle wealth is decreasing. Our Government is carrying on a Grow More Food Campaign. Millions of rupees are being spent on this campaign. This campaign cannot succeed so long as we do not preserve the cows. Pandit Thakur Das has given us some figures to show the number of cows slaughtered in our country. I would like to quote here some figures from the Hide and Skin Report of the Government of India. Fifty two lakhs of cows and thirteen lakhs of buffaloes are slaughtered every year in this country. It shows in what amazing numbers cattle are slaughtered here. Thirty six crores acres of land are under cultivation here. These figures also includes the land under cultivation in

Pakistan. I have to give these figures because we have no figure of the land under cultivation in India since the secession of Pakistan from our country. We have six crores bullocks for the cultivation of the land. A scientific estimate would show that we need another one and a half crore of bullocks to keep this land under proper cultivation.

So far as the question of milk supply is concerned I would like to place before you figures of milk supply of other countries as compared to that of our country.

In New Zealand milk supply per capita is 56 ounces, in Denmark 40, in Finland 63, in Sweden 61, in Australia 45, in Canada 35, in Switzerland 49, in Netherland 35, in Norway 43, in U.S.A. 35, in Czechoslovakia 36, in Belgium 35, in Australia 30, in Germany 35, in France 30, in Poland 22, in Great Britain 39 and in India it is only 7 ounces. Just think what will be the state of health of the people of a country where they get only seven ounces of milk per head. There is a huge infantile mortality in this country. Children are dying like dogs and cats. How can they be saved without milk?

Thus even if we look at this problem from the economic point of view, we come to the conclusion that for the supply of milk and agriculture also, the protection of the cow is necessary.

I would like to place before the House one thing more. It has been proved by experience that whatever laws we may frame for the prevention of the slaughter of useful cattle, their object is not achieved. In every province there are such laws. There people slaughter cattle and pay some amount towards fines and sometimes escape even that. Thus our cattle wealth is declining day by day.

Sometime back there was a law like that in Burma but when they saw that cattle could not be saved under it, they banned cow slaughter altogether.

I would like to emphasise one point to my Muslim friends also. I would like to see my country culturally unified even though we may follow different religions. Justas a Hindu and a Sikh or a Hindu and a Jain can live in the same family, in the same way a Hindu and a Muslim can also live in the same family. The Muslims should come forward to make it clear that their religion does not compulsorily enjoin on them the slaughter of the cow. I have studied a little all the religions. I have read the life of Prophet Mohammad Sahib. The Prophet never took beef in his life. This is an historic fact.

Pandit Thakur Das Bhargava pointed out just now that from the time of Akbar to that of Aurangzeb, there was a banon cow slaughter. I want to tell you what Babar, the first Moghul Emperor told Humayun. He said: "Refrain from cow-slaughter to win the hearts of the people of Hindustan."

Pandit Thakur Dass Bhargava just now referred to the Committee constituted by the Government of India for this purpose. It recommended that cow slaughter should be totally banned. I admit that the Government will require money for the purpose. I want to assure you that there will be no lack of money for this purpose. If the allowance given to cattle-pounds and Goshalas is realised from the people by law, all the money needed would be realised. Even if the Government want to impose a new tax for this purpose every citizen of this country will be too glad to pay it. Therefore our Government should not raise before us the financial bogey sooften raised by the British Government. I have travelled a little in this country and I am acquainted with the [views of the people.]”

6. Prof. Shibban Lal Saksena has debated at page 574 of Constituent Assembly Debates Vol. VII as under:

"Sir, there are two aspects to this question. One is the religious aspect and the other is the economic aspect. I shall first deal with the religious aspect. I am not one of those men who think that merely because a thing has a religious aspect, it should not be enacted as law. I personally feel that cow protection, if it has become a part of the religion of the Hindus, it is because of its economic and other aspects, I believe that the Hindu religion is based mostly on the principles which have been found useful to the people of this country in the course of centuries. Therefore, if thirty crores of our population feel that this thing should be incorporated in the laws of the country, I do not think that we as an Assembly representing 35 crores should leave it out merely because it has a religious aspect. I agree with Seth Govind Das that we should not think that because a thing has a religious significance, so it is bad. I say, religion itself sanctifies what is economically good. I wish to show how important cattle preservation is for us mahatma Gandhi infact, has written in so many of his articles about his belief that cow protection was most essential for our country. From the scientific point of view, I wish to point out that Dr. Wright who is an expert on the subject in his report on our National Income says that out of 22 crores of national income per annum, about eleven crores are derived from the cattle wealth of India, representing the wealth of most of our people who live in the villages.

Sometimes it is supposed that we have too many cattle and that most of them are useless, and therefore, they must be slaughtered. This is a wrong impression. If you compare the figures, you will find that in India there are only 50cattle per 100 of the population, whereas in Denmark it is74, in U.S.A. 71, in Canada 80, in Cape Colony 120 and in New Zealand 150. So in New Zealand, there are about three times the number of cattle per head of population than we have here. So, to say that we have too many cattle is not right. As for useless cattle, scientists say that their excreta has value as manure and its cost is more than the expenditure on the upkeep of such cattle.

Then again, our agriculture depends mostly on cattle, as it is mostly of small holdings where the cultivators cannot make use of tractors and other implements. They depend on bullocks, and if you compare the figures of bullocks, you will find that although we have got an area of33 1/2 million acres of land to cultivate, we have only six crores of bullocks which works at about 16 bullocks per 100acres of land which is quite insufficient. Therefore, even from the point of view of our agricultural economy, we need a very large number of bullocks. It has been estimated that to meet our requirements, we would require about eleven crores more bullocks.

Then, coming to our requirements of milk and other products, if we compare our milk consumption with that of other countries, we find that it is only 5 oz. per head, andt hat is very little, compared to the figures of other countries. Therefore I think that we must have this amendment incorporated in our Constitution."

7. Dr. Raghu Vira has debated at page 575 of Constituent Assembly Debates Vol. VII as under:

" Sir, I think it my most bounden duty in this House to express the feelings, feelings which no words can really convey, that not a single cow shall be slaughtered in this land.

These sentiments which were expressed thousands of years ago still ring in the hearts of tens of millions of this land. My friends tell me that it is an economic question, that Muslim kings have supported the preservation of cows and banned the killing of the cows. That is all right. But when we attain freedom, freedom to express ourselves in every form and manner - our Preamble says 'There shall be liberty of expression' - is that merely expression of thought or is that the

expression of our whole being? This country evolved a civilization and in that civilization we gave prominent place to what we call Ahimsa or non-killing and non-injury, not merely of human beings but also of the animal kingdom. The entire universe was treated as one and the cow is the symbol of that oneness of life and are we not going to maintain it? Brahma hatya and go-hatya - the killing of the learned man, the scientist, the philosopher or the sage and the killing of a cow are on a par. If we do not allow the killing of a scientist or a sage in this land it shall certainly be ordained by this House that no cow shall be killed. I know in my childhood we were not allowed to drink until the cow has had its drink and we were not allowed to eat till the cow has had its meal. The cow takes precedence over the children of the family, because she is the mother of the individual, she is the mother of the nation. Ladies and gentlemen in this House, I appeal to you to look back with serenity and to search your souls. We are representatives of millions of our people...........”

8. Sh. R.V. Dhulekar has debated at page 576 of Constituent Assembly Debates Vol. VII as under:

“ Sir, I always believed from my childhood that India had a mission and because India had a mission therefore I wanted the independence of this country. many millions of the people, who died for this country, also like me had believed that India had a mission, and what was that mission? The mission was that we should go about the world and carry the message of peace, love, freedom and Abhaya (freedom from fear) to every body in the world. When independence was achieved I was happy to believe that I shall carry out my mission, that I shall carry to the world this message, viz., that India has got no grudge against any country in the world, it has no expansionist ideas but that it is going to save the whole world from the danger of internecine war, bloodshed and many other ills that humanity is suffering from. In the same way and for the same purpose I appeal to the House to discuss this subject from a dispassionate point of view. It is not the crumbs, the loaves and fishes that we are fighting for. Loaves and fishes were left behind by some people thirty years back and by some others fifty years back. We did not want to achieve this independence for loaves and fishes. Those who want the mare welcome but men like us who have a mission or a message for the world cannot love loaves and fishes. We do not want ambassadorship, premierships, ministerships or wealth. We want that India should declare today that the whole human world as well as the whole animal world is free today and will be protected. The cow is a representative of the animal kingdom, the peepal tree is the representative of the vegetable kingdom, the touchstone or the shaligram is the representative of the mineral world. We want to save and give peace and protection to all those four worlds and therefore it is that the Hindus of India have put these four things as representatives of this world - the human being, the cow, the peepal and the shaligram. All these were worshipped because we wanted to protect the whole humantly. Our Upanishad says:

We do not want this property, we do not want this food; we do not want this raiment - not because we cannot take it; not because we are cowards; not because we cannot carry Imperialism to the four corners of the world; but we may not have it because we see the whole world identical with our own soul. So our humanity which resides in this Bharatvarsha for several thousand years has marched forward and has taken the cow within the fold of human society. Some people here talked to me and said "You say that you want to protect the cow and want it to be included in the Fundamental Rights. Is the protection of the cow a fundamental right of a human being? Or is it the fundamental right of the cow?" I replied to them and tell them suppose it is a question of saving your mother or

protecting your mother. Whose fundamental right is it? Is it the fundamental right of the mother? No. It is my fundamental right to protect my mother, to protect my wife, my children and my country. In the Fundamental Rights you have said that you will give justice, equity and all these things. Why? Because you say "it is your fundamental right to have justice". What does that justice mean? It means that we shall be protected, our families shall be protected. And our Hindu society, or our Indian society, has included the cow in our fold. It is just like our mother. In fact it is more than our mother. I can declare from this platform that there are thousands of persons who will not run at a man to kill that man for their mother or wife or children, but they will run at a man if that man does not want to protect the cow or wants to kill her.

With these few words, I wish to say that these two amendments which have been put forward by Mr. Bhargava and Seth Govind Das should be dealt with dispassionately. I shall appeal to you that only that amendment should be passed which is very clear. If Mr. Bhargava's amendment is doubtful, then certainly Seth Govind Das's amendment should be passed.

9. Sh. Z.H. Lari has debated at page 577 of Constituent Assembly Debates Vol. VII as under:

"Mr. Vice-President, I appreciate the sentiments of those who want protection of the cow - may be on religious grounds or maybe in the interests of agriculture in this country. I have come here not to oppose or support any of the amendments but to request the House to make the position quite clear and not to leave the matter in any ambiguity or doubt. The House, at the same time, must appreciate that Mussalmans of India have been, and are, under the impression that they can, without violence to the principles which govern the State, sacrifice cows and other animals on the occasion of Bakrid. It is for the majority to decide one way or the other. We are not here to obstruct the attitude that the majority community is going to adopt. But let there not linger an idea in the mind of the Muslim public that they can do one thing, though in fact they are not expected to do that. The result has been, as I know in my own Province on the occasion of the last Bakrid, so many orders under Section 144 in various places, districts and cities. The consequence has been the arrests of many, molestation of even more, and imprisonment of some. Therefore, if the House is of the opinion that slaughter of cows should be prohibited, let it be prohibited in clear, definite and unambiguous words. I do not want that there should be a show that you could have this thing although the intention may be otherwise. My own submission to this House is that it is better to come forward and incorporate a clause in Fundamental Rights that cow slaughter is henceforth prohibited, rather than it being left vague in the Directive Principles, leaving it open to Provincial Governments to adopt it one way or the other, and even without adopting definite legislation to resort to emergency powers under the Criminal Procedure. In the interests of good-will in the country and of cordial relations between the different communities I submit that this is the proper occasion when the majority should express itself clearly and definitely.

I for one can say that this is a matter on which we will not stand in the way of the majority if the majority wants to proceed in a certain way, whatever may be our inclinations. We feel - we know that our religion does not necessarily say that you must sacrifice cow: it permits it. The question is whether, considering the sentiments that you have, considering the regard which the majority have for certain classes of animals, do they or do they not permit the minority - not a right - but a privilege or a permission which it at present has? I cannot put it higher. I won't class it as interference with my religion. But I do not want that my liberty should be taken away, and especially the peaceful celebration of any

festival should be marred by the promulgation of orders under Section 144. I have come only to plead that. Therefore, let the leaders of the majority community here and now make it clear and not leave it to the back-benchers to come forward and deliver sermons one way or the other. Let those who guide the destinies of the country, make or mar them, say definitely "this is our view", and we will submit to it. We are not going to violate it. This is the only thing I have come to say. I hope you will not misunderstand me when I say this. It is not due to anger, malice or resentment but it is out of regard for cordial relations between the communities, and what is more, due to the necessity of having a clear mind that I say this. Henceforward the Muslim minority must know where they stand so that they may act accordingly, and there be no occasion for any misunderstanding between the majority and the Muslims on this point.

In view of what I have said, I would not oppose nor support any of the amendments, but I would invite a very clear and definite rule instead of the vague phraseology of the clauses which have been put forward. It proceeds to say that we should have modern and scientific agriculture. Modern and scientific agriculture will mean mechanization and so many other things. The preceding portion of the clause speaking about modern and scientific agriculture and the subsequent portion banning slaughter of cattle do not fit in with each other. I appreciate the sentiments of another member who said "this is our sentiment, and it is out of that sentiment that we want this article". Let that article be there, but for God's sake, postpone the discussion of the article and bring it in clear, definite and unambiguous terms so that we may know where we stand and thereafter there should be no occasion for any misunderstanding between the two communities on this issue which does not affect religion but affects practices which obtain in the country."

10. Pandit Thakur Dass Bhargava again debated at page 579 of Constituent Assembly Debates Vol. VII as under:

"Does not the honourable Member know that many useless cattle have been turned into good cattle by goshalas and other organisations and at least 90 per cent can be salvaged by proper feeding and treatment."

11. Article 48 of the Constitution of India reads as follows:

"**48. Organisation of agriculture and animal husbandry.** The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle."

12. Article 51-A (g) of the Constitution of India reads as follows:

"51-A (g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;"

13. The relevant entry No. 15 of the State List in the Seventh Schedule of the Constitution of India reads as under:

"15. Preservation, protection and improvement of stock and prevention of animal diseases; veterinary training and practice."

14. Entry Nos. 17 & 17-B of the Concurrent List in the Seventh Schedule of the Constitution of India reads as under:

"17. Prevention of cruelty to animals.

17-B. Protection of wild animals and birds."

15. Their lordships of the Hon'ble Supreme Court in the case of ***Haji Usmanbhai Qureshi and others vs. The State of Gujarat,*** reported in ***AIR 1986 SC 1213,*** have upheld that ban put on slaughter of bulls and bullocks below 16 years, under clauses (c) and (d) of the Bombay Animal Preservation Act is not violative of Article 19(1) (g) of the Constitution. It has been held as follows:

> " 15. It is thus clear that because of various scientific factors, namely, better cattle feeding, better medical health and better animal husbandry services, the longevity of cattle in the State of Gujarat has increased and in this context it is correct to say that if the scientific tests were to be applied, bulls and bullocks upto sixteen years of age can be said to be useful for the purpose of breeding, draught and other agricultural purposes. In these circumstances the prescription of The age of sixteen years in clauses (c) and (d) of sub-s. (lA) of s.5 can be said to be reasonable, looking to the balance which has to be struck between public interest, which requires useful animals to be preserved and permitting the different appellants before us to carry on their trade and profession.
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> 17. The material before the court thus clearly goes to show that with the help of the scientific advances which have taken place since 1962, the longevity of the cattle and their useful span of life has increased and, therefore, the prescribed age of sixteen years can be said to be a reasonable restriction on the right of the appellants to carry on their trade and profession as mentioned inArticle 19(1)(g) of the Constitution.
>
> 19. This contention in our opinion has no force. The dealers in different tpes of meat are not in the same class. It is only if the classification is unreasonable that it can be struck down. But here a clear distinction is maintained on scientific grounds between animals which are useful and which have not yet reached the age of 16 years so far as bulls and bullocks are concerned. As regards buffaloes there is no restriction as to the age and the only restriction is sub-s. (2) of s. 5 and that section has remained unamended, namely the test is whether the animal, male or female, is useful or likely to become useful for the purposes of milch or draught or any kind of agricultural operations; whether the animal, if male is useful or likely t become useful for the purpose of breeding, and whether the animal, if female, is useful or likely to become useful for the purpose of giving milk or bearing offspring. So looking to the different purposes for which buffaloes and their progeny on the one hand and cows and their progeny on the other hand are used in each State it cannot be said that there is any hostile discrimination against those who deal in meat of bulls and bullocks. Bulls and bullocks, particularly bullocks, are useful for agricultural purposes and male buffaloes are seldom used for any purpose other than breeding or rearing progeny and under these circumstances the impugned amendment is not hit by Art. 14 of the Constitution."

16. Their lordships of the Hon'ble Supreme Court in the case of ***State of Gujarat vs. Mirzapur Moti Kureshi Kassab Jamat and others,*** reported in ***(2005) 8 SCC 534,*** have expanded the scope of Article 48 vis-à-vis Article 51-A. The Hon'ble Supreme Court also discussed the unique and essential role of bovine and bovine dung in our economy. Their lordships have held as follows:

> "51. By enacting clause (g) in Article 51-A and giving it the status of a fundamental duty, one of the objects sought to be achieved by the Parliament is to ensure that the spirit and message of Articles 48 and 48A is honoured as a fundamental duty of every citizen. The Parliament availed the opportunity provided by the Constitution (Forty-second Amendment) Act, 1976 to improve the manifestation of objects contained in Article 48 and 48-A. While Article 48-A speaks of "environment", Article 51-A(g) employs the expression "the natural environment" and includes therein "forests, lakes, rivers and wild life".

While Article 48 provides for "cows and calves and other milch and draught cattle", Article 51-A(g) enjoins it as a fundamental duty of every citizen "to have compassion for living creatures", which in its wider fold embraces the category of cattle spoken of specifically in Article 48.

61. According to their inherent genetic qualities, cattle breeds are broadly divided into 3 categories (i) Milch breed (ii) Draught breed, and (iii) Dual purpose breed. Milch breeds include all cattle breeds which have an inherent potential for milk production whereas draught breeds have an inherent potential for draught purposes like pulling, traction of loads etc. The dual purpose breeds have the potential to perform both the above functions.

68. In our opinion, the expression 'milch or draught cattle' as employed in Article 48 of the Constitution is a description of a classification or species of cattle as distinct from cattle which by their nature are not milch or draught and the said words do not include milch or draught cattle, which on account of age or disability, cease to be functional for those purposes either temporarily or permanently. The said words take colour from the preceding words "cows or calves". A specie of cattle which is milch or draught for a number of years during its span of life is to be included within the said expression. On ceasing to be milch or draught it cannot be pulled out from the category of "other milch and draught cattle."

80. As we have already indicated, the opinion formed by the Constitution Bench of this Court in Quareshi-I is that the restriction amounting to total prohibition on slaughter of bulls and bullocks was unreasonable and was not in public interest. We, therefore, proceed to examine the evidence available on record which would enable us to answer questions with regard to the 'reasonability' of the imposed restriction qua 'public interest'.

81. The facts contained in the Preamble and the Statement of Objects and Reasons in the impugned enactment highlight the following facts:-

(i) it is established that cow and her progeny sustain the health of the nation;

(ii) the working bullocks are indispensable for our agriculture for they supply power more than any other animal (the activities for which the bullocks are usefully employed are also set out);

(iii) the dung of the animal is cheaper than the artificial manures and extremely useful of production of biogas;

(iv) it is established that the backbone of Indian agriculture is the cow and her progeny and they have on their back the whole structure of the Indian agriculture and its economic system;

(v) the economy of the State of Gujarat is still predominantly agricultural. In the agricultural sector use of animals for milch, draught, breeding or agricultural purposes has great importance. Preservation and protection of agricultural animals like bulls and bullocks needs emphasis. With the growing adoption of non-conventional energy sources like biogas plants, even waste material have come to assume considerable value. After the cattle cease to breed or are too old to work, they still continue to give dung for fuel, manure and biogas and, therefore, they cannot be said to be useless.

Apart from the fact that we have to assume the above- stated facts as to be correct, there is also voluminous evidence available on record to support the above said facts. We proceed to notice few such documents.

82. Shri J.S. Parikh, Deputy Secretary, Agriculture Cooperative and Rural Development, Department, State of Gujarat, filed three affidavits in the High Court of Gujarat in Special Civil Application No. 9991 of 1993. The first affidavit

was filed on 20th October, 1993, wherein the following facts are discernible and mentioned as under:

(i) With the improved scientific animal husbandry services in the State, the average longivity of animals has considerably increased. In the year 1960, there were only 456 veterinary dispensaries and first aid veterinary centers etc, whereas in the year 1993, there are 946 veterinary dispensaries and first aid veterinary centers etc. There were no mobile veterinary dispensaries in 1960 while there are 31 mobile veterinary dispensaries in the State in 1993. In addition, there are around 467 centres for intensive cattle development where besides first aid veterinary treatment, other animal husbandry inputs of breeding, food or development etc. are also provided. In the year 1960, five lakh cattles were vaccinated whereas in the year 1992-93 around 200 lakh animals are vaccinated to provide life saving protection against various fatal diseases. There were no cattle food compounding units preparing cattle food in the year 1960, while in the year 1993 there are ten cattle food factory producing 1545 MT of cattle food per day. As a result of improved animal husbandry services, highly contagious and fatal disease of Rinder Pest is controlled in the state and that the deadly disease has not appeared in the last three years.

(ii) Because of various scientific technologies namely, proper cattle feeding, better medical and animal husbandry services, the longevity of the cattle in the State has considerably increased.

(iii) The population of bullock is 27.59 lakhs. Over and above agricultural work, bullocks are useful for other purposes also. They produce dung which is the best organic measure and is cheaper than chemical manure. It is also useful for production of bio-gas.

(iv) It is estimated that daily production of manure by bullocks is about 27,300 tonnes and bio-gas production daily is about 13.60 cubic metres. It is also estimated that the production of bio-gas from bullock dung fulfil the daily requirement of 54.78 lakh persons of the State if whole dung production is utilized. At present, 1,91,467 bio-gas plants are in function in the State and about 3-4 lakhs persons are using bio-gas in the State produced by these plants.

(v) The population of farmers in the State is 31.45 lakhs. Out of which 7.37 lakhs are small farmers, 8 lakhs are marginal farmers, 3.05 lakhs are agricultural labourers and 13.03 lakhs are other farmers. The total land of Gujarat State is 196 lakh hectares and land under cultivation is 104.5 lakh hectares. There are 47,800 tractors by which 19.12 lakh hectares land is cultivated and the remaining 85.38 lakh hectares land is cultivated by using bullocks. It may be mentioned here that all the agricultural operations are not done using tractors. The bullocks are required for some of agricultural operations along with tractors. There are about 7,28,300 bullock carts and there are about 18,35,000 ploughs run by bullocks in the State.

(vi) The figure of slaughter of animals done in 38 recognised slaughter houses are as under:

Year	Bullock/Bull	Buffalo	Sheep	Goat
1990-91	9,558	41,088	1,82,269	2,22,507
1991-92	9,751	41,882	2,11,245	2,20,518
1992-93	8,324	40,034	1,13,868	1,72,791

The above figures show that the slaughter of bullocks above the age of 16 years is done in the State in very small number. The animals other than bullocks are slaughtered in large number. Hence, the ban on the slaughter of cow and cow

progeny will not affect the business of meat production significantly. Therefore, the persons engaged in this profession will not be affected adversely.

Thereafter two further affidavits were filed by Shri J.S. Parikh, abovesaid, on 17th March, 1998, wherein the following facts are mentioned :

(i) there are about 31.45 lakhs land holders in Gujarat. The detailed classifications of the land holders are as under:-

Sl.No.	Details of land holders	No. of land holders
1.	01 hectare	8.00 lakhs
2.	1-2 hectares	7.37 lakhs
3.	2 and above	16.08 lakhs

(ii) almost 50 per cent of the land holdings are less than 2 hectares; tractor keeping is not affordable to small farmers. For economic maintenance of tractors, one should have large holding of land. Such land holders are only around 10 per cent of the total land holders. Hence the farmers with small land holdings require bullocks as motive power for their agricultural operations and transport;

(iii) the total cultivable land area of Gujarat State is about 124 lakh hectares. Considering that a pair of bullocks is required for ploughing 10 acres of land the bullock requirement for ploughing purpose alone is 5.481 million and approximately equal number is required for carting. According to the livestock census 1988 of Gujarat State, the availability of indigenous bullocks is around 2.84 millions. Thus the availability of bullocks as a whole on percentage of requirement works out to be about 25 per cent. In this situation, the State has to preserve each single bull and bullock that is available to it;

(iv) it is estimated that bull or bullock at every stage of life supplies 3,500 kgs of dung and 2,000 litres of urine and whereas this quantity of dung can supply 5,000 cubic feet of biogas, 80 M.T. of organic fertilizer, the urine can supply 2,000 litres of pesticides and the use of these products in farming increases the yield very substantially. The value of above contribution can be placed at Rs.20,000/- per year to the owner;

(v) since production of various agricultural crops removes plant nutrients from the soil, they must be replenished with manures to maintain and improve fertility of soil. There are two types of manures which are (i) Organic manures, i.e. natural manures and (ii) Artificial or chemical fertilizer. Amongst the organic manures, farm yard manures is the most valuable organic manure applied to soil. It is the most commonly used organic manure in India. It consists of a mixture of cattle dung, the bedding used in the stable. Its crop increasing value has been recognized from time immemorial (Ref. Hand Book of Agriculture, 1987 by ICAR page 214);

(vi) the importance of organic manure as a source of humus and plant nutrients to increase the fertility level of soils has been well recognised. The organic matter content of cultivated soils of the tropics and sub-tropics is comparatively low due to high temperature and intense microbial activity. The crops remove annually large quantity of plant nutrients from soil. Moreover, Indian soils are poor in organic matter and in major plant nutrients. Therefore, soil humus has to be replenished through periodic addition of organic manure for maintaining soil productivity;

(vii) animals are the source of free availability of farmyard manure, which has all the three elements, i.e. Nitrogen, Phosphoric acid and Potash, needed in fertilizer and at the same time which preserve and enrich the fertility of the soil. In paucity of dung availability, the farmers have to depend upon chemical fertilizers. Investment in chemical fertilizers imposes heavy burden upon the economy. If

there is availability of alternate source of organic manure from animals, it is required to be promoted;

(viii) the recent scenario of ultramodern technology of super ovulation, embryo transfer and cloning technique will be of very much use to propagate further even from the incapable or even old animals which are not capable of working or reproducing. These animals on a large scale can be used for research programmes as well as for production of non-conventional energy sources such as biogas and natural fertilizers. At present, there are 19,362 biogas plants installed in the State during 1995-97. On an average, each adult cattle produces 4.00 kg. of dung per day. Out of the total cattle strength of (1992 Census) 67,85,865, the estimated dung produced is 99,07,363 tonnes;

(ix) India has 74% of rural population, and in Gujarat out of 4.13 crores of human population, there are 1.40 crores of workers which comprises of 47,04,000 farmers and 32,31,000 workers are workers related to livestock and forestry. In Gujarat, there are 9.24 lakhs marginal farmers and 9.15 lakhs of small farmers, according to the 1991-92 census. Animals are reared in few numbers per family and the feed is obtained from the supplementary crop on fodder/agricultural by-products or from grazing in the gaucher land. In Gujarat 8.48 lakh hectares of land is available as permanent pasture and grazing land. An individual cattle-owner does not consider one or two bullocks as an extra burden for his family, even when it is incapable of work or production. Sometimes the unproductive animals are sent to Panjarapoles and Gosadans. In Gujarat, there are 335 Gaushalas and 174 Panjarapoles which are run by non-governmental oranizations and trusts. Formerly farmers mostly kept few animals and, in fact, they are treated as part of their family and maintained till death. It cannot be treated to be a liability upon them or burden on the economy;

(x) butchers are doing their business since generations, but they are not doing only the slaughter of cow class of animals. They slaughter and trade the meat of other animals like buffaloes, sheep, goats, pig and even poultry. In Gujarat there are only 38 registered slaughter houses functioning under various Municipalities/Nagar Panchayats. Beef (meat of cattle) contributes only 1.3% of the total meat groups. Proportion of demand for beef is less in the context of demand for pig, mutton and poultry meat. Slaughtering of bulls and bullocks for the period between 1990-91 and 1993-94 was on an average 9,000;

(xi) number of bullocks have decreased in a decade from 30,70,339 to 28,93,227 as in 1992. A statement showing the amount of dung production for the year 1983-84 to 1996-97 and a statement showing the nature of economy of the State of Gujarat is annexed. The number of bullocks slaughtered per day is negligible compared to other animals, and the business and/or trade of slaughtering bullocks would not affect the business of butchers. By prohibiting slaughter of bullocks the economy is likely to be benefited.

The three affidavits are supported by documents, statements or tables setting out statistics which we have no reason to disbelieve. Neither the High Court has expressed any doubt on the contents of the affidavit nor has the veracity of the affidavits and correctness of the facts stated therein been challenged by the learned counsel for the respondents before us.

83. In this Court Shri D.P. Amin, Joint Director of Animal Husbandry, Gujarat State, has filed an affidavit. The salient facts stated therein are set out hereunder:

(i) The details of various categories of animals slaughtered since 1997-1998 shows that slaughter of various categories of animals in regulated slaughter houses of Gujarat State has shown a tremendous decline. During the year way

back in 1982-83 to 1996-97 the average number of animals slaughtered in regulated slaughter houses was 4,39,141. As against that (previous figure) average number of slaughter of animals in recent 8 years i.e. from 1997-98 to 2004-05 has come down to only 2,88,084. This clearly indicates that there has been a vast change in the meat eating style of people of Gujarat State. It is because of the awareness created among the public due to the threats of dangerous diseases like Bovine Spongiform Encephalopathy commonly known as "Mad Cow disease" B.S.E. which is a fatal disease of cattle meat origin not reported in India. Even at global level people have stopped eating the beef which is known as meat of cattle class animals. This has even affected the trade of meat particularly beef in the America & European countries since last 15 years. Therefore, there is international ban on export-import of beef from England, America & European countries;

(ii) there is reduction in slaughter of bulls & bullocks above the age of 16 years reported in the regulated slaughter houses of Gujarat State. As reported in the years from 1982-83 to 1996-97, the slaughter of bulls & bullocks above the age of 16 years was only 2.48% of the total animals of different categories slaughtered in the State. This percentage has gone down to the level of only 1.10% during last 8 years i.e. 1997-98 to 2004-05 which is very less significant to cause or affect the business of butcher communities;

(iii) India is predominantly agrarian society with nearly >th of her population living in seven lakh rural hamlets and villages, possesses small fragmentary holding (54.6% below 1 hectare 18% with 1-2 hectares). Draft/pack animal contributes more than 5 crores horse power (H.P.) or 33,000 megawatt electric power and shares for/in 68% of agricultural operations, transport & other draft operations. In addition to draft power, 100 million tonnes dung per year improves the soil health and also used as raw material for biogas plant;

(iv) the cattle population in Gujarat in relation to human population has declined from 315 per 1000 humans in 1961 to 146 per 1,000 humans in 2001 indicating decline in real terms;

(v) in Gujarat 3.28 million draft animal (bullocks 85%) have multifaceted utilities viz. agricultural operations like ploughing, sowing, hoeing, planking, carting, hauling, water lifting, grinding, etc.; Gujarat State has a very rich cattle population of Kankrej & Gir breed, of which Kankrej bullocks are very well known for its draft power called "Savai Chal";

(vi) considering the utility of aged bullocks above 16 years as draft power a detailed combined study was carried out by Department of Animal Husbandry and Gujarat Agricultural University (Veterinary Colleges S.K. Nagar & Anand). The experiments were carried out within the age group of 16 to 25 years. The study covered different age groups of 156 (78 pairs) bullocks above the age of 16 years. The aged bullocks i.e. above 16 years age generated 0.68 horse power draft output per bullock while the prime bullock generated 0.83 horse power per bullock during carting/hauling draft work in a summer with about more than 42?C temp. The study proves that 93% of aged bullock above 16 years of age are still useful to farmers to perform light & medium draft works. The detailed report is on record;

(vii) by the end of year 2004-05 under the Dept. of Animal Husbandry, there are 14 Veterinary Polyclinics, 515 Vety. Dispensaries, 552 First Aid Vety. Centres and 795 Intensive Cattle Development Project Sub Centers. In all, 1876 institutions were made functional to cater various health care activities to livestock population of State of Gujarat. About two crores of livestock and poultry were vaccinated against various diseases. As a result, the total reported out

break of infectious diseases was brought down to around 106 as against 222 in 1992-1993. This shows that State has created a healthy livestock and specifically the longevity of animals has been increased. This has also resulted into the increased milk production of the state, draft power and source of non-conventional energy in terms of increased quantity of dung and urine;

(viii) the value of dung is much more than even the famous "Kohinoor" diamond. An old bullock gives 5 tonnes of dung and 343 pounds of urine in a year which can help in the manufacture of 20 carts load of composed manure. This would be sufficient for manure need of 4 acres of land for crop production. The right to life is a fundamental right and it can be basically protected only with proper food and feeding and cheap and nutritious food grains required for feeding can be grown with the help of dung. Thus the most fundamental thing to the fundamental right of living for the human being is bovine dung. (Ref. Report of National Commission on Cattle, Vol.III, Page 1063-1064);

(ix) the dung cake as well as meat of bullock are both commercial commodities. If one bullock is slaughtered for its meat (Slaughtering activity) can sustain the butchers trade for only a day. For the next day's trade another bullock is to be slaughtered. But if the bullock is not slaughtered, about 5000-6000 dung cakes can be made out of its dung per year, and by the sale of such dung cake one person can be sustained for the whole year. If a bullock survives even for five years after becoming otherwise useless it can provide employment to a person for five years whereas to a butcher, bullock can provide employment only for a day or two.

(x) Even utility of urine has a great role in the field of pharmaceuticals as well as in the manufacturing of pesticides. The Goseva Ayog, Govt. of Gujarat had commissioned study for "Testing insecticides properties of cow urine against various insect pests". The study was carried out by Dr. G.M. Patel, Principal Investigator, Department of Entomology, C.P. College of Agriculture, S.D. Agricultural University, Sardar Krishi Nagar, Gujarat. The study has established that insecticides formulations prepared using cow urine emerged as the most reliable treatment for their effectiveness against sucking pest of cotton. The conclusion of study is dung & urine of even aged bullocks are also useful and have proved major effect of role in the Indian economy;

(xi) it is stated that availability of fodder is not a problem in the State or anywhere. During drought period deficit is compensated by grass-bank, silo and purchase of fodder from other States as last resources. The sugarcane tops, leaves of banana, baggase, wheat bhoosa and industrial byproducts etc. are available in plenty. A copy of the letter dated 8.3.2004 indicting sufficient fodder for the year 2004, addressed to Deputy Commissioner, Animal Husbandry Government of India is annexed.

Report on draughtability of bullocks above 16 years of age

84. On 20th June, 2001 the State of Gujarat filed I.A. No. 2/2001 in Civil Appeal Nos. 4937-4940 of 1998, duly supported by an affidavit sworn by Shri D.U. Parmar, Deputy Secretary (Animal Husbandry) Agriculture and Cooperation Department, Government of Gujarat, annexing therewith a report on draughtability of aged bullocks above 16 years of age under field conditions. The study was conducted by the Gujarat Agricultural University Veterinary College, Anand and the Department of Animal Husbandry, Gujarat State, Ahmedabad. The study was planned with two objectives:

(i) To study the draughtability and utility of aged bullocks above 16 years of age; and

(ii) To compare the draughtability of aged bullocks with bullocks of prime age.

85. Empirical research was carried out under field conditions in North Gujarat Region (described as Zone-I) and Saurashtra region (described as Zone-II). The average age of aged bullocks under the study was 18.75 years. The number of bullocks/pair used under the study were sufficient to draw sound conclusions from the study. The gist of the findings arrived at, is summed up as under:

1. Farmer's persuasion

The aged bullocks were utilized for different purposes like agricultural operations (ploughing, planking, harrowing, hoeing, threshing) and transport-hauling of agricultural produce, feeds and fodders of animals, drinking water, construction materials (bricks, stones, sand grits etc.) and for sugarcane crushing/ khandsari making. On an average the bullocks were yoked for 3 to 6 hours per working day and 100 to 150 working days per year. Under Indian conditions the reported values for working days per year ranges from 50 to 100 bullock paired days by small, medium and large farmers. Thus, the agricultural operations-draft output are still being taken up from the aged bullocks by the farmers. The farmers feed concentrates, green fodders and dry fodders to these aged bullocks and maintain the health of these animals considering them an important segment of their families. Farmers love their bullocks.

2. Age, body measurement and body weight

The biometric and body weight of aged bullocks were within the normal range.

3. Horsepower generation/Work output

The aged bullocks on an average generated 0.68 hp/bullock, i.e.18.1% less than the prime/young bullocks (0.83 hp/bullock). The aged bullocks walked comfortably with an average stride length of 1.43 meter and at the average speed of 4.49 km/hr. showing little less than young bullocks. However, these values were normal for the aged bullocks performing light/medium work of carting. These values were slightly lower than those observed in case of prime or young bullocks. This clearly indicates that the aged bullocks above 16 years of age proved their work efficiency for both light as well as medium work in spite of the age bar. In addition to this, the experiment was conducted during the months of May-June, 2000 a stressful summer season. Therefore, these bullocks could definitely generate more work output during winter, being a comfortable season. The aged bullock above 16 years of age performed satisfactorily and disproved that they are unfit for any type of draft output i.e. either agricultural operations, carting or other works.

4. Physiological responses and haemoglobin concentration

These aged bullocks are fit to work for 6 hours (morning 3 hours + afternoon 3 hrs.) per day. Average Hb content (g%) at the start of work was observed to be 10.72 g% and after 3 hours of work 11.14g%, indicating the healthy state of bullocks. The increment in the haemoglobin content after 3 to 4 hours of work was also within the normal range and in accordance with prime bullocks under study as well as the reported values for working bullocks.

5. Distress symptoms In the initial one hour of work, 6 bullocks (3.8%) showed panting, while 32.7% after one hour of work. After 2 hour of work, 28.2% of bullocks exhibited salivation. Only 6.4% of the bullocks sat down/lied down and were reluctant to work after completing 2 hours of the work. The results are indicative of the fact that majority of the aged bullocks (93%) worked normally. Summer being a stressful season, the aged bullocks exhibited distress symptoms earlier than the prime/young bullocks. However, they maintained their

physiological responses within normal range and generated satisfactory draught power.

86. The study report submitted its conclusions as under:

"1. The aged bullocks above 16 years of age generated 0.68 horse power draft output per bullock while the prime bullocks generated 0.83 horsepower per bullock during carting-hauling draft work.

2. The aged bullocks worked satisfactorily for the light work for continuous 4 hours during morning session and total 6 hours per day (morning 3 hours and afternoon 3 hours) for medium work.

3. The physiological responses (Rectal temperature, Respiration rate and Pulse rate) and haemoglobin of aged bullocks were within the normal range and also maintained the incremental range during work. However, they exhibited the distress symptoms earlier as compared to prime bullocks.

4. Seven percent aged bullocks under study were reluctant to work and/or lied down after 2 hours of work.

5. The aged bullocks were utilized by the farmers to perform agricultural operations (ploughing, sowing, harrowing, planking, threshing), transport-hauling of agricultural product, feeds and fodders, construction materials and drinking water.

Finally, it proves that majority (93%) of the aged bullocks above 16 years of age are still useful to farmers to perform light and medium draft works."

87. With the report, the study group annexed album/photographs and cassettes prepared while carrying out the study. Several tables and statements setting out relevant statistics formed part of the report. A list of 16 authentic references originating from eminent authors on the subject under study which were referred to by the study group was appended to the report.

88. This application (I.A. No. 2/2001) was allowed and the affidavit taken on record vide order dated 20.8.2001 passed by this Court. No response has been filed by any of the respondents controverting the facts stated in the affidavit and the accompanying report. We have no reason to doubt the correctness of the facts stated therein; more so, when it is supported by the affidavit of a responsible officer of the State Government.

Tenth Five Year Plan (2002-2007) Documents

89. In the report of the Working Group on Animal Husbandry and Dairy Farming, the Tenth Five Year Plan (2002-2007) dealing with 'the draught breed relevance and improvement', published by the Government of India, Planning Commission in January, 2001, facts are stated in great detail pointing out the relevance of draught breeds and setting out options for improvement from the point of view of the Indian Economy. We extract and reproduce a few of the facts therefrom:

"3.6.12 Relevance of draught breeds and options for improvement

3.6.12.1 In India 83.4 million holdings (78%) are less than 2 ha. where tractors and tillers are uneconomical and the use of animal power becomes inevitable since tractors and tillers are viable only for holdings above 5 ha.. In slushy and water logged fields tractor tiller is not suitable. In narrow terraced fields and hilly regions tractors cannot function. Animal drawn vehicle are suitable for rural areas under certain circumstances/conditions viz., uneven terrain, small loads (less than 3 tons), short distances and where time of loading and unloading is more than travel time or time is not a critical factor and number of collection points/distribution points are large as in case of milk, vegetable, water, oil, etc.

In India the energy for ploughing two-thirds of the cultivated area comes from animal power and animal drawn vehicles haul two-thirds of rural transport.

3.6.12.2 The role of cattle as the main source of motive power for agriculture and certain allied operations would continue to remain as important as meeting the requirement of milk in the country. It has been estimated that about 80 million bullocks will be needed. There is, therefore, a need for improving the working efficiency of the bullocks through improved breeding and feeding practices.

3.6.13 Development of Draught Breeds

Focused attention to draft breed will not be possible unless a new scheme is formulated for this purpose.

3.6.13.2 In tracts where there are specialized draught breeds of cattle like Nagori in Rajasthan, Amritmahal and Hallikar in Karnataka, Khillar in Maharashtra etc., selection for improvement in draughtability should be undertaken on a large scale as the cattle breeders in these areas derive a large income by sale of good quality bullocks. Planned efforts should be made for improving the draught capacity and promoting greater uniformity in the type of the cattle population in the breeding tracts. There is need to intensify investigations to develop yardsticks for objective assessment of draught capacity of bullocks.

3.6.14 Supplementation of fund-flow for cattle and Buffalo development.

3.6.14.2 A number of organizations like NABARD, NDDB, NCDC etc. are also likely to be interested in funding activities relating to cattle and buffalo development in the form of term as loan provided timely return is ensured. Time has now come for exploring such avenues seriously at least on pilot basis in selected areas, where better prospects of recovery of cost of breeding inputs and services exists."

90. Recognising the fact that the cow and its progeny has a significant role to play in the agricultural and rural economy of the country, the Government felt that it was necessary to formulate measures for their development in all possible ways. In view of the persistent demands for action to be taken to prevent their slaughter, the Government also felt and expressed the need to review the relevant laws of the land relating to protection, preservation, development and well-being of cattle and to take measures to secure the cattle wealth of India.

91. Yet another document to which we are inclined to make a reference is Mid-Term Appraisal of 10th Five Year Plan (2002- 2007) released in June, 2005 by the Government of India (Planning Commission). Vide para 5.80 the report recommends that efforts should be made to increase the growth of bio- pesticides production from 2.5 to 5 per cent over the next five years.

92. According to the report, Organic farming is a way of farming which excludes the use of chemical fertilizers, insecticides, etc. and is primarily based on the principles of use of natural organic inputs and biological plant protection measures.

93. Properly managed organic farming reduces or eliminates water pollution and helps conserve water and soil on the farm and thereby enhances sustainability and agro-biodiversity.

94. Organic farming has become popular in many western countries. There are two major driving forces behind this phenomenon; growing global market for organic agricultural produce due to increased health consciousness; and the premium price of organic produce fetched by the producers.

95. India has a comparative advantage over many other countries.

96. The Appraisal Report acknowledged the commencement of the biogas programme in India since 1981-82. Some 35,24,000 household plants have been installed against an assessed potential of 120,00,000 units.

97. Biogas has traditionally been produced in India from cow dung (gobar gas). However, dung is not adequately and equitably available in villages. Technologies have now been developed for using tree-based organic substrates such as leaf litter, seed starch, seed cakes, vegetable wastes, kitchen wastes etc. for production of biogas. Besides cooking, biogas can also be used to produce electricity in dual fired diesel engines or in hundred per cent gas engines. Ministry of Non-conventional Energy Sources (MNES) is taking initiatives to integrate biogas programme in its Village Energy Security Program (VESP).

98. Production of pesticides and biogas depend on the availability of cow-dung.

National Commission on Cattle

99. Vide its Resolution dated 2nd August, 2001, the Government of India established a National Commission on Cattle, comprising of 17 members.

100. The Commission was given the follow terms of reference:-

a. To review the relevant laws of the land(Centre as well as States) which relate to protection, preservation, development and well being of cow and its progeny and suggest measures for their effective implementation,

b. To study the existing provisions for the maintenance of Goshalas, Gosadans, Pinjarapoles and other organisations working for protection and development of cattle and suggest measures for making them economically viable,

c. To study the contribution of cattle towards the Indian economy and to suggest ways and means of organising scientific research for maximum utilisation of cattle products and draught animal power in the field of nutrition and health, agriculture and energy, and to submit a comprehensive scheme in this regard to the Central Government,

d. To review and suggest measures to improve the availability of feed and fodder to support the cattle population.

101. The Committee after extensive research has given a list of recommendations. A few of them relevant in the present case are:-

" 1.The Prohibition for slaughter of cow and its progeny, which would include bull, bullocks, etc., should be included in Fundamental Rights or as a Constitutional Mandate anywhere else, as an Article of Constitution. It should not be kept only in the Directive Principles or/Fundamental duties as neither of these are enforceable by the courts.

2. The amendment of the Constitution should also be made for empowering the Parliament to make a Central Law for the prohibition of slaughter of cow and its progeny and further for prohibition of their transport from one State to another.

3. The Parliament should then make a Central law, applicable to all States, prohibiting slaughter of cow and its progeny. Violation of the Law should be made a non-bailable and cognizable offence.

xxx xxx xxx

14. The use and production of chemical fertilizers and chemical pesticides should be discouraged, subsidies on these items should be reduced or abolished altogether. The use of organic manure should be subsidized and promoted."

102. Thus the Commission is of the view that there should be a complete prohibition on slaughter of cow progeny.

Importance of Bovine Dung

103. The Report of the National Commission on Cattle, ibid, refers to an authority namely, Shri Vasu in several sub- paragraphs of para 12. Shri Vasu has highlighted the unique and essential role of bovine and bovine dung in our economy and has pleaded that slaughter of our precious animals should be stopped. He has in extenso dealt with several uses of dung and its significance from the point of view of Indian society. Dung is a cheap and harmless fertilizer in absence whereof the farmers are forced to use costly and harmful chemical fertilizers. Dung also has medicinal value in Ayurved, the Indian system of medicines.

Continuing Utility of Cattle :

104. Even if the utility argument of the Quareshi's judgment is accepted, it cannot be accepted that bulls and bullocks become useless after the age of 16. It has to be said that bulls and bullocks are not useless to the society because till the end of their lives they yield excreta in the form of urine and dung which are both extremely useful for production of bio-gas and manure. Even after their death, they supply hide and other accessories. Therefore, to call them 'useless' is totally devoid of reality. If the expenditure on their maintenance is compared to the return which they give, at the most, it can be said that they become 'less useful'.(Report of the National Commission on Cattle, July 2002, Volume I, p. 279.)

105. The Report of the National Commission on Cattle has analyzed the economic viability of cows after they stopped yielding milk and it also came to the conclusion that it shall not be correct to call such cows 'useless cattle' as they still continue to have a great deal of utility. Similar is the case with other cattle as well.

"37. Economic aspects:

37.1 The cows are slaughtered in India because the owner of the cow finds it difficult to maintain her after she stops yielding milk. This is because it is generally believed that milk is the only commodity obtained from cows, which is useful and can be sold in exchange of cash. This notion is totally wrong. Cow yields products other than milk, which are valuable and saleable. Thus the dung as well as the urine of cow can be put to use by owner himself or sold to persons or organizations to process them. The Commission noticed that there are a good number of organizations (goshalas) which keep the cows rescued while being carried to slaughter houses. Very few of such cows are milk yielding. Such organizations use the urine and dung produced by these cows to prepare Vermi-compost or any other form of bio manure and urine for preparing pest repellents. The money collected by the sale of such products is normally sufficient to allow maintenance of the cows. In some cases, the urine and dung is used to prepare the medical formulations also. The organizations, which are engaged in such activities, are making profits also.

37.2 Commission examined the balance sheet of some such organizations. The expenditure and income of one such organization is displayed here. In order to make accounts simple the amounts are calculated as average per cow per day.

It is obvious that expenditure per cow is Rs. 15-25 cow/day.

While the income from sale is Rs. 25-35 cow-day.

37.3 These averages make it clear that the belief that cows which do not yield milk are unprofitable and burden for the owner is totally false. In fact it can be said that products of cow are sufficient to maintain them even without milk. The milk in such cases is only a by-product.

37.4 It is obvious that all cow owners do not engage in productions of fertilizers or insect repellents. It can also be understood that such activity may not be feasible for owners of a single or a few cows. In such cases, the cow's urine and dung may be supplied to such organizations, which utilize these materials for producing finished products required for agricultural or medicinal purpose. Commission has noticed that some organizations which are engaged in production of agricultural and medical products from cow dung and urine do purchase raw materials from nearby cow owner at a price which is sufficient to maintain the cow." (Report of National Commission on Cattle, July 2002, Vol. II, pp.68-69)

106. A host of other documents have been filed originating from different sources such as Governmental or Semi-governmental, NGOs, individuals or group of individuals, who have carried out researches and concluded that world-over there is an awareness in favour of organic farming for which cattle are indispensable. However, we do not propose to refer to these documents as it would only add to the length of the judgment. We have, apart from the affidavits, mainly referred to the reports published by the Government of India, whose veracity cannot be doubted.

107. We do not find any material brought on record on behalf of the respondents which could rebut, much less successfully, the correctness of the deductions flowing from the documented facts and statistics stated hereinabove.

108. The utility of cow cannot be doubted at all. A total ban on cow slaughter has been upheld even in Quareshi-I. The controversy in the present case is confined to cow progeny. The important role that cow and her progeny play in the Indian Economy was acknowledged in Quareshi-I in the following words:

"The discussion in the foregoing paragraphs clearly establishes the usefulness of the cow and her progeny. They sustain the health of the nation by giving them the life giving milk which is so essential an item in a scientifically balanced diet. The working bullocks are indispensable for our agriculture, for they supply power more than any other animal. Good breeding bulls are necessary to improve the breed so that the quality and stamina of the future cows and working bullocks may increase and the production of food and milk may improve and be in abundance. The dung of the animal is cheaper than the artificial manures and is extremely useful. In short, the back bone of Indian agriculture is in a manner of speaking the cow and her progeny. Indeed Lord Linlithgow has truly said "The cow and the working bullock have on their patient back the whole structure of Indian agriculture." (Report on the Marketing of Cattle in India, p. 20). If, therefore, we are to attain sufficiency in the production of food, if we are to maintain the nation's health, the efficiency and breed of our cattle population must be considerably improved. To attain the above objectives, we must devote greater attention to the preservation, protection and improvement of the stock and organise our agriculture and animal husbandry on modern and scientific lines."

109. On the basis of the available material, we are fully satisfied to hold that the ban on slaughter of cow progeny as imposed by the impugned enactment is in the interests of the general public within the meaning of clause (6) of Article 19 of the Constitution.

128. In the first and second Five Year Plans (Quareshi-I era), there was scarcity of food which reflected India's panic. The concept of food security has since then undergone considerable change.

129. 47 years since, it is futile to think that meat originating from cow progeny can be the only staple food or protein diet for the poor population of the

country. 'India Vision 2020' (ibid, Chapter 3) deals with 'Food Security and Nutrition : Vision 2020'. We cull out a few relevant findings and observations therefrom and set out in brief in the succeeding paragraphs. Food availability and stability were considered good measures of food security till the Seventies and the achievement of self-sufficiency was accorded high priority in the food policies. Though India was successful in achieving self-sufficiency by increasing its food production, it could not solve the problem of chronic household food insecurity. This necessitated a change in approach and as a result food energy intake at household level is now given prominence in assessing food security. India is one of the few countries which have experimented with a broad spectrum of programmes for improving food security. It has already made substantial progress in terms of overcoming transient food insecurity by giving priority to self-sufficiency in foodgrains, employment programmes, etc. The real problem, facing India, is not the availability of food, staple food and protein rich diet; the real problem is its unequal distribution. The real challenge comes from the slow growth of purchasing power of the people and lack of adequate employment opportunities. Another reason for lack of food and nutrient intake through cereal consumption is attributable to changes in consumer tastes and preferences towards superior food items as the incomes of the household increases. Empirical evidence tends to suggest a positive association between the calorie intake and nutritional status. The responsiveness is likely to be affected by the factors relating to health and environment. It is unclear as to how much of the malnutrition is due to an inadequate diet and how much due to the environment.

137. For multiple reasons which we have stated in very many details while dealing with Question-6 in Part II of the judgment, we have found that bulls and bullocks do not become useless merely by crossing a particular age. The Statement of Objects and Reasons, apart from other evidence available, clearly conveys that cow and her progeny constitute the backbone of Indian agriculture and economy. The increasing adoption of non-conventional energy sources like Bio-gas plants justify the need for bulls and bullocks to live their full life in spite of their having ceased to be useful for the purpose of breeding and draught. This Statement of Objects and Reasons tilts the balance in favour of the constitutional validity of the impugned enactment. In Quareshi-I the Constitution Bench chose to bear it in mind, while upholding the constitutionality of the legislations impugned therein, insofar as the challenge by reference to Article 14 was concerned, that "the legislature correctly appreciates the needs of its own people". Times have changed; so have changed the social and economic needs. The Legislature has correctly appreciated the needs of its own people and recorded the same in the Preamble of the impugned enactment and the Statement of Objects and Reasons appended to it. In the light of the material available in abundance before us, there is no escape from the conclusion that the protection conferred by impugned enactment on cow progeny is needed in the interest of Nation's economy. Merely because it may cause 'inconvenience' or some 'dislocation' to the butchers, restriction imposed by the impugned enactment does not cease to be in the interest of the general public. The former must yield to the latter.

138. According to Shri M.S. Swaminathan, the eminent Farm Scientist, neglect of the farm sector would hit our economy hard. According to him "Today, global agriculture is witnessing two opposite trends. In many South Asian countries, farm size is becoming smaller and smaller and farmers suffer serious handicaps with reference to the cost-risk-return structure of agriculture. In contrast, the average farm size in most industrialized countries is over several hundred hectares and farmers are supported by heavy inputs of technology,

capital and subsidy. The on-going Doha round of negotiations of the World Trade Organisation in the field of agriculture reflects the polarization that has taken place in the basic agrarian structure of industrialized and developing countries. Farming as a way of life is disappearing and is giving way to agribusiness." (K.R. Narayanan Oration delivered by Dr. Swaminathan at the Australian National University, Canberra, published in 'The Hindu', October 17, 2005, p.10) "In India, nearly 600 million individuals are engaged in farming and over 80 per cent of them belong to the small and marginal farmer categories. Due to imperfect adaptation to local environments, insufficient provision of nutrients and water, and incomplete control of pests, diseases and weeds, the present average yields of major farming systems in India is just 40 per cent of what can be achieved even with the technologies currently on the shelf. There is considerable scope for further investment in land improvement through drainage, terracing, and control of acidification, in areas where these have not already been introduced." (ibid)

139. Thus, the eminent scientist is very clear that excepting the advanced countries which have resorted to large scale mechanized farming, most of the countries (India included) have average farms of small size. Majority of the population is engaged in farming within which a substantial proportion belong to small and marginal farmers category. Protection of cow progeny will help them in carrying out their several agricultural operations and related activities smoothly and conveniently. Organic manure would help in controlling pests and acidification of land apart from resuscitating and stimulating the environment as a whole."

17. Their lordships of the Hon'ble Supreme Court in the case of ***Ramlila Maidan Incident, in re,*** reported in ***(2012) 5 SCC 1***, have held that the Constitution does not merely speak of human rights protection. It also speaks of preservation and protection of man as well as animals, all creatures, plants, rivers, hills and environment. It has been held as follows:

"310. The Constitution does not merely speaks for human right protection. It is evident from the catena of judgments of this Court that it also speaks of preservation and protection of man as well as animals, all creatures, plants, rivers, hills and environment. Our Constitution professes for collective life and collective responsibility on one hand and individual rights and responsibilities on the other hand. In Kharak Singh v. State of U.P. & Ors., AIR 1963 SC 1295; and Govind v. State of Madhya Pradesh & Anr., AIR 1975 SC 1378, this Court held that right to privacy is a part of life under Article 21 of the Constitution which has specifically been re-iterated in People's Union for Civil Liberties v. Union of India &. Anr., AIR 1997 SC 568, wherein this Court held:

"We do not entertain any doubt that the word 'life' in Article 21 bears the same signification. Is then the word 'personal liberty' to be construed as excluding from its purview an invasion on the part of the police of the sanctity of a man's home and an intrusion into his personal security and his right to sleep which is the normal comfort and a dire necessity for human existence even as an animal? It might not be inappropriate to refer here to the words of the preamble to the Constitution that it is designed to 'assure the dignity of the individual' and therefore of those cherished human values as the means of ensuring his full development and evolution. We are referring to these objectives of the framers merely to draw attention to the concepts underlying the Constitution which would point to such vital words as 'personal liberty' having to be construed in a reasonable manner and to be attributed that sense which would promote and achieve those objectives and by no means to stretch the meaning of the phrase to square with any preconceived notions or doctrinaire constitutional theories".

18. Their lordships of the Hon'ble Supreme Court in the case of ***Animal Welfare Board of India vs. A. Nagaraja and ors.,*** reported in ***(2014) 7 SCC 547,*** have held that there are five internationally recognized freedoms of animals; i) freedom from hunger, thirst and malnutrition; ii) freedom from fear and distress; iii) freedom from physical and thermal discomfort; iv) freedom from pain, injury and disease; and v) freedom to express normal patterns of behaviour. Their lordships have further held that every species has an inherent right to live and shall be protected by law, subject to the exception provided out of necessity. Article 21 of the Constitution, while safeguarding the rights of humans, protects life and the word "life" has been given an expanded definition and any disturbance from the basic environment which includes all forms of life, including animal life, which are necessary for human life, fall within the meaning of Article 21 of the Constitution. So far as animals are concerned, "life" means something more than mere survival or existence or instrumental value for human-beings, but to lead a life with some intrinsic worth, honour and dignity. Dignity of animals under the Indian Constitution is also duly recognized. It has been held as follows:

> "15. We have to examine the various issues raised in these cases, primarily keeping in mind the welfare and the well-being of the animals and not from the stand point of the Organizers, Bull tamers, Bull Racers, spectators, participants or the respective States or the Central Government, since we are dealing with a welfare legislation of a sentient- being, over which human-beings have domination and the standard we have to apply in deciding the issue on hand is the "Species Best Interest", subject to just exceptions, out of human necessity.
>
> 55. As early as 1500-600 BC in Isha-Upanishads, it is professed as follows:
>
> > "The universe along with its creatures belongs to the land. No creature is superior to any other. Human beings should not be above nature. Let no one species encroach over the rights and privileges of other species."
>
> In our view, this is the culture and tradition of the country, particularly the States of Tamil Nadu and Maharashtra.
>
> 56. PCA Act has been enacted with an object to safeguard the welfare of the animals and evidently to cure some mischief and age old practices, so as to bring into effect some type of reform, based on eco-centric principles, recognizing the intrinsic value and worth of animals. All the same, the Act has taken care of the religious practices of the community, while killing an animal vide Section 28 of the Act.
>
> INTERNATIONAL APPROACH TO ANIMALS WELFARE
>
> 57. We may, at the outset, indicate unfortunately, there is no international agreement that ensures the welfare and protection of animals. United Nations, all these years, safeguarded only the rights of human beings, not the rights of other species like animals, ignoring the fact that many of them, including Bulls, are sacrificing their lives to alleviate human suffering, combating diseases and as food for human consumption. International community should hang their head in shame, for not recognizing their rights all these ages, a species which served the humanity from the time of Adam and Eve. Of course, there has been a slow but observable shift from the anthropocentric approach to a more nature's right centric approach in International Environmental Law, Animal Welfare Laws etc. Environmentalist noticed three stages in the development of international environmental law instrument, which are as under:
>
> (a) The First Stage: Human self-interest reason for environmental protection
>
> 57.1 The instruments in this stage were fuelled by the recognition that the conservation of nature was in the common interest of all mankind.
>
> 57.2 Some the instruments executed during this time included the Declaration of the Protection of Birds Useful to Agriculture (1875), Convention Designed to

Ensure the Protection of Various Species of Wild Animals which are Useful to Man or Inoffensive (1900), Convention for the Regulation of Whaling (1931) which had the objective of ensuring the health of the whaling industry rather than conserving or protecting the whale species.

57.3 The attitude behind these treaties was the assertion of an unlimited right to exploit natural resources – which derived from their right as sovereign nations.

(b) The Second Stage: International Equity

57.4 This stage saw the extension of treaties beyond the requirements of the present generation to also meet the needs to future generations of human beings. This shift signalled a departure from the pure tenets of anthropocentrism.

57.5 For example, the 1946 Whaling Convention which built upon the 1931 treaty mentioned in the preamble that "it is in the interest of the nations of the world to safeguard for future generations the great natural resource represented by the whale stocks". Similarly, the Stockholm Declaration of the UN embodied this shift in thinking, stating that "man …… bears a solemn responsibility to protect and improve the environment for present and future generations" and subsequently asserts that "the natural resources of the earth …. must be safeguarded for the benefit of present and future generations through careful planning and management". Other documents expressed this shift in terms of sustainability and sustainable development.

(c) The Third Stage: Nature's own rights

57.6 Recent Multinational instruments have asserted the intrinsic value of nature.

57.7 UNEP Biodiversity Convention (1992) "Conscious of the intrinsic value of biological diversity and of the ecological, genetic, social, economic, educational, cultural, recreational and aesthetic values of biological diversity and its components …. [we have] agreed as follows:……". The World Charter for Nature proclaims that "every form of life is unique, warranting respect regardless of its worth to man." The Charter uses the term "nature" in preference to "environment" with a view to shifting to non-anthropocentric human-independent terminology."

58. We have accepted and applied the eco-centric principles in T. N. Godavarman Thirumulpad v. Union of India and Others (2012) 3 SCC 277, T. N. Godavarman Thirumulpad v. Union of India and Others (2012) 4 SCC 362 and in Centre for Environmental Law World Wide Fund - India v. Union of India and Others (2013) 8 SCC 234.

59. Based on eco-centric principles, rights of animals have been recognized in various countries. Protection of animals has been guaranteed by the Constitution of Germany by way of an amendment in 2002 when the words "and the animals" were added to the constitutional clauses that obliges 'state' to respect 'animal dignity'. Therefore, the dignity of the animals is constitutionally recognised in that country. German Animal Welfare Law, especially Article 3provides far-reaching protections to animals including inter alia from animals fight and other activities which may result in the pain, suffering and harm for the animals. Countries like Switzerland, Austria, Slovenia have enacted legislations to include animal welfare in their national Constitutions so as to balance the animal owners' fundamental rights to property and the animals' interest in freedom from unnecessary suffering or pain, damage and fear.

60. Animals Welfare Act of 2006 (U.K.) also confers considerable protection to the animals from pain and suffering. The Austrian Federal Animal Protection Act also recognises man's responsibilities towards his fellow creatures and the subject

"Federal Act" aims at the protection of life and well being of the animals. The Animal Welfare Act, 2010 (Norway) states "animals have an intrinsic value which is irrespective of the usable value they may have for man. Animals shall be treated well and be protected from the danger of unnecessary stress and strain. Section 26 of the Legislation prohibits training an animal to fight with people, the operative portion of the same reads as follows :

"Any person who trains animals and who uses animals which are used for showing, entertainment and competitions, including those who organise such activities, shall ensure that the animals:

a) xxx xxx xxx

b) xxx xxx xxx

c) xxx xxx xxx

(d) are not trained for or used in fights with other animals or people."

61. When we look at the rights of animals from the national and international perspective, what emerges is that every species has an inherent right to live and shall be protected by law, subject to the exception provided out of necessity. Animal has also honour and dignity which cannot be arbitrarily deprived of and its rights and privacy have to be respected and protected from unlawful attacks.

62. Universal Declaration of Animal Welfare (UDAW) is a campaign led by World Society for the Protection of Animals (WSPA) in an attempt to secure international recognition for the principles of animal welfare. UDAW has had considerable support from various countries, including India. WSPA believes that the world should look to the success of the Universal Declaration of Human Rights (UDHR) to set out what UDAW can achieve for animals. Five freedoms referred to in UDAW, which we will deal with in latter part of the judgment, find support in PCA Act and the rules framed thereunder to a great extent.

63. World Health Organization of Animal Health (OIE), of which India is a member, acts as the international reference organisation for animal health and animal welfare. OIE has been recognised as a reference organisation by the World Trade Organisation (WTO) and, in the year 2013, it has a total of 178 member countries. On animal welfare, OIE says that an animal is in good state of welfare if (as indicated by Scientific evidence) it is healthy, comfortable, well nourished, safe, able to express innate behaviour and if it is not suffering from unpleasant states such as pain, fear and distress.

FREEDOM:

64. Chapter 7.1.2 of the guidelines of OIE, recognizes five internationally recognized freedoms for animals, such as:

i) freedom from hunger, thirst and malnutrition;

ii) freedom from fear and distress;

iii) freedom from physical and thermal discomfort;

iv) freedom from pain, injury and disease; and

v) freedom to express normal patterns of behaviour.

Food and Agricultural Organisation (FAO) in its "Legislative and Regulatory Options for Animal Welfare" indicated that these five freedoms found their place in Farm Welfare Council 2009 U.K. and is also called Brambell's Five Freedoms. These five freedoms, as already indicated, are considered to be the fundamental principles of animal welfare and we can say that these freedoms find a place in Sections 3 and 11 of PCA Act and they are for animals like the rights

guaranteed to the citizens of this country under Part III of the Constitution of India.

65. Animals are world-wide legally recognised as 'property' that can be possessed by humans. On deletion of Article 19(1)(f) from the Indian Constitution, right to property is more a fundamental right in India, this gives the Parliament more a leeway to pass laws protecting the rights of animals. Right to hold on to a property which includes animals also, is now only a legal right not a fundamental right. We have also to see the rights of animals in that perspective as well.

66. Rights guaranteed to the animals under Sections 3, 11, etc. are only statutory rights. The same have to be elevated to the status of fundamental rights, as has been done by few countries around the world, so as to secure their honour and dignity. Rights and freedoms guaranteed to the animals under Sections 3 and 11 have to be read along with Article 51A(g)(h) of the Constitution, which is the magna carta of animal rights.

69. Speciesism as a concept coined by Richard Ryder in his various works on the attitude to animals, like Animal Revolution, Changing Attitudes towards Speciesism (Oxford: Basil Blackwell, 1989), Animal Welfare and the Environment (London: Gerald Duckworth, 1992) etc. Oxford English Dictionary defines the term as "the assumption of human superiority over other creatures, leading to the exploitation of animals". Speciesism is also described as the widespread discrimination that is practised by man against the other species, that is a prejudice or attitude of bias towards the interest of members of one's own species and against those of members of other species. Speciesism as a concept used to be compared with Racism and Sexism on the ground that all those refer to discrimination that tend to promote or encourage domination and exploitation of members of one group by another. One school of thought is that Castism, Racism and Sexism are biological classification, since they are concerned with physical characteristics, such as, discrimination on the ground of caste, creed, religion, colour of the skin, reproductive role etc. rather than with physical properties, such as the capacity for being harmed or benefited.

70. We have got over those inequalities like Castism, Racism, Sexism etc. through Constitutional and Statutory amendments, like Articles 14 to 17, 19, 29 and so on. So far as animals are concerned,Section 3 of the Act confers right on animals so also rights under Section 11 not to be subjected to cruelty. When such statutory rights have been conferred on animals, we can always judge as to whether they are being exploited by human-beings. As already indicated, an enlightened society, of late, condemned slavery, racism, castism, sexism etc. through constitutional amendments, laws etc. but, though late, through PCA Act, Parliament has recognized the rights of animals, of course, without not sacrificing the interest of human beings under the Doctrine of necessity, like experiments on animals for the purpose of advancement by new discovery of physiological knowledge or of knowledge which will be useful for saving or for prolonging life or alleviating suffering or for combating any disease, whether of human beings, animals or plants and also destruction of animals for food under Section 11(3) of the PCA Act. Legislature through Section 28also saved the manner of killing of animals in the manner prescribed by religions, those are, in our view, reasonable restrictions on the rights enjoyed by the animals under Section 3 read with Section 11(1). Evidently, those restrictions are the direct inevitable consequences or the effects which could be said to have been in the contemplation of the legislature for human benefit, since they are unavoidable. Further, animals like Cows, Bulls etc. are all freely used for farming, transporting loads etc., that too, for the benefit of human beings,

thereby subjecting them to some pain and suffering which is also unavoidable, but permitted by the Rules framed under the PCA Act.

NON-ESSENTIAL ACTIVITIES:

71. We have, however, lot of avoidable non-essential human activities like Bullock-cart race, Jallikattu etc. Bulls, thinking that they have only instrumental value are intentionally used though avoidable, ignoring welfare of the Bulls solely for human pleasure. Such avoidable human activities violate rights guaranteed to them under Sections 3 and 11 of PCA Act. AWBI, the expert statutory body has taken up the stand that events like Jallikattu, Bullock-cart race etc. inherently involve pain and suffering, which involves both physical and mental components, including fear and distress. Temple Grandin and Catherine Johnson, in their work on "Animals in Translation" say:

"The single worst thing you can do to an animal emotionally is to make it feel afraid. Fear is so bad for animals I think it is worse than pain. I always get surprised looks when I say this. If you gave most people a choice between intense pain and intense fear, they'd probably pick fear." Both anxiety and fear, therefore, play an important role in animal suffering, which is part and parcel of the events like Jallikattu, Bullock-cart Race etc..

RIGHT TO LIFE:

72. Every species has a right to life and security, subject to the law of the land, which includes depriving its life, out of human necessity. Article 21 of the Constitution, while safeguarding the rights of humans, protects life and the word "life" has been given an expanded definition and any disturbance from the basic environment which includes all forms of life, including animal life, which are necessary for human life, fall within the meaning of Article 21 of the Constitution. So far as animals are concerned, in our view, "life" means something more than mere survival or existence or instrumental value for human-beings, but to lead a life with some intrinsic worth, honour and dignity. Animals' well-being and welfare have been statutorily recognised under Sections 3 and 11of the Act and the rights framed under the Act. Right to live in a healthy and clean atmosphere and right to get protection from human beings against inflicting unnecessary pain or suffering is a right guaranteed to the animals under Sections 3 and 11 of the PCA Act read with Article 51A(g) of the Constitution. Right to get food, shelter is also a guaranteed right under Sections 3 and 11 of the PCA Act and the Rules framed thereunder, especially when they are domesticated. Right to dignity and fair treatment is, therefore, not confined to human beings alone, but to animals as well. Right, not to be beaten, kicked, over-ridder, over-loading is also a right recognized by Section 11 read withSection 3 of the PCA Act. Animals have also a right against the human beings not to be tortured and against infliction of unnecessary pain or suffering. Penalty for violation of those rights are insignificant, since laws are made by humans. Punishment prescribed in Section 11(1) is not commensurate with the gravity of the offence, hence being violated with impunity defeating the very object and purpose of the Act, hence the necessity of taking disciplinary action against those officers who fail to discharge their duties to safeguard the statutory rights of animals under the PCA Act."

19. Their lordships of the Hon'ble Supreme Court in the case of ***Shakti Prasad Nayak vs. Union of India & ors.,*** reported in ***(2014) 15 SCC 514,*** have restrained State of West Bengal from taking any step to administer any kind of contraceptives or introducing any method of sterilization which hinders natural procreative process of elephants or any wildlife. It has been held as follows:

"17. At this juncture, we are obliged to take note of the submission made by Mr. Tapesh Kumar Singh, learned counsel appearing for State of Jharkhand that State of West Bengal has decided to take a regressive step by introducing contraceptives so that the elephants do not procreate and consequently the accidents of the present nature are avoided. If it is so, it is absolutely impermissible and also condemnable. Mr. Avijit Bhattacharjee, learned counsel appearing for the State of West Bengal shall take instructions in this regard and file an affidavit of the competent authority. However, as advised at present, we restrain the authorities of the State of West Bengal from taking any steps to administer any kind of contraceptives or introducing any method of sterilization which hinders natural procreative process of the elephants or any wildlife."

20. It is evident from the combined reading of Articles 48 and 51-A(g) of the Constitution of India that the citizen must show compassion to the animal kingdom. The animals have their own fundamental rights. Article 48 specifically lays down that the State shall endeavour to prohibit the slaughter of cows and calves, other milch and draught cattle. This Court has issued numerous directions to the respondents on 7.10.2014, 8.1.2015, 2.5.2015, 14.10.2015 and 2.3.2016 in this regard.

21. In sequel to the directions issued by this Court on 2.3.2016, the Superintendent of Police, Kangra at Dharamshala has filed the affidavit. According to the averments contained in the affidavit, FIR No. 332/2015 dated 14.10.2015, FIR No. 346/2015 dated 24.10.2015, FIR No. 354/2015 dated 2.11.2015, FIR No. 238/2015 dated 22.11.2015, FIR No. 105/2014 dated 28.12.2014, FIR No. 112/2015 dated 3.12.2015, FIR No. 45/2015 dated 12.3.2015 and FIR No. 103/2015 dated 21.4.2015 have been registered under Section 11 of Prevention of Cruelty to Animals Act, Sections 279, 336, 337 and 429 IPC and Section 187 M.V. Act against the accused. The challans have also been presented in the Courts. The Superintendent of Police, Kangra has undertaken to comply with the directions issued by this Court from time to time in letter and spirit.

22. The Superintendent of Police, Police District Baddi, Distt. Solan, has also filed the affidavit. According to the averments contained in the affidavit, all the SHOs and IOs in the Police district have been directed to keep strict vigil to trace persons who abandon their animals and to take action against them according to the directions issued by this Court. FIR No. 18/15 dated 15.4.2015 has been registered under Section 429 IPC and Section 11 of Prevention of Cruelty to Animals Act, 1960 and Section 8 of the H.P. Prohibition of Cow Slaughter Act, 1979 at Ramshehar and two accused were arrested. The charge sheet has been filed on 2.4.2016. One FIR No. 80/2016 dated 2.4.2016 stood registered with PS Baddi under Section 11(1) (D) of Prevention of Cruelty to Animals Act, 1960 and three persons were arrested. Challan has been filed in the Court of JMIC, Nalagarh on 25.4.2016. Two stray cows were handed over to "Gaushala" at Satiwala-Barotiwala and entry to this effect was made in daily diary vide entry No. 34 dated 30.3.2015 and daily diary No. 33 dated 24.4.2015 at Police Station Barotiwala.

23. The Superintendent of Police, Sirmaur at Nahan has filed an affidavit. According to the averments contained in the affidavit, directions have been issued to the Police functionaries especially at district entry and exit points to ensure that no kind of violation of Transportation of Animals Rules takes place in the district and is being ensured through the SHOs regularly. During the year 2015, total 13 cases have been registered in district Sirmaur against the violators/offenders under the various sections of IPC, Prevention of Cruelty to Animals Act, 1960, H.P. Prohibition of Cow Slaughter Act, 1979 and H.P. Police Act, 2007. 12 cases have been presented in the Court, out of which one case has been decided and 11 cases are pending trial.

24. The Superintendent of Police, Kullu has also filed an affidavit in pursuance to the directions issued by this Court. According to the averments contained in the affidavit, strict vigil is being kept in his district on the defaulters/violators of rules for the transportation of

animals. Naka/Patrolling parties and officials have been deputed for traffic duty and briefed/instructed regularly to keep strict vigil in the area.

25. The Superintendent of Police, Hamirpur has also filed an affidavit in pursuance to the directions issued by this Court. According to the averments contained in the affidavit, it was found that 14 cows and calves were being transported in a truck without following the rules for transportation of animals. Three violators have been booked under Section 114/115 of H.P. Police Act, 2007 and cows and calves have been released from the truck. No case of slaughtering, cause or cause to be slaughtered, or offer, or cause to be offered for slaughter, any cow/calf has come into the notice of the police in his district.

26. The Superintendent of Police, Kinnaur District at Reckong Peo has filed an affidavit. According to the averments contained in the affidavit, strict vigil is being kept on the defaulters/violators in the District. Two cases were registered against the defaulters and FIR Nos. 63/2014 and 8/2016 have been registered and challans have been put up in the Court.

27. The Superintendent of Police, Lahaul Spiti at Keylong has also filed an affidavit in pursuance to the directions issued by this Court. According to the averments contained in the affidavit, the SHOs, IOs and field functionaries have been directed to maintain strict vigil on all vehicles in which animals and poultry are being transported as per the transport of Animal Rules, 1978.

28. According to the affidavit filed by the Superintendent of Police, Una, 10 cases were registered in the district under the Prevention of Cruelty to Animals Act, 1960. No case was registered under Section 11 D of Prevention of Cruelty to Animals Act, 1960 till the date of filing of the affidavit.

29. The Superintendent of Police, Shimla has also filed an affidavit. According to the averments contained in the affidavit, necessary directions have been issued to the subordinate functionaries as per the orders passed by this Court. FIR No. 6/2016 PS Sunni and another FIR No. 37/2016 was registered at PS Dhalli under Prevention of Cruelty to Animals Act, 1960. The final report has been presented before the trial Court.

30. The Superintendent of Police, Solan has also filed an affidavit. According to the averments contained in the affidavit, one FIR was registered at PS Arki and another at Darlaghat and charge sheet has been filed.

31. The Superintendent of Police, Chamba, has also filed an affidavit. According to the averments contained in the affidavit, FIRs have been registered against the accused under the Prohibition of Cow Slaughter Act, 1979. The in-charge of traffic check posts/barriers have been directed to comply with the directions issued by this Court.

32. According to the affidavit filed by the Superintendent of Police, Mandi, the orders passed by this Court were circulated to all the supervisory officers. The directions were issued to remove stray animals from the National Highway and make arrangements for their transportation to nearest "Gaushalas" to ensure safe, free and smooth flow of traffic. 11 cases have been registered under the provisions of Section 11 of Prevention of Cruelty to Animals Act, 1960 and Sections 289 and 429 IPC.

33. All the Superintendents of Police throughout the State of Himachal Pradesh are directed to comply with the directions issued by this Court from time to time in letter and spirit and to ensure timely presentation of challans before the Courts of law.

34. In the affidavit filed by the Deputy Commissioner, Una, in sequel to directions issued by this Court on 2.3.2016, it is reported that all the BDOs in Una District have been appointed as Nodal Officers to expedite the construction work of each "Gaushala". A meeting was convened on 10.3.2016 by the Deputy Commissioner. The meeting was again convened on 21.3.2016 in which the Executive Officer, Municipal committee, Una, Mehatpur and Gagret were

directed to complete the construction work of gausadans within three months as per the directions issued by this Court. The meeting was also convened on 7.4.2016 by the Deputy Commissioner, Una in which SDO(C) Amb was directed to transfer the land for the establishment of new Gausadan and also ensure its construction work to be done expeditiously. A detailed report was sought from the District Revenue Officer, Una and in total 92 cases, land has been transferred for the construction of New Gausadan in Distt. Una and no case is pending with him. The Secretary, Nagar Panchayat Daulatpur Chowk had also identified the land for establishment of Gausadan. He has intimated on 10.5.2016 that the land has been identified by him at Gram Sabha Gondpur Banehra Lower and Gram Sabha Nangal Jarialan for establishment of new Gausadan and NOC has also been received by him from the concerned Gram Panchayat. The proposal of land transfer for establishment of new Gausadan at Nagar Panchayat, Daulatpur Chowk would be put up shortly to him. Now, as far as Gausadan at Gagret is concerned, land has already been transferred vide order dated 10.12.2015. According to the affidavit, there was need for new Gausadan at Santokhgarh as the existing Gausadan has limited capacity of 110 animals. The Executive Officer, MC Santokhgarh is directed to identify the land for establishment of new Gausadan in the adjoining Panchayat Chhatterpur, PO Santokhgarh. Zila Parishad, Una has sanctioned Rs. 2,00,000/- and Rs. 3,00,000/- for each gosadan respectively. There would be one gausadan at each Municipal Committee level and about 4-5 gausadans at Block Level. Out of the 4-5 gausadans, there will be one master gausadan at Block level. The Veterinary Doctor is directed to visit each gausadan on weekly basis as well as on need basis. A society is also being constituted under the control of government functionary for the proper functioning of gausadan in which facility of open membership and donation in kind would be made. It has also been stated that the Executive Officer, MC Una has intimated that five kanals of land has been transferred in the name of Urban Development Department at Village Samoor Kalan Doem for establishment of new gausadan and the construction work is in progress since 2.5.2016.

35. The Court appreciates the sincere efforts made by the Deputy Commissioner, Una towards implementation of directions issued by this Court from time to time in letter and spirit. The model visualized in the affidavit providing one gausadan at the Municipal Committee level and 4-5 gausadans at Block Level and setting up of society should be adopted by all the Deputy Commissioners in the State of Himachal Pradesh. The Deputy Commissioner, Una is directed to ensure that the land is transferred in remaining cases expeditiously and the gausadans are constructed within a period of six months from today. The construction of gausadans in the Municipal Councils within Una district be also completed within three months from today. The Court also appreciates the release of funds by Zila Parishad Una amounting to Rs. 5,00,000/- for the construction of gausadans. The Deputy Commissioners throughout the State shall also ensure that at least there is one master gausadan at block level. The Deputy Commissioner Una is also directed to ensure that sufficient funds are released for the upkeep of cows as well as stray cattle by providing them sufficient fodder, water etc.

36. The Deputy Commissioner, Lahaul and Spiti has also filed an affidavit. According to him, 41 Panchayats of the district have submitted resolutions to the effect that no stray cattle exist in the entire district. According to the meetings convened on 29.2.2016 and 24.5.2016 there was no need of gausadan/gaushala/shelter in Lahaul & Spiti. However, the Veterinary Institutions have been directed to maintain separate OPD register of sick stray cattle and to report cases in monthly progress report separately. Thus, it is evident that there is a problem of stray cattle in Lahaul & Spiti. The Deputy Commissioner, Lahaul & Spiti is directed to ensure to construct at least one shelter in each Block to house stray cattle.

37. The Deputy Commissioner, Bilaspur has also filed an affidavit. According to him, an amount of Rs. 60,00,000/- has been released as second installment for the construction of gausadans at six places i.e. Rs. 10,00,000/- for each gausadan. The funds for construction of gausadans at Balghad and Balhseena has been released from Sh. Baba Balak Nath Temple Trust on 28.1.2016 whereas funds have been released for Talli, Kuthera, Ranikotla and Barmana from Sh. Naina Devi Ji Temple Trust on 15.3.2016. A sum of Rs. 1,16,47,800/- has already been

released for construction of six new gausadans in the district. A sum of Rs. 5,00,000/- has been released for enhancing the capacity of existing gausadan at Padyalag. BDO, Jhandutha has intimated that construction of gausadan at Balghar is in progress. He has been directed to complete the work at Balghar by June, 2016. BDO Jhandutha has intimated that work of construction of gausadan at Balhseena is in progress. BDO, Sadar has intimated that work of construction of gausadan at Ranikotla has been completed and boundary wall work and construction of shed is in progress. He has further informed that site development work of Barmana (Lagat) is in progress. BDO, Shri Naina Devi Ji has informed that the construction of gausadan work at Talli is in progress. BDO, Ghumarwin has intimated that construction of gausadan work is in progress.

38. Now, as far as M.C. Bilaspur is concerned, the Executive Officer concerned has intimated that tender for conversion of Municipal pond building situated near sabji mandi complex Bilaspur to gausadan has been invited and the process for obtaining no objection certificate from the concerned department is in progress. There will be a direction to complete the work within six months from today. Similarly, the Deputy Commissioner shall ensure that the construction of gausadan at Ghumarwin is undertaken at the earliest by identifying the land and also to obtain all the no-objections from the concerned departments. Gausadan at Nagar Panchayat Talli be completed at the earliest and not later than three months.

39. The Deputy Commissioner, Bilaspur is directed to ensure that the construction work of gausadans in the district are completed expeditiously within three months from today, including taking up of steps for enhancing the capacity of existing gausadans as undertaken in the affidavit.

40. The Deputy Commissioner, Mandi has also filed an affidavit. According to him, there were 32 cluster points identified and six gausadans were made functional. Thus, total gausadans in the district are 15. The process of opening new gausadans, as mentioned in the affidavit, be completed within a period of six months. The process of transferring forest land in the name of Panchayati Raj Department be also completed at the earliest. The authorities concerned are directed to ensure release of sufficient funds to facilitate the transfer of forest land to the Panchayati Raj Institutions. 690 stray cattle have been treated and 155 number of awareness camps have been organized. The Court appreciates the efforts made by the Deputy Commissioner, Mandi for the construction of gausadans.

41. The Deputy Commissioner, Kullu, in his affidavit has averred that the District Administration has received proposal from 106 out of total 204 Gram Panchayats to construct gausadans. The Government of HP has declared District Panchayat Officer, Kullu as User Agency to move and process all cases of diversion of forest land for non-forestry purposes. The Deputy Commissioner has undertaken to provide necessary microchip in all the animals throughout the district. The process for transfer of land has also been undertaken. There are seven gausadans in the district. The Zila Parishad Kullu has sanctioned a sum of Rs. 64,45,000/- for the up-gradation and construction of gausadans at Bandrol, Bajaura, Chanaun, Kararsu, etc. The construction work has been completed at Kungash. A sum of Rs. 5,00,000/- has been sanctioned for construction of gausadan at Dalash. The land has been transferred in the name of Panchayat. Rs. 18,00,000/- have been sanctioned for the construction of gausadan at Chanon. The Deputy Commissioner, Kullu is directed to ensure the completion of construction work at Chanon and Dalash within six months from today.

42. According to the averments contained in the affidavit filed by Deputy Commissioner, Shimla, in compliance to the order dated 2.3.2016, Sub-Committee has submitted the latest status report. The revenue papers of seven selected places have been sent to BDO, Jubbal, Chhohara, CEO Nagar Parishad Rohru. The Deputy Commissioner, Shimla is directed to ensure that the revenue papers are completed, the land is transferred and gausadans are constructed at Purana Jubbal, Chanderpur, Sheeladesh, Disbani, Sundha Bhonda, Thalli Jangla, Barada, Pujarli No. 3, Dhara and Knevara. A meeting of Sub-Divisional Level Committee, Chopal

was held on 30.5.2016. The Chairman apprised the members that left over cases of FRA of 20 Panchayats received from BDO Chopal have been sent to the Deputy Commissioner, Shimla for NOC and joint inspection of selected land for the construction of gausadans. The Deputy Commissioner, Shimla is directed to issue NOCs within a period of 4 weeks, if not already granted.

43. The meeting was held under the Chairmanship of SDM Theog on 7.5.2016. The Chairman informed that as per the directions issued by this Court, four gausadans in each block are to be constructed on priority basis. In GP Sainj, Deothi, Kot Shillaroo and Dhar Kandroo of Theog Block and representative of BDO Jubbal and Kotkhai told that in GP Deori Khaneti and Premnagar, gausadan will be constructed on priority basis. The Deputy Commissioner, Shimla is directed to ensure that as per para (IV) of the affidavit, gausadans are constructed on priority basis within a period of six months from today.

44. The meeting of Sub Committee Shimla (Rural) was held on 12.5.2016 wherein directions were issued to the concerned BDOs to expedite the process of land transfer cases concerning gausadans. In Block Mashobra, three gausadans are functional while construction work of gausadan is in progress at GP Chedi. In Development Block Mashobra in 38 Gram Panchayats, land has been selected while in rest 7 Gram Panchayats, selection process is in progress. The Deputy Commissioner, Shimla is directed to ensure that the gausadan at Gram Panchayat Chedi be constructed within six months. Similarly, gausadans be also constructed in Block Mashobra where the land has been identified. Now, as far as 7 Gram Panchayats where the selection process is in progress, the Deputy Commissioner, Shimla shall ensure that the land is identified expeditiously.

45. The Deputy Commissioner, Kangra has averred in the affidavit that the Sub Divisional Officer (C), Dharamshala has submitted that two new sheds are complete in GP Sarah with the capacity to house about 80 stray cattle. The gausadan at Attarian in tehsil Indora is functional. Shri Ram Gopal Mandir Trust Damtal is also functional. Similarly at Khajjian, Private Mahadav Gausadan Centre gausadans are functional and at Mahal Chakwan Khanni, gausadan work is in progress. At Sub Division Dehra, land has been transferred and Rs. 6,00,000/- was sanctioned for the construction of gausadan at GP Muhal. The construction work has been completed except the roof work, for which the balance amount of Rs. 2,00,000/- have been sanctioned. The Deputy Commissioner, Kangra is directed to ensure that the construction is completed within three months.

46. The land for the construction of gausadan in MC area Dehra has also been identified. The Deputy Commissioner, Kangra is directed to ensure that the gausadan is completed within six months after completing all the codal formalities. The construction work of gausadan at Jijjal is in progress. The work be completed within a period of six months from today.

47. In Sub Division Palampur, two sheds have been constructed by the Society and an amount of Rs. 6,00,000/- has been spent. In Sub Division Kangra, now since the land has been transferred to the Urban Development Department, the construction of gausadan shall be completed within a period of six months. The Deputy Commissioner, Kangra is directed that in those cases where the land has already been transferred as per para (G) of the affidavit, the construction be completed within six months from today and in those cases where the land has not been transferred, the same be transferred within three months and thereafter construction be completed within six months. The Deputy Commissioner, Kangra is also directed to ensure the completion of construction of gausadans at Sub Divisions Jaisinghpur, Jawali and Baijnath within a period of six months from today.

48. The Deputy Commissioner, Sirmaur at Nahan has also filed an affidavit. As per the affidavit, the contouring, building plan and estimate of the proposed gausadan at Nauni-ka-bag, Nahan has been prepared and construction work of the gausadan is being started soon. The concerned authorities are directed to complete the work within three months. The

construction of gausadan at Rajgarh be also completed within six months since the land has already been identified. There are 228 Gram Panchayats in the district. The work of cattle registration in 228 Gram Panchayats has been completed. The construction work is in progress in 41 Gram Panchayats. In 10 Gram Panchayats, construction of gausadans has been completed. The land for construction of gausadans in 174 Gram Panchayats has been identified. The Deputy Commissioner, Sirmaur is directed to ensure the construction of gausadans in the remaining Gram Panchayats within three months where the land has been identified and in the Gram Panchayats where the land has not been identified, it be done within six months from today. The Deputy Commissioner Sirmaur is also directed to constitute a Committee to ensure the early transfer of land for the construction of gausadans in his district. The members of the Committee shall expedite the process of transfer of land.

49. According to the affidavit filed by the Deputy Commissioner, Hamirpur, meeting of Sub-Committee, Sujanpur under the Chairmanship of SDM Sujanpur was held on 26.4.2016. The SDM Sujanpur informed that the land has been transferred in 23 cases and in one case land transfer is in progress. The Deputy Commissioner, Hamirpur is directed to ensure that the construction of gausadan is undertaken in all the 23 cases and completed within six months and in remaining one case land is transferred and construction of gausadan is completed within six months.

50. The meeting of Sub-Committee under the Chairmanship of SDM Barsar was held on 23.5.2016. The representative of SDM Barsar informed that land has been transferred in 43 cases, 6 cases of land transfer are under process. In those cases where the land has already been transferred construction be completed within three months and sufficient funds are made available. In six cases, land transfer cases be expedited.

51. The SDM Nadaun informed that the land has been transferred in 49 cases and 10 cases of land transfer are under process. The Deputy Commissioner, Hamirpur is directed to ensure construction of gausadans in those cases where the land has already been transferred within six months and in those cases where the land transfer is in process, the same be done expeditiously.

52. The meeting of Sub Committee under the Chairmanship of SDM Bhoranj was held on 27.4.2016 wherein it was informed that in 30 cases land has been transferred and in 8 cases it is in process. The Deputy Commissioner, Hamirpur is directed to ensure construction of gausadans in those cases where the land has already been transferred within six months and in those cases where the land transfer is in process, the same be done expeditiously.

53. The meeting of Sub Committee under the Chairmanship of SDM Hamirpur was held on 27.4.2016 wherein it was informed that in 47 cases land has been transferred and in 16 cases it is in process. The Deputy Commissioner, Hamirpur is directed to ensure construction of gausadans in those cases where the land has already been transferred within six months and in those cases where the land transfer is in process, the same be expedited and thereafter the construction of gausadans be completed within six months. The Chief Secretary to the State of Himachal Pradesh is also directed to facilitate the release of amount from the 14th Finance Commission.

54. The Deputy Commissioner, Chamba has filed the affidavit in sequel to the directions issued by this Court on 2.3.2016. As per the affidavit, the land measuring 2312 sq. yards in Mohal Chamba was identified for the construction of gausadan. A sum of Rs. 5.50 lac was utilized for the construction. At MC Dalhousie, a sum of Rs. 5,00,000/- has been sanctioned for the construction of gausadan, however, the land could not be transferred. The Deputy Commissioner, Chamba is directed to ensure early transfer of land for the construction of gausadan at MC Dalhousie within a period of six months.

55. The construction of gausadan at GP Salooni has been completed. The land for the construction of gausadan in GP Bhalei has been identified. The codal formalities be

completed for the transfer of forest land and thereafter construction of gausadan be completed within six months.

56. Now, as far as construction of gausadan at Tissa is concerned, the leveling work of the land selected for gausadan in GP Gadfari has been completed. An amount of Rs. 4,00,000/- was sanctioned out of which an amount of Rs. 2,00,000/- has been released to GP Gadfari for the construction of gausadan. The process of construction be completed within a period of six months positively.

57. The gausadan at Sihuntha has been completed. The construction work of gausadan in Mohal Gulahar, GP Turkara near Chowari be completed within a period of three months from today. Similarly, the gausadan at GP Parchhore and at Mohal Hatli, GP Tunuhatti near Nainikhad be also completed within six months from today.

58. The construction of gausadan at Lahal, GP Khanni after getting the land transferred be completed within three months from today. Similarly, construction work/land transfer for the construction of gausadans at GP Bhanota, GP Janghi, GP Mehla, GP Baloth, GP Bharian Kothi be completed within a period of six months from today. The Court places its appreciation for the early construction of gausadans at GP Janghi, GP Mehla, GP Baloth and GP Bharian Kothi. The construction work at Sub Division Pangi has also been completed.

59. In the affidavit filed by Deputy Commissioner, Kinnaur, it is averred that 26 estimates for construction of gausadans have been prepared and Rs. 13,75,383/- stands released from Distt. Panchayat Office to Zila Parishad concerned in the district. The construction work of three gausadans have already been started in Sub Division Kalpa and Sub Division Nichar. The Deputy Commissioner, Kinnaur is directed to ensure the early completion of the work of construction at three places, mentioned hereinabove and also at 26 places within a period of six months from today.

60. In the affidavit filed by Deputy Commissioner, Solan, it is averred that 46-01 bigha land has been transferred for the construction of gausadans in the district. The gausadans are being set up in a cluster approach and will cater to all Panchayats in a particular cluster so that optimum cattle population is covered. An amount of Rs. 47,95,247/- has been sanctioned for the purpose. The Deputy Commissioner, Solan is directed to ensure early construction of 35 gausadans as undertaken in the affidavit, but not later than six months from today.

61. The Addl. Chief Secretary (UD) has filed the affidavit. According to the averments contained in the affidavit, all the Urban Local Bodies have already been directed on 13.8.2015 and 4.12.2015 to spend funds for the construction and maintenance of gausadans out of the funds under the 13th Finance Commission. The Animal Husbandry Department has placed the issue of stray cattle before the Cabinet in the meeting held on 11.5.2016. The matter was considered by the Cabinet. The Cabinet approved that a cluster approach may be followed for construction of gausadans considering that the capacity of State, Local bodies, NGOs etc. to construct and manage gausadans, is limited. However, this Court is of the considered opinion that taking into consideration the menace of stray cattle numbering 32,100 across the State of Himachal Pradesh, the orders passed by this Court from time to time for the construction of gausadans/gaushallas/shelters is imperative. The respective Panchayats have already taken steps for construction of gausadans/gaushallas/shelters at the grass root level. The stray cattle destroy the crops and are obstructing the smooth flow of traffic. The State Government has also not taken necessary steps for the removal of stray cattle from the National Highway which is resulting in injuries to the hapless animals and to the commuters. The paucity of funds should not come in the way of construction of gausadans/gaushallas/shelters throughout the State of Himachal Pradesh. It is the constitutional duty of the State to protect the cattle wealth by augmenting its financial capacity.

62. The MC Shimla has constructed gausadan at Boileauganj. Action taken progress made by the concerned Urban Local Bodies is highlighted in para 5 of the affidavit. The Addl.

Chief Secretary (UD) is directed to ensure that the construction of gausadns at 38 urban areas, if not already completed be completed within a period of six months from today.

63. The Deputy Secretary (PR) has filed the affidavit/status report. According to the averments made in the affidavit, a sum of Rs. 5,34,84,939/- has been released for the construction of gausadans in eleven districts.

64. The Addl. Chief Secretary (Animal Husbandry), has filed the affidavit. According to the averments made in the affidavit, treatment is being provided to sick and injured stray animals. Separate registers have been maintained in all the Veterinary Institutions for maintaining record of treatment provided to stray cattle. In the affidavit, it is reiterated that there is dearth of funds. It is the responsibility of the Department of Animal Husbandry, Dairying and Fisheries, Government of India to provide sufficient funds. The matter has already been taken up by the State Government.

65. The Department of Animal Husbandry, Dairying and Fisheries, Government of India through Secretary is directed to provide sufficient funds for the construction of gausadans in the State of Himachal Pradesh. 122 gausadans have already been constructed. The Himachal Pradesh Govansh Samverdhan Board has been constituted vide notification dated 8.2.2016. The Board is directed to formulate norms for registration of gausadans within three months from today.

66. The Chief Secretary to the State of Himachal Pradesh has also filed the affidavit. He was directed to file the status/compliance report within three months before 1.6.2016. The Chief Secretary was directed to implement broader recommendations made by the National Commission of Farmers (NCF) constituted on 18.11.2004. The matter was taken up with the Government of India. MSP is recommended by Commission (NCF) for agricultural costs and prices. The Court is not satisfied with the affidavit as to why the MSP could not be introduced for 107 commodities, as mentioned in the order dated 2.3.2016. It is always open to the State to adopt MSPs recommended by the NCF for agricultural costs and prices or at its own level. The MSP is must to protect the interest of the farmers. It is also highlighted in the affidavit that there is Market Intervention Scheme (MIS) in place which is implemented on the request of State Governments for procurement of perishable and horticultural commodities in the event of fall in market prices. There are items i.e. apple, citrus fruits like Kinnow/Malta/Santra, Galgal and Mango included therein. If there can be Market intervention Scheme for three commodities, there is no reason why there cannot be Market Intervention Scheme for 107 commodities as mentioned in the order dated 2.3.2016.

67. Accordingly, the Chief Secretary to the State of Himachal Pradesh is directed to take up the matter again with the Ministry concerned of the Government of India for declaring MSP for 107 commodities and till then, the State Government is directed to at least formulate Market Intervention Scheme for 107 commodities as per order dated 2.3.2016. There can also be price regulation fund which is in vogue for onion and potatoes. The matter shall be taken up by the Chief Secretary to the State of Himachal Pradesh directly with the Commission for Agricultural Costs and Prices (CACP), Government of India within six weeks from today.

68. The compounded annual growth rates (CAGR) in nominal as well as real incomes (deflated by state specific CPI-AL) of farmer households during 2002-03 to 2012-13 is as under:

> " In 2012-13, an average Indian farmer's monthly income was Rs 6,426. Punjab's farmers had the highest income at Rs 18,059, followed by those in Haryana (Rs 14,434), Jammu & Kashmir (Rs 12,683) and Kerala (Rs 11,888). Bihar's farmers earned the least, with their monthly incomes averaging Rs 3,558.
>
> * The CAGR of farmers' nominal incomes between 2002-03 and 2012-13 was 11.8 per cent at an all-India level. Within this, Haryana registered the highest growth (17.5 per cent) and West Bengal the lowest (6.7 per cent).

> * In real income terms, Odisha emerged as the top performer with a CAGR of 8.3 per cent, closely followed by Haryana (8 per cent), Rajasthan 7.9 (per cent) and Madhya Pradesh (7.3 per cent), as against a national average of 3.5 per cent. The worst performers were Bihar and West Bengal, with negative real growth rates in their farmers' incomes.
>
> * Coming to sources of farmers' income, the share from cultivation rose from 45.8 per cent in 2002-03 to 47.9 per cent in 2012-13. But the share of income from farming of animals was the one that grew the most, from 4.3 per cent to 11.9 per cent, while the contribution from both non-farm business and wages & salaries declined over this period. Thus, the highest growth was registered in receipts from livestock farming. And this was true, especially in states that showed overall higher real income growth rates."

69. The State Government should also implement the Pradhan Mantri Krishi Sinchayee Yojana (PMKSY) in letter and spirit in order to ensure water to every farm ("har khet ko paani").

70. The Court has also directed to constitute the State Agriculture Commission. It has been specifically undertaken in the affidavit that the same is under active consideration of the State Government. The Chief Secretary to the State of Himachal Pradesh is directed to ensure that the State Agriculture Commission is constituted, notified and made functional within a period of three months positively.

71. The State Government is also directed to implement Pradhan Mantri Fasal Bima Yojana (PMFBY) in letter and spirit to provide better insurance cover. The State Government has only covered Maize and Paddy in Kharif and Wheat and Barley in Rabi under the cover. The other crops be also included in Pradhan Mantri Fasal Bima Yojana (PMFBY). The State Government is also directed to scrupulously implement Weather Based Crop Insurance Scheme (WBCIS) for all the crops in the State of Himachal Pradesh. The Pradhan Mantri Fasal Bima Yojana (PMFBY) is laudable step and must be implemented in letter and spirit to mitigate the hardship faced by the farmers.

72. Now, as far as waiver of loans to the small and marginal farmers is concerned at least up to Rs. 50,000/- (rupees Fifty thousand) according to the affidavit filed, the directions were issued to General Manager and Convener State Level Bankers Committee (SLBC) on 21.4.2016. The Convener Bank informed that the meeting was likely to be held in the month of June, 2016. The General Manager and Convener State Level Bankers Committee (SLBC) is directed to decide the issue within a period of three months from today, if not already decided.

73. This Court has also suggested the Union of India to enact the law prohibiting slaughtering of cow/calf, import or export of cow/calf, selling of beef or beef products, in its wisdom, at national level within three months. The Union of India has filed an affidavit. According to the averments made in the reply/affidavit, the subject falls within entry No. 15 of the State List. It is also stated in the reply/affidavit that the only five States and one Union Territory have no legislation on the subject, however, Union of India has not taken into consideration entry No. 17 and 17B of the Concurrent List. It is open for the Union of India to enact law at the national level prohibiting slaughtering of cow/calf, import or export of cow/calf, selling of beef or beef products under entry No. 17 of the Concurrent List. Accordingly, the directions issued by this Court on 14.10.2015 to Union of India to enact law prohibiting slaughtering of cow/calf, import or export of cow/calf, selling of beef or beef products, at the national level, are reiterated. The necessary steps be taken within six months from today. A copy of this order be also sent to the National Law Commission for its kind perusal.

74. The Chief Secretary to the Government of Himachal Pradesh is directed to ensure release of sufficient funds for the construction of gausadans.

75. The Writ Petition is disposed of with the mandatory directions issued hereinabove. The directions issued by this Court from time to time on 7.10.2014, 8.1.2015, 2.5.2015, 14.10.2015 and 2.3.2016, shall also form integral part of this judgment. Pending application(s), if any, shall stand disposed of.

76. The description of farmer has aptly been described by the American Poet Edwin Markham's poem ***"The Man with the Hoe".*** This poem was called "the battle-cry of the next thousand years" and translated into 37 languages. We quote:

> "……Bowed by the weight of centuries he leans
>
> Upon his hoe and gazes on the ground,
>
> The emptiness of ages in his face,
>
> And on his back the burden of the world………"
>
> "The cow and the working bullock have on their patient back the whole structure of Indian agriculture." (Report on the Marketing of Cattle in India, p. 20).
>
> गौर अहन्या भवति/ न हिंसितव्या/ न हिंसितव्या/
>
> यः कश्चिद् गां हिनस्ति महापातकी भवति/

****

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

ICICI Lombard General Insurance Co. Ltd. …Appellant.
Versus
Smt. Bimla Devi and others …Respondents.

FAO No. 427 of 2011
Decided on: 29.07.2016

Motor Vehicles Act, 1988- Section 166- Deceased was a student and was also working as a Supervisor with the Govt. Contractor who appeared in the witness box and stated that he was paying Rs. 8,000/- per month to the deceased as salary- deceased was a bachelor and 50 % amount was to be deducted towards his personal expenses—claimants had suffered loss of dependency of Rs. 4,000/- per month- deceased was 21 years of age- multiplier of '15' is applicable- claimants are entitled to Rs. 4,000/- x 12 x 15 = Rs. 7,20,000/- under the head 'loss of dependency'- Tribunal had awarded Rs. 25,000/- on account of 'love and affection' including funeral expenses, which are maintained- claimants are entitled for compensation of Rs. 7,20,000/- + Rs. 25,000/- = Rs. 7,45,000/- along with interest @ 7.5% per annum from the date of the claim petition till its realization. (Para-9 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 appellant: Mr. Jagdish Thakur, Advocate.
For the respondents: Mr. Dheeraj Kumar, Advocate, for respondents No. 1 and 2.
Mr. Monal, 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 26th May, 2011, made by the Motor Accident Claims Tribunal (1st), Solan, District Solan, H.P. (for short "the Tribunal") in Petition No. 62-S/2 of 2009, titled as Smt. Bimla Devi and another versus Sh. Phulena Yadav and others, whereby compensation to the tune of ₹ 11,05,000/- with interest @ 7.5% per annum from the date of the petition till its realization and the insurer was saddled with liability (for short "the impugned award").

2. The claimants, the owner-insured and the driver of the offending vehicle have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. The appellant-insurer has called in question the impugned award on the grounds taken in the memo of the appeal.

4. Learned counsel for the appellant-insured argued that another claim petition arising out of the same accident, being Claim Petition No. 44-S/2 of 2009, titled as Balak Ram and another versus Gullu Transport Company and another, was filed before the Motor Accident Claims Tribunal, Shimla, District Shimla, H.P., whereby compensation to the tune of ₹ 6,32,000/- with interest @ 9% per annum from the date of filing of the claim petition till deposit was awarded and the insurer was directed to satisfy the award with right of recovery. The said award was subject matter of FAO No. 517 of 2015, titled as ICICI Lombard Motor Insurance versus Sh. Balak Ram Chauhan and others, came to be determined by this Court vide judgment and order, dated 15th July, 2016, in terms of which the claimants were held entitled to compensation to the tune of ₹ 6,06,000/- with interest @ 7.5% per annum and it was held that the Tribunal has rightly saddled the insurer with liability with right of recovery. Further argued that in this case also, right of recovery was to be granted, which has not been granted and the owner-insured is caught by principle of *res-judicata,* and that the amount awarded is excessive. He has made available certified copy of judgment in FAO No. 517 of 2015 (supra) across the Board, made part of the file.

5. Both the arguments of the learned counsel for the appellant-insurer are tenable and forceful for the following reasons:

6. The driver, namely Shri Phulena Yadav, had driven the truck, bearing registration No. RJ-14 GA-4122, rashly and negligently on 6th March, 2009, near Shoghi, District Shimla, caused the accident, which has given birth to two claim petitions, i.e. Claim Petition No. 44-S/2 of 2009, titled as Balak Ram and another versus Gullu Transport Company and another (subject matter of FAO No. 517 of 2015) and Claim Petition No. 62-S/2 of 2009, titled as Smt. Bimla Devi and another versus Sh. Phulena Yadav and others (subject matter of the appeal in hand).

7. This Court has already upheld the award made in the claim petition, subject matter of FAO No. 517 of 2015, so far it relates to granting of right of recovery in favour of the appellant-insurer, but, in the case in hand, right of recovery has not been granted on the ground that the insurer has not led any evidence to prove that the offending vehicle was being plied in violation of the terms and conditions of the insurance policy.

8. It is apt to record herein that this Court has upheld the right of recovery granted in favour of the insurer in a case arising out of the same accident. The parties are

governed by the doctrine of *res judicata.* Accordingly, it is held that the insurer has to satisfy the impugned award with right of recovery.

9. The deceased was a student and was also working as a Supervisor with Shri Mohan Singh Chauhan, Government Contractor, who appeared in the witness box and stated that he was paying ₹ 8,000/- per month to him as salary. Thus, there is proof on the file that the deceased was earning ₹ 8,000/- per month and while granting compensation by using multiplier method, the income, as it is proved, has to be taken into account. The deceased was a bachelor, thus 50% is to be deducted towards his personal expenses in view of the law laid down by the Apex Court in the case titled as **Sarla Verma (Smt) and others versus Delhi Transport Corporation and another,** reported in **(2009) 6 Supreme Court Cases 121,** which was upheld by a larger Bench of the Apex Court in **Reshma Kumari & Ors. versus Madan Mohan & Anr.,** reported in **2013 AIR SCW 3120.** Thus, it is held that the claimants have suffered loss of dependency to the tune of ₹ 4,000/- per month.

10. The deceased was 21 years of age at the time of the accident. The Tribunal has rightly applied the multiplier of '15' in view of **Sarla Verma's** and **Reshma Kumari's cases (supra)** read with the Second Schedule appended with the Motor Vehicles Act, 1988 (for short “MV Act”).

11. Viewed thus, the claimants are held entitled to ₹ 4,000/- x 12 x 15 = ₹7,20,000/- under the head 'loss of income/dependency'.

12. The Tribunal has awarded ₹ 25,000/- on account of loss of love and affection including funeral expenses, which is maintained.

13. Having said so, it is held that the claimants are entitled to compensation to the tune of ₹ 7,20,000/- + ₹ 25,000/- = ₹ 7,45,000/- with interest @ 7.5% per annum from the date of the claim petition till its realization and insurer is saddled with liability with right of recovery from the owner-insured.

14. Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the impugned award read with this judgment through payee's account cheque or by depositing the same in their respective bank accounts.

15. Excess amount, if any, be released in favour of the insurer through payee's account cheque.

16. Having glance of the above discussions, the impugned award is modified, as indicated hereinabove, and the appeal is disposed of accordingly.

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.

Lal Singh …..Appellant

Versus

Kamal Devi and others ….. Respondents

FAO No.24 of 2011

Date of decision: 29.07.2016

Motor Vehicles Act, 1988- Section 166- Tribunal held that claimant had failed to prove that driver of offending truck had driven the same rashly and negligently and dismissed the petition- held, that Tribunal must not succumb to the niceties and hyper technicalities of law- negligence is to be determined on the preponderance of probabilities and not on the basis of proof beyond reasonable doubt- claimants had specifically stated that accident had taken place due to negligence of the driver- mere denial of the accident is not sufficient- witnesses of the claimant prima facie established that accident was outcome of rash and negligent driving of the driver- deceased was 24 years of age- his income cannot be less than Rs. 5,000/- per month- 50% of the amount is to be deducted towards personal expenses and the loss of dependency will be Rs. 2500- multiplier of 15 is applicable- claimant is entitled to Rs. 2500x12x15 = Rs. 4,50,000/- as compensation along with interest @ 7.5% per annum from the date of filing of the claim petition till deposit. (Para-6 to 22)

Cases referred:

Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another, (2013) 10 SCC 646.
Savita vs. Bindar Singh & others, 2014 AIR SCW 2053
Sohan Lal Passi v. P.Sesh Reddy and others, AIR 1996 Supreme Court 2627
Sarla Verma (Smt.) and others vs Delhi Transport Corporation and another, AIR 2009 SC 3104
Reshma Kumari & others versus Madan Mohan and another, 2013 AIR (SCW) 3120,

For the appellant: Mr.Lalit Sehgal, Advocate.
For the respondents: Nemo for respondents No.1 and 2.
Mr.G.C. Gupta, Senior Advocate, with Ms.Meera Devi, Advocate, for respondent No.3.
Mr.Lalit K. Sharma, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 22nd December, 2010, passed by the Motor Accident Claims Tribunal(II), Mandi, District Mandi, H.P., (for short, "the Tribunal") in Claim Petition No.5 of 2001, titled Lal Singh vs. Kamal Dev and others, whereby the claim petition came to be dismissed, (for short the "impugned award").

2. Facts of the case, in brief, are that on 1.3.2000, deceased Ramesh Kumar, while driving truck bearing No.HP-24-3425, was going from Barmana to Lakhyani Baroti. When the said truck reached near Dehar, another truck bearing registration No.HP-23-3752, being driven by its driver, namely, Kamal Dev, rashly and negligent, hit the truck of deceased Ramesh Kumar, as a result of which the truck (HP-24-3425) fell down the hill, causing death of driver Ramesh Kumar, constraining his mother and father to file the Claim Petition before the Tribunal claiming compensation to the tune of 10.00 lacs, as per the break-ups given in the claim petition. During the pendency of the Claim Petition, the mother of the deceased Ramesh Kumar expired and was deleted from the array of claimants.

3. The claim petition was resisted by the respondents and following issues were framed:

"1. Whether respondent No.1 was driving truck No.HP-23-3752 on 1.3.2000 near village Dehar in a rash and negligent manner resulting in causing death of Ramesh Kumar son of the petitioner? OPP

2. If issue No.1 is proved, whether the petitioner is entitled for compensation, if so from whom? OPP

3. Whether there has been any breach of the terms and conditions of the insurance Policy? OPR

4. Whether respondent No.1 was not holding valid and effective driving license at the time of accident? OPR-3

5. Relief."

4. The claimants examined as many as five witnesses, namely, PW-1 Dr. Deepak Malhotra, PW-2 Ashwani Kumar, PW-3 Lal Singh (claimant), PW-4 Ajit Ram and PW-5 Ram Singh. Respondents also examined RW-1 Sukh Ram and RW-2 Kamlesh Kumar.

5. The Tribunal, after scanning the evidence, held that the claimant has failed to prove that the driver of the offending truck, namely, Kamal Dev, had driven the offending truck bearing No.HP-23-3752 rashly and negligently and accordingly, dismissed the claim petition.

6. The findings recorded by the Tribunal are erroneous and against the concept of granting compensation. The Tribunal, while dismissing the claim petition, seems to have applied the standard of proof required in criminal proceedings, which is against the spirit of awarding compensation in accident cases. The Tribunal has to keep in mind that the victims of a vehicular accident have to establish prima facie that the injury or the death was due to the rash and negligent driving of a motor vehicle.

7. It is beaten law of the land that the Courts, while determining the cases of compensation in vehicular accidents, must not succumb to the niceties and hyper technicalities of law. It is also well established principle of law that negligence in vehicular accident cases has to be decided on the hallmark of preponderance of probabilities and not on the basis of proof beyond reasonable doubt. Furthermore, the claimants claiming compensation in terms of Section 166 of the Motor Vehicles Act, 1988, (for short, the Act), is not to be seen as an adversial litigation, but is to be determined while keeping in view the aim and object of granting compensation.

8. My this view is fortified by the judgment of the Apex Court in ***Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another, (2013) 10 SCC 646***.

9. The Apex Court in **Savita vs. Bindar Singh & others, 2014 AIR SCW 2053,** has held that at the time of fixing compensation, courts should not succumb to niceties or technicalities of law. It is apt to reproduce paragraph 6 of the said decision hereunder:

> *"6. After considering the decisions of this Court in Santosh Devi (Supra) as well as Rajesh v. Rajbir Singh (supra), we are of the opinion that it is the duty of the Court to fix a just compensation. At the time of fixing such compensation, the court should not succumb to the niceties or technicalities to grant just compensation in favour of the claimant. It is the duty of the court to equate, as far as possible, the misery on account of the accident with the compensation so that the injured or the dependants should not face the vagaries of life on account of discontinuance of the income earned by the victim. Therefore, it will be the bounden duty of the Tribunal to award just, equitable, fair and reasonable compensation judging the situation prevailing at that point of time with reference to the settled principles on assessment of damages. In doing so, the Tribunal can also ignore the claim made by the claimant in the application for compensation with the prime object to assess the award based on the principle that the award should be just, equitable, fair and reasonable compensation."*

10. A reference may also be made to the decision of the Apex Court in **Sohan Lal Passi v. P.Sesh Reddy and others, AIR 1996 Supreme Court 2627,** in which, in paragraph 12, it was observed that the courts, while deciding claim petitions, must keep in mind that the right of the claimants is not defeated on technical grounds. Relevant portion of paragraph 12 of the said decision is reproduced hereunder:

"12. .... While interpreting the contract of insurance, the Tribunal and Courts have to be conscious of the fact that right to claim compensation by heirs and legal representatives of the victims of the accident is not defeated on technical grounds. Unless it is established on the materials on record that it was the insured who had wilfully violated the condition of the policy by allowing a person not duly licensed to drive the vehicle when the accident took place, the insurer shall be deemed to be a judgment debtor in respect of the liability in view of sub-section (1) of Section 96 of the Act. It need not be pointed out that the whole concept of getting the vehicle insured by an insurance company is to provide an easy mode of getting compensation by the claimants, otherwise in normal course they had to pursue their claim against the owner from one forum to the other and ultimately to execute the order of the Accident Claims Tribunal for realisation of such amount by sale of properties of the owner of the vehicle. The procedure and result of the execution of the decree is well known."

11. This Court also, in the recent past, in series of judgments, has followed the similar principle and held that granting of compensation is just to ameliorate the sufferings of the victims and compensation is to be granted without succumbing to the niceties of law, hyper-technicalities and procedural wrangles and tangles.

12. In the instant case, the claimant has specifically pleaded in the claim petition that the accident had taken place due to the rash and negligent driving of driver namely Kamal Dev. Respondents have denied the said factum, but mere denial is not sufficient to conclude that the offending truck was not being driven rashly and negligently at the time of accident. The claimant has examined PW-4 Ajit Ram, who has clearly stated that the driver of the offending truck No.HP-23-3752 had hit the truck being driven by deceased Ramesh Kumar, as a result of which the truck rolled down the hill resulting into the death of Ramesh Kumar. RW-2 Kamlesh Kumar, who was conductor with truck No.HP-24-3425, has stated that the driver of the offending truck, while driving the offending truck bearing No.HP-23-3752 rashly and negligently, hit the truck bearing No.HP-24-3425, as a result of which the said truck rolled down the road.

13. In addition to above, statements of PW-1 Dr.Deepak Malhotra, PW-3 Lal Singh (claimant), PW-4 Ajit Ram and PW-5 Ram Singh do establish that the deceased Ramesh Kumar had died in a vehicular accident and there is sufficient evidence on the file to prima facie conclude that the accident was the outcome of rash and negligent driving of the driver, namely, Kamal Dev (driver of truck No.HP-23-3752).

14. The Tribunal has not properly appreciated the statements of PW-4 Ajit Ram and RW-2 Kamlesh Kumar, while dismissing the claim petition. On the contrary, the statements of these witnesses do established, prima facie, that the driver, namely, Kamal Dev hit the truck being driven by deceased Ramesh Kumar, as a result of which it rolled down and driver Ramesh Kumar died on the spot.

15. Viewed thus, the findings recorded by the Tribunal on issue No.1 are set aside and it is held that the accident was the outcome of rash and negligent driving of driver, namely, Kamal Dev, who, at the relevant time, was driving truck bearing No.HP-23-3752, in which Ramesh Kumar sustained injuries and succumbed to the same.

16. Before issue No.2 is taken up, I deem it proper to deal with other issues.

17. Respondents have not led any evidence to prove that the truck bearing No.HP-23-3752 was being driven in violation of the terms and conditions contained in the insurance policy. Accordingly, the findings returned by the Tribunal on this issue are upheld.

18. It was for the respondents to plead and prove that the driver of the offending truck, namely, Kamal Dev was not having a valid and effective driving licence, has not led any evidence. Accordingly, the findings returned by the Tribunal on this issue are also upheld.

19. It is also not out of place to record herein that the findings recorded by the Tribunal on issues No.3 and 4 have not been challenged by the original respondents, either by

way of appeal or cross objections. Thus also, the findings on issues No.3 and 4 merit to be upheld and are upheld accordingly.

20. Coming to issue No.2, the factum of insurance is admitted. The deceased was 24 years of age, was driver by profession and was bachelor at the time of death. By guess work, the monthly income of the deceased cannot be said to be less than Rs.5,000/-. Since the deceased was a bachelor, as per the mandate of 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,** 50% amount has to be deducted from the income of the deceased towards his personal expenses. Thus, the monthly loss of source of dependency to the claimant can be said to be Rs.2,500/-.

21. The deceased was 24 years of age at the time of death, therefore, as per the dictum of the Apex Court in Sarla Verma's case supra and 2nd Schedule attached to the Act, multiplier of 15 is just and appropriate and is applied in the instant case.

22. In view of the above, the claimant is held entitled to Rs.2500x12x15 = Rs.4,50,000/- as compensation, with interest at the rate of 7.5% per annum from the date of filing of the claim petition till deposit.

23. Having said so, the appeal is allowed and the impugned award is set aside. Consequently, the claim petition is allowed and the insurer is saddled with the liability. The insurer is directed to deposit the compensation amount, alongwith up-to-date interest, in the Registry of this Court, within a period of eight weeks from today and on deposit, the Registry is directed to release the amount in favour of the claimant forthwith.

24. The appeal is disposed of accordingly.

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

M/s. Shanti Flats & Foundations Private Limited …Appellant.

Versus

Smt. Mitto Devi and others …Respondents.

FAO No. 413 of 2009

Decided on: 29.07.2016

Motor Vehicles Act, 1988- Section 173- It was contended that issue involved in the appeal relates only to issue No. 2 so far it relates to 'from whom' and issue No. 7 – findings recorded by the Tribunal on Issues No. 2 and 7 set aside as regards the liability with a direction to decide the issues within 12 weeks. (Para-2 to 4)

For the appellant: Mr. Neeraj Gupta, Advocate.

For the respondents: Mr. Sandeep Chauhan, Advcate, vice Mr. Karan Singh Kanwar, Advocate, for respondents No. 1 to 4.
Mr. Rupinder Singh, Advocate, for respondent No. 5.
Ms. Shashi Kiran, Advocate, for respondent No. 6.
Mr. Jagdish Thakur, Advocate, for respondent No. 7.

The following judgment of the Court was delivered:

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

Learned counsel for the appellant argued that he has wrongly mentioned the particulars of the Bank in CMP No. 4073 of 2016 as Himachal Pradesh Gramin Bank, Sarsari,

which has submitted its report and prayed that the concerned Bank be directed to give the details. Further argued that the issue involved in this appeal revolves around only to issue No. 2 so far it relates to 'from whom' and issue No. 7. His statement is taken on record.

2. Learned counsel for respondents stated that there is no ground available to the appellant to question the impugned award on these counts.

3. It appears that the learned counsel for the appellant is trying to convert this Court into a trial Court, which is not permissible as per law.

4. Keeping in view the submissions made by the learned counsel for the appellant read with the facts of the case, I deem it proper to set aside the findings recorded by the Tribunal on issue No. 7 and issue No. 2 so far it relates to as to who is to be saddled with liability with a direction to the Tribunal to decide the said issues within twelve weeks with effect from 1st October, 2016. The appellant-insured and the insurer be granted two opportunities each to lead evidence.

5. Parties to cause appearance before the Tribunal on 1st October, 2016.

6. Appellant is directed to deposit the awarded amount by or before 1st October, 2016. On deposition, the Tribunal is directed to release the said amount in favour of the claimants strictly as per the terms and conditions contained in the impugned award.

7. It is made clear that the deposition and release of the said amount shall remain subject to the outcome of the findings to be recorded by the Tribunal on the issues in dispute.

8. The impugned award so far it relates to other issues is upheld.

9. The appeal is disposed of accordingly.

10. 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.

Nagender Kumar …..Appellant

Versus

Nitu and others ….. Respondents

FAO No.44 of 2011

Date of decision: 29.07.2016

Motor Vehicles Act, 1988- Section 166 - Claim petition was dismissed by the Tribunal after holding that Claimant had failed to prove that accident was outcome of rash and negligent driving of the driver of the car- held, that there is no evidence to prove that accident was outcome of rash and negligent driving of the car- no FIR was registered regarding the accident – Tribunal had rightly recorded the findings regarding the lack of negligence of driver of the car- appeal dismissed. (Para-7 and 8)

For the appellant: Ms.Leena Guleria, Proxy Counsel.

For the respondents: Mr.Vikas Rathour, Advocate, for respondents No.1 to 4.
Mr.G.D. Sharma, Advocate, for respondent No.5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 30th September, 2010, passed by the Motor Accident Claims Tribunal(II), Mandi, District Mandi, H.P., (for short, "the Tribunal") in

Claim Petition No.120 of 2002, titled Nagender Kumar vs. Nitu and others, whereby the claim petition came to be dismissed, (for short the "impugned award").

2. Claimant Nagender Kumar filed the claim petition under Section 166 of the Motor Vehicles Act, 1988, (for short, the Act), for grant of compensation to the tune of Rs.5.00 lacs, as per the break-ups given in the claim petition.

3. The claim petition was resisted by the respondents by filing replies and issues were framed.

4. The claimant, in order to prove his case, examined PW-1 Dr.Harish Behl and PW-3 Nand Kumar. The claimant also stepped into the witness box as PW-2. Respondents examined RW-1 Harish Kumar and RW-2 Ritu Naamdhari, as witnesses.

5. The Tribunal, after scanning the pleadings of the parties and the evidence led, held that the claimant had failed to prove that the accident was the outcome of rash and negligent driving of the driver of the car and, thus, dismissed the claim petition.

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

7. There is not an iota of evidence on the record to prima facie prove that the accident was the outcome of rash and negligent driving of the driver, who was driving the car. Even no FIR was registered in regard to the accident. On the last date of hearing, the learned counsel for the appellant/claimant was asked to produce any prescription slip or medical record, which may suggest that the claimant sustained injuries in the accident and remained under treatment for the same. Today, the learned counsel for the appellant stated that the appellant is not in a position to produce any such document.

8. The pleadings and proof of rash and negligent driving is the sine qua non for maintaining the Claim Petition under Section 166 of the Motor Vehicles Act, 1988.

9. In view of the above, no fault can be found with the impugned award and the same deserves to be upheld. Accordingly, the impugned award is upheld and the appeal is dismissed.

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

FAO (MVA) No. 339 of 2011 a/w
CWP No. 6687 of 2011.
Date of decision: 29th July, 2016.

FAO No. 339 of 2011.

National Insurance Co. Ltd. .....Appellant.
Versus
Sh. Prem Singh and others .....Respondents

CWP No. 6687 of 2011.

National Insurance Co. Ltd. .....Appellant.
Versus
Sh. Prem Singh and others .....Respondents

Motor Vehicles Act, 1988- Section 166- It was contended that challan was presented against respondents No. 2 and 3 and not against respondent No. 6 and the Tribunal had erred in holding that accident was outcome of contributory negligence of respondents No. 2 and 6- held, that proof by preponderance of probabilities is required in a criminal case but prima facie proof is required in a claim petition- simply because accused/driver has been acquitted, claim petition cannot be

dismissed - drivers had parked their trucks illegally on wrong sides without switching on parking light – this led to the accident- accident was outcome of contributory negligence of both the drivers. (Para-7 to 14)

Cases referred:

Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another, (2013) 10 SCC 646
Oriental Insurance Co. versus Mst. Zarifa and others, AIR 1995 Jammu and Kashmir 81
Cholamandlan MS General Insurance Co. Ltd. Vs Smt. Jamna Devi and others, ILR 2015 (V) HP 207
Tulsi Ram versus Smt. Mena Devi and others, I L R 2015 (V) HP 557
Anil Kumar versus Nitim Kumar and others, I L R 2015 (IV) HP 445 (D.B.)
Kusum Kumari versus M.D. U.P Roadways and others, I L R 2014 (V) HP 1205
NKV Bros. (P) Ltd vs. M. karumai Ammal and others AIR 1980 SC 1354
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 608
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/Petitioner: Ms. Devyani Sharma, Advocate, for the appellant in FAO No. 339 of 2011
Mr. Lalik K. Sharma, Advocate, for the petitioner in CWP No. 6687 of 2011.

For the respondent(s): Mr. G.S. Rathour, Advocate, for respondent No.1 in FAO No. 339 of 2011.
Mr. Atul Jhingan, Advocate, for respondents No. 2 to 4 in both the appeal and writ petition.
Mr. Dharam Singh, Advocate, for respondents 5 and 6 in FAO No. 339 of 2011 and for respondent No. 6 in CWP No. 6687 of 2011.
Mr. B.M. Chauhan, Advocate, for respondent No. in both the appeals and the writ petition.
Ms. Devyani Sharma, Advocate, for respondent No. 5 in CWP No. 6687 of 2011.

The following judgment of the Court was delivered:

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

Appellant and writ petitioner have questioned the judgment and award dated 23.3.2011, made by the Motor Accident Claims Tribunal, Shimla, H.P. in MAC Petition No. 17-S/2 of 2006, titled *Sh. Prem Singh versus M/s Supper Pipe and others*, for short "the Tribunal", by the medium of FAO No. 339 of 2011 and Civil Writ Petition No.6687 of 2011, respectively, whereby compensation to the tune of Rs.8,08,000/- came to be awarded in favour of the claimants alongwith interest @ 9% per annum, with Rs.5000/- as costs, and insurers, namely, National Insurance Company and Oriental Insurance Company, came to be saddled with the liability, hereinafter referred to as "the impugned award", for short.

2. This judgment will govern both the appeal and the writ petition.

3. The claimant being the victim of the vehicular accident filed claim petition for the grant of compensation, as per the break-ups given in the claim petition, which was resisted by the respondents and following issues came to be framed by the Tribunal.

(i) *Whether the petitioner claimant has sustained injuries in question due to rash and negligent driving of vehicles No. PH-13-F-9976, PB-13-G-9976 and HP-63-0698 by their respective drivers? OPP.*

(ii) *If issue No. 1 is proved, to what amount of compensation the petitioner is entitled to and from whom? OPP*

(iii) *Whether the petition is not maintainable, as alleged? OPRs.*

(iv) *Whether the respondents No.1,2 and 3 are not liable to pay any compensation in this petition as alleged? OPRs 1, 2 and 3.*

(v) *Whether the insurance policy in question pertaining to vehicle No. PH-13F-9976 was obtained by the respondent No. 1 by non-disclosure of material facts, if so, its effect? OPR-4.*

(vi) *Whether respondent No. 2 was not holding valid and effective driving licence, if so, its effect? OPR-4.*

(vii) *Whether the respondent No. 1 was not possessing valid registration certificate at the time of accident, as alleged, if so, its effect? OPR-4.*

(viii) *Whether the vehicle No. PB-13F-9976 was being driven at the time of accident in violation of Act? OPR-4.*

(ix) *Whether the respondent No. 4 is not liable to pay any compensation, as alleged? OPR-4.*

(x) *Whether the petition is bad for mis-joinder of parties, as alleged? OPRs. 3 and 8.*

(xi) *Whether the petition is collusive as alleged? OPRs 4 and 7.*

(xii) *Whether the petition is bad for non-joinder of necessary parties? OPR-7.*

(xiii) *Whether the accident was caused due to rash and negligent driving of vehicle No. PB-13F-9976 and PB-13G-9976, as alelged?OPR-7*

(xiv) *Whether the petitioner was not an unauthorized passenger in vehicle No. HP-63-0968, as alleged? OPR-7.*

(xv) *Whether the driver of the vehicle No. HP-63-0698, was not having valid and effective driving licence at the time of accident? OPR-7.*

(xvi) *Whether the driver of truck No. PB-13G-9976 was not having valid and effective driving licence? OPR-8.*

(xvii) *Whether the truck No. PB-13-G-9976 was being driven in violation of the provisions of the Act, if so, its effect? OPR-8.*

(xviii) *Relief.*

4. The learned counsel for the appellant and the writ petitioner have argued that the Tribunal has fallen in an error in directing the insurers to satisfy the award. The drivers, namely, Major Singh, respondent No. 3 in the claim petition and Sant Ram respondent No. 6 in the claim petition had not driven the vehicles rashly and negligently and tried to carve out a case for their exoneration. The arguments advanced by both the learned counsel for the appellant and the writ petitioner are not tenable and devoid of any force for the following reasons.

5. The Tribunal, after scanning the pleadings and the evidence, held that the driver, namely, Jaspal Singh respondent No.2 had wrongly parked the offending vehicle No. PB-13F-9976 and driver Sant Ram respondent No.6, driver of the offending vehicle No. HP-63-0698 had driven the offending vehicle rashly and negligently. It is apt to reproduce relevant portion of para 23 of the impugned award herein.

"23………….On the basis of evidence on record, I have no hesitation in treating the respondents No. 2 and 6 equally responsible for the accident. Issues No. 1, 3 and 13 are accordingly answered against the respondents No. 2 and 6."

6. Neither respondents No. 2 and 6 nor the owner/insured have questioned the said findings. How the insurer who has to indemnify, can question the said findings.

7. The learned counsel for the insurers have argued that the challan was presented against respondents No. 2 and 3 in the claim petition and not against respondent No. 6. Thus, the Tribunal has fallen in an error in holding that the accident was outcome of contributory negligence of respondents No. 2 and 6. This argument is not tenable for the following reasons.

8. In civil cases, proof of preponderance of probabilities is required, in criminal cases, proof beyond reasonable doubt is required and in summary proceeding petition under Section 166 of the Motor Vehicles Act, 1988 for short "the Act", prima facie proof is required.

9. My this view is fortified by the judgment delivered by the apex court in ***Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another***, reported in ***(2013) 10 Supreme Court Cases 646,*** **and** ***Oriental Insurance Co. versus Mst. Zarifa and others*****,** reported in ***AIR 1995 Jammu and Kashmir 81.***

10. This Court has also laid down the similar principles of law in ***FAO No. 692 of 2008*** decided on 4.9.2015 titled ***Cholamandlan MS General Insurance Co. Ltd. Versus Smt. Jamna Devi and others***, ***FAO No. 287 of 2014*** along with connected matter, decided on 18.9.2015 titled ***Tulsi Ram versus Smt. Mena Devi and others***, ***FAO No. 72 of 2008*** along with connected matter decided on 10.7.2015 titled ***Anil Kumar versus Nitim Kumar and others*** and ***FAO No. 174 of 2013*** decided on 5.9.2014 titled ***Kusum Kumari versus M.D. U.P Roadways and others.***

11. The learned counsels also argued that criminal case stands decided and accused/drivers have been acquitted, thus, prayed that claim petition be dismissed, is devoid of any force.

12. The apex Court in ***case*** titled ***NKV Bros. (P) Ltd vs. M. karumai Ammal and others reported in AIR 1980 SC 1354*** held that in criminal case acquittal of the driver cannot be a ground to dismiss the claim petition. It is apt to reproduce para 3 of the said judgment herein:

"3. Road accidents are one of the top killers in our country, specially when truck and bus drivers operate nocturnally. This proverbial recklessness often persuades the Courts, as has been observed by us earlier in other case, to draw an initial presumption in several cases based on the doctrine of res ipsa loquitur. Accidents Tribunals must take special care to see that innocent victims do not suffer and drivers and owners do not escape liability merely because of some doubt here or some obscurity there. Save in plain cases, culpability must be inferred from the circumstances where it is fairly reasonable. The Court should not succumb to niceties, technicalities and mystic maybes. We are emphasissing this aspect because we are often distressed by transport operators getting away with it thanks to judicial laxity, despite the fact that they do not exercise sufficient disciplinary control over the drivers in the matter of careful driving. The heavy economic impact of culpable driving of public transport must bring owner and driver to their responsibility to their "neighbour". Indeed, the State must seriously consider no-fault liability by legislation. A second aspect which pains us is the inadequacy of the compensation or undue parcimony practised by tribunals. We must remember that judicial tribunals are State organs and Art. 41 of the Constitution lays the jurisprudential foundation for state relief against accidental disablement of citizens. There is no justification for niggardliness in compensation. A third factor which is harrowing is the enormous delay in disposal of accident

cases resulting in compensation, even if awarded, being postponed by several years. The States must appoint sufficient number of tribunals and the High Court should insist upon quick disposals so that the trauma and tragedy already sustained may not be magnified by the injustice of delayed justice. Many States are unjustly indifferent in this regard."

13. I have scanned the evidence. The drivers of offending vehicle No. PB13-G-9976 and PB-13-F-9976 had parked their trucks illegally, that too, on wrong sides, had not taken due care and caution while parking the said trucks. Even parking lights of the trucks were not switched on and driver of one of the offending vehicle No. HP-63-0698 had also not taken due care and caution, and was also rash and negligent and hit the offending vehicle No. PB-13-F-9976, from its rear portion. It is apt to reproduce the discussions made by the Tribunal in para 22 of the impugned award herein.

"22. I find no merit in the submission of learned counsel for the respondents No. 1 to 3. At the time of arguments, learned counsel for the respondents No. 1 to 3 had drawn site plan of the trucks No. PB-13-F-9976 and PB-13G-9977. First truck stood stopped on the extreme left side on kacha portion. Second truck stood stopped being the first truck. If the site plan as submitted by the learned counsel for the respondents No. 1 to 3 had been correct, truck No. HP-63-0698 would have struck against rear portion of truck No. PB-13G-9976. This had not happened. The record revealed that truck NO. HP-63-0698 had struck against rear portion of Truck No. PB-13-F-9976. The evidence of petitioner and respondent No. 6 coupled with FIR, clearly pointed out that first truck No. PB-13G-9976 had been stopped somewhat on left side of NH-I. Since truck No. PB13-F-9976 was owned by the same owner, the respondent NO. 2 had stopped this truck parallel to truck No. PB-13G-9976. The respondents No. 2 and 3 had been workmen of the same owner (respondent No.1) There was evidence on record that after having wrongly parked trucks No. PB-13-G-9976 and PB-13-G-9976, the drivers had started conversing with indifference to safety and well being of others. Parking lights of the trucks had not been switched on. It was in these circumstances that the truck N O. HP-63-0698 had struck against rear portion of truck No. PB-13-F-9976."

14. Having said so, I am of the considered view that the Tribunal has rightly held that the driver respondents No. 2 and 6 in the claim petitions have driven the vehicles rashly and negligently and the accident was outcome of contributory negligence of both the drivers. Accordingly, the findings returned on issue No. 1 are upheld.

15. The Tribunal has decided issues No. 1 and 2 in favour of the claimants and Issues No.3 to 17 against the respondents.

16. The learned counsel for the insurers Ms. Devyani Sharma, and Dr. Lalit K. Sharma, Advocates, submitted that the insurers have not questioned the findings returned by the Tribunal on issues No. 3 to 17, are accordingly, upheld.

17. It is beaten law of land that the compensation is to be awarded in an injury case under pecuniary and non-pecuniary heads by making guess work.

18. My this view is fortified by the judgments made by the Apex Court in the cases titled as **R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others,** reported in **AIR 1995 SC 755, Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another,** reported in **2010 AIR SCW 6085, Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited,** reported in **2011 AIR SCW 4787,** and **Kavita versus Deepak and others,** reported in **2012 AIR SCW 4771**.

19. This Court has also laid down the same principle in a series of cases.

20. Applying the test, prima facie, it appears that the Tribunal has rightly made the discussions in paras 26 to 32 of the impugned award. It is apt to record herein that the claimant and respondents in claim petition have not questioned the adequacy of the compensation, is accordingly upheld.

21. In the given circumstances, the impugned award merits to be upheld, appeal and writ petition merit to be dismissed.

22. The insurers are directed to deposit the amount within 6 weeks from today in the Registry, if not already deposited. On deposit, the Registry is directed to release the awarded amount 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.

23. Viewed thus, the impugned award is upheld, appeal and the writ petition are dismissed.

24. 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.

National Insurance Company Limited …Appellant.
Versus
Shri Ravinder Kumar and others …Respondents.

FAO No. 12 of 2011
Decided on: 29.07.2016

Motor Vehicles Act, 1988- Section 166- Claimant was student of 9th standard- he met with an accident caused by the driver while driving the bus- he will have to suffer throughout his life- he remained admitted and under treatment for the period of one year- he has suffered trauma, pain and sufferings, and must have spent huge amount on his treatment and other medical expenses- amount of Rs. 1,43,948/- was awarded, which cannot be said to be excessive in any manner- appeal dismissed. (Para-16)

For the appellant: Mr. Jagdish Thakur, Advocate.
For the respondents: Nemo for respondent No. 1.
Mr. Vinod Thakur, Advocate, for respondent No. 2.
Name of respondent No. 3 stands already deleted.

The following judgment of the Court was delivered:

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

Challenge in this appeal is to judgment and award, dated 29th September, 2010, made by the Motor Accident Claims Tribunal, Hamirpur, H.P. (for short "the Tribunal") in MAC Petition No. 37 of 2006, titled as Ravinder Kumar versus Subhash Chand and others, whereby compensation to the tune of ₹ 1,43,948/- with interest @ 7.5% per annum from the date of filing of the petition till its realization came to be awarded in favour of the claimant-injured and the insurer was saddled with liability (for short "the impugned award").

2. The claimant-injured, owner-insured and driver of the offending vehicle have not questioned the impugned award of 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. In order to determine this appeal, it is necessary to give a brief resume of the case, the womb of which has given birth to the appeal in hand.

5. The claimant-injured invoked the jurisdiction of the Tribunal by the medium of claim petition for grant of compensation, as per the break-ups given in the claim petition, on the ground that he became the victim of a motor vehicular accident, which was caused by the driver, namely Soni Kumar, while driving bus, bearing registration No. HP-22 A-7377, rashly and negligently on 30th June, 2005, at about 2.30 P.M., at place Kot, Tehsil and District Hamirpur, in which he sustained injuries.

6. The claim petition was resisted by the owner-insured and the insurer of the offending vehicle on the grounds taken in the respective memo of objections. The driver of the offending vehicle chose not to appear before the Tribunal and ex-parte proceedings were drawn against him.

7. On the pleadings of the parties, following issues came to be framed by the Tribunal on 7th November, 2008:

> *"1. Whether the petitioner has suffered injuries due to rash and negligent driving of Bus No. HP-22A-7377 by Soni Kumar, respondent No. 2, as alleged? OPP*
>
> *2. If issue No. 1 is proved in affirmative, whether the petitioner/claimant is entitled to compensation, if so, to what amount and from which of the respondents? OPP*
>
> *3. Whether the petition is not maintainable in the present form? OPRs*
>
> *4. Whether the respondent No. 2 was not holding a valid and effective driving licence to drive the vehicle in question at the time of accident? OPR-3*
>
> *5. Whether the vehicle was being driven without any valid route permit and registration certificate? OPR-3*
>
> *6. Relief."*

8. Parties have led evidence.

<u>Issue No. 1:</u>

9. The claimant-injured has led evidence and proved that the driver, namely Shri Soni Kumar, had driven the offending vehicle, i.e. bus, bearing registration No. HP-22 A-7377, rashly and negligently on 30th June, 2005, at about 2.30 P.M., at place Kot and caused the accident, in which he sustained injuries. No evidence to this effect has been led in rebuttal. Having said so, the Tribunal has rightly made discussions in paras 14 to 30 of the impugned award. Accordingly, the findings returned by the Tribunal on issue No. 1 are upheld.

10. Before dealing with issue No. 2, I deem it proper to determine issues No. 3 to 5.

<u>Issue No. 3:</u>

11. It was for the respondents in the claim petition to lead evidence and prove that the claim petition was not maintainable, have not led any evidence to this effect, thus, have failed to discharge the onus.

12. However, I have gone through the record. I wonder how this issue came to be framed by the Tribunal for the reason that the Motor Vehicles Act, 1988 (for short "MV Act") has gone through a sea change in the year 1994 and in terms of Sections 158 (6) and 166 (4) of the MV Act, even a police report can be treated as a claim petition by the Tribunal. Accordingly, the findings returned by the Tribunal on issue No. 3 are upheld.

<u>Issue No. 4:</u>

13. 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 to drive the offending vehicle at the relevant point of time. The Tribunal has rightly made the discussions in paras 32 and 33 of the impugned award, need no interference.

14. However, I have gone through the record and am of the considered view that the appellant-insurer has failed to prove that the driver of the offending vehicle was not having a valid and effective driving licence at the relevant point of time. Accordingly, the findings returned by the Tribunal on issue No. 4 are upheld.

Issue No. 5:

15. It was for the appellant-insurer to plead and prove that the offending vehicle was being driven without any valid route permit and registration certificate, has not led any evidence to this effect, thus, has failed to discharge the onus. Even otherwise, the route permit and registration certificate of the offending vehicle are on the record as Ext. RW-1/D and Ext. RW-1/C, respectively. Thus, the Tribunal has rightly decided issue No. 5, is, accordingly, upheld.

Issue No. 2:

16. The claimant-injured, at the relevant point of time, was a student of 9th standard, became victim of the vehicular accident, has suffered and has to suffer throughout his life. He has remained admitted and was under treatment for a period of more than one year, has suffered trauma, pain and sufferings, and must have spent huge amount on his treatment and other medical expenses. A meagre amount of ₹ 1,43,948/- has been awarded, cannot be said to be excessive in any way. The Tribunal has rightly made the discussions in paras 39 to 41. Accordingly, the findings returned by the Tribunal on issue No. 2 are upheld.

17. Having glance of the above discussions, the impugned award is upheld and the appeal is dismissed.

18. Registry is directed to release the awarded amount in favour of the claimant-injured strictly as per the terms and conditions contained in the impugned award through payee's account cheque or by depositing the same in his bank account.

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

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

Oriental Insurance Co. Ltd. .....Appellant.
Versus
Smt. Gurmeet Rani and others .....Respondents

FAO (MVA) No. 107 of 2011
Date of decision: 29th July, 2016.

Motor Vehicles Act, 1988- Section 149- It was contended that vehicle was carrying the passengers more than the permissible capacity- only one claim petition was filed- held, that carrying more passengers than the permissible capacity does not amount to fundamental breach of the terms and conditions of the policy and the insurer has to satisfy the awards, which are on the higher side. (Para-7 to 12)

Cases referred:

United India Insurance Company Limited versus K.M. Poonam & others, 2011 ACJ 917
National Insurance Company Limited versus Anjana Shyam & others, 2007 AIR SCW 5237
National Insurance Company Ltd. versus Smt. Sumna @ Sharda & others, I L R 2015 (II) HP 825
Hem Ram & another versus Krishan Chand & another, I L R 2015 (III) HP 796
Oriental Insurance Company versus Smt. Indiro and others, ILR 2015 (III) H.P. 1149
Lakhmi Chand versus Reliance General Insurance Co. Ltd. (2016) 3 SCC 100

For the appellants: Mr. Deepak Bhasin, Advocate.
For the respondents: Mr. Nimish Gupta, Advocate, for respondents No. 1 to 3.
Mr. Devender Sharma, Advocate, for respondent No.4.
Mr. Ramesh Sharma, Advocate, for respondent No.5.

The following judgment of the Court was delivered:

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

This appeal is directed against the judgment and award dated 20.12.2010, made by the Motor Accident Claims Tribunal, (II), Una, H.P. in MACP RBT No. 93/2000-61/98, titled *Smt. Gurmeet Rani and others versus Sh. Deepak Kumar and others*, for short "the Tribunal", whereby compensation to the tune of Rs.4,68,000/- came to be awarded in favour of the claimants alongwith interest @ 9% per annum, with Rs.1000/- as costs, hereinafter referred to as "the impugned award", for short.

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

3. Appellant/insurer has questioned the impugned award on the grounds;

(i) That the insured has committed willful breach;

(ii) That the vehicle was carrying the passenger more than the permissible capacity, thus, the insurer was not liable; and,

(iii) that the amount awarded is excessive.

4. All the above grounds are not tenable and devoid of any force for the following reasons.

5. The claimants have proved by leading evidence that the driver, namely, Deepak Kumar has driven the vehicle rashly and negligently and caused the accident. The Tribunal has specifically recorded in para 20 of the impugned award that the FIR was lodged against the driver, investigation was conducted and final repot was presented against the driver. The driver and owner have not questioned the said findings. Thus, the insurer has no right to question the said findings. Even otherwise, I have gone through the record. Prima facie there is proof on the file which is made basis for holding that the driver has driven the vehicle rashly and negligently in which the deceased sustained the injuries and succumbed to the same. Accordingly, the findings returned by the Tribunal on issue No.1 are upheld.

6. Before I deal with issue No. 2, I deem it proper to deal with issues No. 3, 4 and 5 at the first instance. The insurer had to prove these issues. Insurer has only examined Smt. Amarjit Kaur, Clerk from the office of District Transport Officer, Hoshiarpur. She has stated that the driver was having a valid and effective driving licence, the discussion of which has been made in paras 30 to 33 of the impugned award. It was for the insurer to plead and prove that the owner/insured has committed willful breach, has not led any evidence. Issue No. 5 was not pressed by the insurer. Thus, the insurer has failed to discharge the onus on these issues. The Tribunal has rightly decided these issues against the insurer.

7. The learned counsel for the appellant has argued that the vehicle was carrying the passenger more than the permissible capacity. It is for the insurer to press this issue at the relevant point of time because as on today there is only one claim petition before this Court. The insurer is at liberty to take this ground at an appropriate stage, in the appropriate proceedings.

8. The Apex Court in the case titled as **United India Insurance Company Limited versus K.M. Poonam & others,** reported in **2011 ACJ 917,** has laid down the law. It is apt to reproduce para 24 of the judgment herein:

"24. The liability of the insurer, therefore, is confined to the number of persons covered by the insurance policy and not beyond the same. In other words, as in the present case, since the insurance policy of the owner of the vehicle covered six occupants of the vehicle in question, including the driver, the liability of the insurer would be confined to six persons only, notwithstanding the larger number of persons carried in the vehicle. Such excess number of persons would have to be treated as third parties, but since no premium had been paid in the policy for them, the insurer would not be liable to make payment of the compensation amount as far as they are concerned. However, the liability of the Insurance Company to make payment even in respect of persons not covered by the insurance policy continues under the provisions of sub-section (1) of Section 149 of the Act, as it would be entitled to recover the same if it could prove that one of the conditions of the policy had been breached by the owner of the vehicle. In the instant case, any of the persons travelling in the vehicle in excess of the permitted number of six passengers, though entitled to be compensated by the owner of the vehicle, would still be entitled to receive the compensation amount from the insurer, who could then recover it from the insured owner of the vehicle."

9. It is also apt to reproduce para 15 of the judgment of the Apex Court in the case titled as **National Insurance Company Limited versus Anjana Shyam & others,** reported in **2007 AIR SCW 5237,** herein:

"15. In spite of the relevant provisions of the statute, insurance still remains a contract between the owner and the insurer and the parties are governed by the terms of their contract. The statute has made insurance obligatory in public interest and by way of social security and it has also provided that the insurer would be obliged to fulfil his obligations as imposed by the contract and as overseen by the statute notwithstanding any claim he may have against the other contracting party, the owner, and meet the claims of third parties subject to the exceptions provided in Section 149(2) of the Act. But that does not mean that an insurer is bound to pay amounts outside the contract of insurance itself or in respect of persons not covered by the contract at all. In other words, the insured is covered only to the extent of the passengers permitted to be insured or directed to be insured by the statute and actually covered by the contract. The High Court has considered only the aspect whether by overloading the vehicle, the owner had put the vehicle to a use not allowed by the permit under which the vehicle is used. This aspect is different from the aspect of determining the extent of the liability of the insurance company in respect of the passengers of a stage carriage insured in terms of Section 147(1)(b)(ii) of the Act. We are of the view that the insurance company can be made liable only in respect of the number of passengers for whom insurance can be taken under the Act and for whom insurance has been taken as a fact and not in respect of the other passengers involved in the accident in a case of overloading."

10. This Court in batches of appeals, **FAO No. 257 of 2006,** titled as **National Insurance Company Ltd. versus Smt. Sumna @ Sharda & others,** being the lead case, decided on 10.04.2015, **FAO No. 224 of 2008,** titled as **Hem Ram & another versus Krishan Chand & another,** being the lead case, decided on 29.05.2015, and FAO No. 256 of 2010 titled ***Oriental Insurance Company versus Smt. Indiro and others***, being the lead case, decided on 19.6.2015, has laid down the same principle, which is not disputed by the learned counsel for the insurer.

11. The apex Court in case titled ***Lakhmi Chand versus Reliance General Insurance Co. Ltd.*** reported in ***(2016) 3 SCC 100***, held that the mere factum of carrying more passengers than the permitted seating capacity in the goods carrying vehicle by the insured does not amount to a fundamental breach of the terms and conditions of the policy so as to allow the

insurer to eschew its liability towards the damage caused to the vehicle. It is apt to reproduce para 14 of the said judgment herein.

> *"14. The National Commission upheld the order of dismissal of the complaint of the appellant passed by the State Commission. The National Commission however, did not consider the judgment of this Court in the case of B.V. Nagaraju v. Oriental Insurance Co. Ltd Divisional Officer, Hassan, 1996 4 SCC 647. In that case, the insurance company had taken the defence that the vehicle in question was carrying more passengers than the permitted capacity in terms of the policy at the time of the accident. The said plea of the insurance company was rejected. This Court held that the mere factum of carrying more passengers than the permitted seating capacity in the goods carrying vehicle by the insured does not amount to a fundamental breach of the terms and conditions of the policy so as to allow the insurer to eschew its liability towards the damage caused to the vehicle. This Court in the said case has held as under:-*
>
> *"It is plain from the terms of the Insurance Policy that the insured vehicle was entitled to carry six workmen, excluding the driver. If those six workmen when travelling in the vehicle, are assumed not to have increased risk from the point of view of the Insurance Company on occurring of an accident, how could those added persons be said to have contributed to the causing of it is the pose, keeping apart the load it was carrying.*
>
> *In the present case the driver of the vehicle was not responsible for the accident. Merely by lifting a person or two, or even three, by the driver or the cleaner of the vehicle, without the knowledge of the owner, cannot be said to be such a fundamental breach that the owner should, in all events, be denied indemnification. The misuse of the vehicle was somewhat irregular though, but not so fundamental in nature so as to put an end to the contract, unless some factors existed which by themselves, had gone to contribute to the causing of the accident."*

12. This Court in a batch of appeals, **FAO No. 257 of 2006,** titled as **National Insurance Company Ltd. versus Smt. Sumna @ Sharda & others,** being the lead case, decided on 10.04.2015, has held that the insurer has to satisfy the awards which are on higher side.

13. **Issue No.2.** The deceased was 30 years of age at the time of accident. The claimants have pleaded his monthly income Rs.8,000/- per month. The Tribunal, after making discussion held that the deceased was earning Rs.3000/- per month and held that the claimants have lost source of dependency to the tune of Rs.2000/- per month and applied the multiplier of "17". Thus, the amount awarded cannot be excessive in any way rather it is meager.

14. The insurer is directed to deposit the amount within 6 weeks from today in the Registry, if not already deposited. On deposit, 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 account, strictly in terms of the conditions contained in the impugned award.

15. Accordingly, the impugned award is upheld and the appeal is dismissed.

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.

Oriental Insurance Company Ltd. .....Appellant

Versus

Master Pritiyush Kant and another ..... Respondents

FAO No.46 of 2011
Date of decision: 29.07.2016

Motor Vehicles Act, 1988- Section 166- Tribunal had discussed all the aspects as to how compensation is to be awarded in an injury case- amount awarded by Tribunal cannot be said to be excessive but is meager- claimant has also not questioned the award, hence the same is reluctantly upheld. (Para-11)

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 Alliance Insurance Company Limited, 2011 AIR SCW 4787
Kavita versus Deepak and others, 2012 AIR SCW 4771

For the appellant: Mr.G.D. Sharma, Advocate.
For the respondents: Mr.Kishore Pundir, Proxy Counsel.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 27th September, 2010, passed by the Motor Accident Claims Tribunal, Fast Track Court, Chamba, District Chamba, H.P., (for short, "the Tribunal") in M.A.C. No.28 of 2009, titled Master Pritiyush Kant vs. Oriental Insurance Co. Ltd., whereby a sum of Rs.8,11,041/- alongwith interest at the rate of 7.5% per annum from the date of filing of the claim petition till deposit came to be awarded as compensation in favour of the claimant and the insurer was saddled with the liability (for short the "impugned award").

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

3. Feeling aggrieved, the appellant-insurer has questioned the impugned award on the ground that the offending vehicle, at the time of accident, was being driven in contravention to the terms and conditions contained in the insurance policy and the owner had committed willful breach. Second ground urged by the appellant was that the amount awarded by the Tribunal is excessive. These grounds are not tenable for the following reasons.

4. It was averred that the claimant, on 11th August, 2008, was traveling in car bearing No.PB-02K-0078, and at about 5.30 a.m. when the said car reached at Nehar Nullah near Kutt Tehsil Bhattiyat, District Chamba, H.P., it met with an accident. The claimant sustained injuries and suffered 75% disability, constraining him to file the claim petition through his grandmother for grant of compensation to the tune of Rs.17,44,066/-, as per the break-ups given in the claim petition.

5. The claim petition was resisted by the respondents and the following issues were framed:

"1. Whether the petitioner sustained injuries in a motor vehicle accident which took place on 11.8.2008 at about 5.30 AM at Nehar Nullah near Kutt Tehsil Bhattiyat, Distt. Chamba due to rash and negligent driving of driver of vehicle No.PB-02K-0078? OPP

2. If issue No.1 is proved in affirmative, whether petitioner is entitled for the grant of compensation, if so, to what amount and from which of the respondents? OPP

3. Whether the driver o the offending vehicle was not holding a valid and effective driving licence at the time of accident? OPR-1

4. Whether the driver of the offending vehicle was driving the vehicle in contravention of terms and condition of insurance policy? OPR-1

5. Whether the injured was unauthorized occupant in the vehicle as alleged? OPR-1

6. Whether the petition has been filed in collusion with respondent No.2 as alleged, if so, its effect? OPR-1

7. Relief."

6. In order to prove his case, the claimant examined Dr.Rakesh Verma (PW-1), HC Neeraj Kumar (PW-2), Kaku Ram (PW-3), and Smt. Shanta, (PW-4 i.e. grand mother through whom the claim petition was filed). On the other hand, the respondents have not led any evidence.

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

8. The claimant has proved on record that the accident, in which the claimant sustained injuries, had occurred due to the rash and negligent driving of the offending vehicle which was being driven by its driver, namely, Karam Chand. As recorded supra, the respondents have not led any evidence to prove to the contrary. Moreover, there is sufficient material on the record of the file to hold that the accident was the outcome of rash and negligent driving of the driver Karam Chand. Accordingly, the findings returned by the Tribunal on issue No.1 are upheld.

9. Before dealing with issue No.2, I deem it proper to take up other issues at the first instance.

10. As far as issues No.3 to 6 are concerned, the onus to prove these issues was upon the insurer, has not led any evidence, therefore, has failed to discharge the onus cast on it. Accordingly, the findings returned by the Tribunal on these issues are upheld.

11. Coming to issue No.2, the Tribunal, while assessing the amount of compensation, has discussed all aspects in paragraphs 12 to 19 as to how compensation is to be granted in an injury case. Therefore, the amount awarded by the Tribunal cannot be said to be excessive in view of the law laid down by 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 Alliance Insurance Company Limited, 2011 AIR SCW 4787** and **Kavita versus Deepak and others, 2012 AIR SCW 4771.** On the contrary, it appears that the amount awarded is meager. However, the claimant has not questioned the impugned award. Accordingly, the compensation awarded is reluctantly upheld.

12. Having said so, the impugned award is upheld and the appeal is dismissed.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Smt. Raksha Devi …. Petitioner

Versus

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

CWP No. 11890 of 2011
Reserved on: 27.07.2016
Date of decision: 29.07.2016

Constitution of India, 1950- Article 226- Petitioner was appointed as Anganwari Worker – her appointment was challenged by respondent No. 6- her appointment was set aside on the ground that income of her family was more than Rs. 12,000/- per month- an appeal was preferred before Divisional Commissioner, Mandi, who dismissed the same- writ petition was filed, which was

disposed of with a direction to take appropriate steps to get the income verified from the Competent Authority and thereafter to afford an opportunity to the affected party to participate in the proceedings – petition was heard by the Appellate Authority and it was found that appointment was bad as certificate of the income produced by the petitioner showing her family to be separate was contrary to parivar register- an appeal was preferred, which was dismissed- held, that Appellate Authority had not referred the matter to the Competent Authority to examine the veracity of the income certificate of the petitioner in accordance with the direction of the High Court- writ petition allowed- order set aside and direction issued to decide the same after affording opportunity to the parties to put forth their case in accordance with the direction of the High Court. (Para-11 to 18)

For the petitioner:	Mr. H.S. Rana, Advocate.
For the respondents:	Ms. Parul Negi, Deputy Advocate General, for respondents No. 1 to 5. Mr. Rajiv Rai, Advocate, for respondent No. 6.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.:

This writ petition has been filed praying for the following reliefs:-

"1. That the orders of Additional District Magistrate dated 06/07/2011 (Annexure P-7) and order dated 14/12/2011 of Divisional Commissioner, Mandi (Annexure P-8) may kindly be set aside being totally against the directions of this Hon'ble High Court in CWP No. 2044/2008 dated 17/05/2010 (Annexure P-6) and being totally wrong, illegal, arbitrary, discriminatory and against the principles of natural justice.

2. That the appointment of Respondent no. 6 may kindly be set aside being wrong and illegal as the Respondent no. 6 was not in the selection list.

3. That the appointment of the petitioner may be held valid and may be allowed to work as Anganwari worker at Dolra in continuation of her initial appointment.

4. That the order of CDPO in setting aside the appointment of petitioner dated 03/10/2008 (Annexure P-3) may also be set aside being wrong and illegal.

5. That record of the case may be summoned for the kind perusal of this Hon'ble High Court."

2. Brief facts necessary for the adjudication of the present case are that the present petitioner was appointed as Anganwari Worker at Anganwari Centra, Dolra, District Bilaspur, in the year 2007, which appointment of her was challenged by one Smt. Meena Devi (respondent No. 6 in the present petition) before the Appellate Authority prescribed under the scheme/guidelines for the engagement of Anganwari Workers/Helpers i.e. Deputy Commissioner, Bilaspur. The Appellate Authority vide order dated 29.02.2008 set aside the appointment of the present petitioner as Anganwari Worker at Anganwari Centre, Dolra, on the ground that income of the family of the present petitioner was more than Rs.12,000/- per annum, which rendered her ineligible for the post of Anganwari worker. This order was challenged by the petitioner before the next Appellate Authority provided under the scheme i.e. Divisional Commissioner, Mandi Division. Said authority also dismissed the appeal filed by the petitioner and upheld the order passed by the first Appellate Authority vide order dated 26.09.2008.

3. These two orders were challenged by the petitioner before this Court by way of CWP No. 2044 of 2008, which petition was disposed of by this Court vide judgment dated 17.05.2010 alongwith other connected matters, in which, it was inter alia held:-

> "4. Learned Senior Additional Advocate General submits that the Anganwadi Workers/Helpers, in these cases, had made an attempt to steal an appointment, based on false certificates of income. Even assuming so, the competent authority should have first taken steps to cancel such certificates, based on which the appointments were made. So long as the same having not been done, we find force in the submission made by the learned counsel for the petitioners that there is an irregularity, if not illegality, in the process of cancellation of appointment.
>
> 5. In case the authority is of the view that the income certificate issued to any Anganwadi Workers/ Helpers in these cases, is not based on proper computation of income, it will be open to the competent authority to take steps to cancel the same. But it is made clear that such cancellation shall only be, after affording an opportunity for hearing to the incumbent concerned. So long as the cancellation is not made by the competent authority in accordance with law, and procedure for cancellation and in case notice is not given to the affected party in the enquiry, the incumbent concerned shall not be deprived of their posts, to which they were appointed, based on the income certificates, they produced at the relevant time.
>
> 6. There will be a direction to the appellate authority in these cases, to take appropriate steps in the cases where a dispute on income is involved, to get the same duly processed by the competent authority, in the matter of cancellation. Necessary steps in that regard will be taken and action finalized within a period of four months from the date of production of this judgment to the competent authority. That competent authority will also afford an opportunity to the affected party to participate in that proceedings. Subject to the outcome of the action thus taken by the competent authority, on the income certificate already issued to the incumbent, the appellate authority will take appropriate action within two months. We also make it clear that in the event of any appointment being cancelled, the appellate authority will also issue necessary directions for the next person from the list, to be appointed, in case a list is available. Needless to say that until the process, as above said, is completed, the incumbents now working, will be continued. We may make it clear that the inquiry will be on the basis of the Policy/Guidelines as existed at the time of appointment."

4. Pursuant to the said judgment, the case with regard to the appointment of the petitioner was again heard by the Appellate Authority, which Authority again held the appointment of the petitioner to be bad vide order dated 06.07.2011. It was held by the Appellate Authority that it was evident from the Parivar Register of the husband of the petitioner that the family was separated on 23.09.2005 and before the said date petitioner Raksha Devi was part of joint family and on these basis, the said authority held that the certificate of income procured by Raksha Devi showing her family as separate unit cannot be treated as a valid one for the purpose of her selection to the post of Anganwari Worker.

5. In appeal, the next Appellate Authority i.e. Divisional Commissioner, vide order dated 14.12.2011, upheld the order dated 06.07.2011 passed by the first Appellate Authority.

6. Feeling aggrieved by these two orders, the petitioner has filed the present writ petition.

7. No reply has been filed to the writ petition, nor the same was intended to be filed by either of the respondents and accordingly, the case was heard on merit.

8. Mr. H.S. Rana, learned counsel appearing for the petitioner has strenuously argued that the impugned orders i.e. order dated 06.07.2011 (Annexure P-7) and order dated 14.12.2011 (Annexure P-8) passed by the authorities below were not sustainable in law because the appeal filed by the private respondent against the selection of the petitioner as Anganwari Worker was not adjudicated by the first Appellate Authority in consonance with the directions issued by this Court in CWP No. 2044 of 2008. According to Mr. Rana, this Court vide its judgment dated 17.05.2010 in CWP No. 2044 of 2008 and other connected matters, had directed that in those cases where income certificate of an incumbent was in dispute then the same shall be duly processed by the competent authority and the competent authority will afford an opportunity to the affected party to participate in the proceedings commenced in this regard and the Appellate Authority will take appropriate action in the matter depending upon the outcome of the action thus taken by the competent authority on the income certificate already issued to the incumbent. Mr. Rana submitted that this direction of the Court was not followed while deciding the appeal because the matter with regard to the veracity of the income certificate of the petitioner was not referred to the competent authority and the Appellate Authority ventured to adjudicate upon the validity of the same itself without following the directions issued by the Court in CWP No. 2044 of 2008. Mr. Rana argued that this important aspect of the matter was also ignored by the next Appellate Authority in the appeal which was filed by the present petitioner before it. On this ground, Mr. Rana submitted that the orders passed by both the authorities below were not sustainable in law.

9. On the other hand, learned counsel for the respondents have submitted that there was no infirmity with the orders which had been passed by the authorities below because the appointment of the petitioner was rightly set aside as she was not eligible to be appointed as Anganwari Worker as per norms of the scheme. According to them, the orders passed by the authorities below were self speaking and the same required no interference.

10. I have heard learned counsel for the parties.

11. In my considered view, there is considerable force in the arguments of Mr. Rana. It is evident from perusal of orders dated 06.07.2011 and 14.12.2011 that while passing the said orders the authorities concerned have not taken into consideration the directions which were issued by this Court in CWP No. 2044 of 2008 pertains to the veracity of the income certificate of an incumbent. It is not in dispute that the appointment of the petitioner has been set aside on the ground that the income certificate on the basis of which she was appointed was not a valid one. However, the Appellate Authority before deciding the appeal did not refer the matter to the competent authority and resultantly, no findings were returned in the matter with regard to the veracity of the income certificate of the petitioner, on the basis of which, the Appellate Authority was to take appropriate action. Not only this, this Court in unambiguous terms had held that till the time income certificate is held to be bad by the competent authority an adverse inference cannot be drawn with regard to the validity of the same. This important aspect of the matter has also been ignored by the Appellate Authority while passing order dated 06.07.2011. Besides, even the second Appellate Authority has ignored this very important aspect of the matter while upholding the order passed by the first Appellate Authority dated 06.07.2011.

12. Therefore, in my considered view, orders dated 06.07.2011 and 14.12.2011 passed by the Appellate Authorities are not sustainable in law.

13. Mr. H.S. Rana, learned counsel for the petitioner has also submitted that he has placed on record certain documents from which it is evident that the income certificate which has been procured by the private respondent is also not a valid certificate and there is

tampering in the records of the Panchayat pertaining to the entries in the Panchayat Register qua the private respondent.

14. In my considered view, it will not be appropriate for this Court to go into these issues which have been raised by Mr. H.S. Rana and all the parties shall be at liberty to produce all relevant documents before the Appellate Authority to substantiate their case.

15. Accordingly, this writ petition is allowed and order passed by the Additional District Magistrate dated 06.07.2011 (Annexure P-7) and order passed by the Divisional Commissioner, Mandi Division, dated 14.12.2011 (Annexure P-8) are quashed and set aside and the case is remanded back to the first Appellate Authority with directions to decide the same afresh after affording opportunity to all the parties to putforth their cases in accordance with the directions passed by this Court in CWP No. 2044 of 2008 within a period of two months from today. Till the decision of the appeal, respondent No. 6 shall be permitted to continue as Anganwari Worker in Anganwari Centre, Dolra. No order as to cost. Miscellaneous application(s) pending, if any, 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 H.P. .....Appellant.

Versus

Akhilesh Kumar and others .....Respondenst.

Cr. Appeal No. 586 of 2010.
Reserved on: 21.07.2016
Decided on : 29.07.2016

Indian Penal Code, 1860- Section 498-A, 306 and 201 read with Section 34- Deceased was married to the accused A - accused started maltreating her for being less educated and for not giving clothes to her Jethani- she told her brother that accused were maltreating her and they would not send her to her parents house during Diwali- she died subsequently by consuming poison – accused were tried and acquitted by the trial Court- held, in appeal that trial Court had discarded the testimonies of witnesses due to the fact that they were relatives of the deceased- however, deceased would have confided to her close relatives and not to strangers- testimonies of prosecution witnesses corroborated each other- presumption regarding abetment of the suicide was not rebuted- trial Court had not properly appreciated the evidence and had wrongly acquitted the accused- appeal allowed and accused convicted. (Para-9 to 13)

For the Appellant: Mr. Parmod Thakur, Additional Advocate General.
For the Respondents: Mr. J.R.Poswal, Advocate.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge :

The instant appeal is directed by the State of Himachal Pradesh against the impugned judgment rendered on 29/09/2010 by the learned Additional Sessions Judge, Ghumarwin, District Bilaspur, H.P. (Camp at Bilaspur) in Sessions trial No. 2/7 of 2006, whereby the learned trial Court acquitted the respondents (for short 'accused') for the offences charged.

2. The brief facts of the case are that on 16.10.2005 at 6.30 a.m one Shri Hamender Singh visited Police Station Bharari and reported that Kalpana who was daughter of his paternal

aunt Neelam Devi and who was married to accused Akhilesh in village Doharu about 6 months back had died due to consuming poison on that day at 4.30 a.m. This information was recorded in daily diary of the police station by SHO Duglu Ram and thereafter he alongwith his subordinate officials visited the spot where he recorded the statement of Smt. Neelam Kumari, mother of the deceased under Section 154 Cr.P.C. in which she alleged that deceased Kalpana was married to Akhilesh Kumar on 23rd May, 2005. Her daughter was kept well for one month but thereafter her mother-in-law Roshani Devi and sister-in-law Tripta started maltreating her. They also did not send her to their house during Kala Mahina. When she asked her son-in-law Akhilesh as to why they were maltreating her daughter he told her that none was doing so. On the other hand accused Akhilesh, his mother and his sister-in-law were blaming her daughter for being less educated and she was not giving clothes to her Jethani. It is alleged therein that on 15.10.2005 her son rang up Kalpana and she told him that the accused persons were maltreating her and they would not send her to her parents house during Diwali and that he should visit her and take her alongwith him on the 30.10.2015. On 16.10.2005 at about 3.00 a.m Smt. Leela Devi and Satya Devi came in a vehicle and informed her that Kalpana had died by consuming poison. On the basis of this statement F.I.R came to be registered in P.S.Bharari. The case was investigating by S.I.Duglu Ram. The investigation revealed that the deceased committed suicide by consuming poison due to maltreatment and harassment of her husband, mother-in-law and sister-in-law. After completing all codal formalities and on conclusion of the investigation into the offence, allegedly committed by the accused challan was prepared and filed in the Court.

3. Accused Akhilesh Kumar, Roshani Devi and Tripta Devi were charged by the learned trial Court for theirs committing offences punishable under Sections 498-A, 306 and 201 read with Section 34 IPC whereas accused Ishwar Singh was charged by the learned trial Court of his committing offences punishable under Section 201 read with Section 34 IPC.

4. In order to prove its case, the prosecution examined 18 witnesses. On closure of prosecution evidence, the statements of the accused under Section 313 of the Code of Criminal Procedure, were recorded in which they pleaded innocence and claimed false implication. However, they chose to lead evidence in defence two witnesses.

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

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

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

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

9. Deceased Kalpana was married on 23rd May, 2005 to accused Akhilesh. She by consuming poison committed suicide in the intervening night of 15.10.2016 and 16.10.2016. Consequently, her demise occurred within a short span of hers solemnizing marriage with accused Akhilesh. The learned trial Court in dispelling the creditworthiness of the testimonies of the prosecution witnesses was goaded by theirs holding a close relation with the deceased whereupon it concluded of their testimonies in the absence of rendition of the relevant account by independent witnesses hence standing imbued with a vice of interestedness. In sequel the learned trial Court discounted the creditworthiness of the prosecution witnesses. However, the aforesaid ground as meted by the learned trial Court to dispel the efficacy of the testimonies of the close

relatives of the deceased is mis-founded, imminently when law does not enjoin the testimonies of close relatives of the deceased who committed suicide at her matrimonial home on hers standing purportedly instigated by the accused persons by their purported acts of illtreatement and maltreatment perpetrated upon her person being discountable unless their testimonies are wanting in legal vigour, arising from theirs deposing a contrived version qua the perpetration of cruelty upon the deceased by the accused, cruelty whereof stood engendered by theirs demanding dowry from the deceased, also hence their testimonies would be construable to stand stained with a vice of concoction also the testimonies of the close relatives of the deceased would suffer the ill-fate of their veracity standing discounted on the preeminent principle of law of no evident immediate proximity occurring vis-à-vis the purported cruelty meted by the accused upon the deceased vis-à-vis the ill-fated occurrence, whereupon a construction is enjoined to be erected of the accused not abetting the commission of suicide by the deceased. Obviously given the deceased committing suicide within a short hiatus occurring since her solemnizing marriage with accused Akhilesh necessarily hence the principle of proximity vis.a.vis the commission of suicide by the deceased with the purported cruelty meted by the accused upon her stands saturated.

10. Be that as may, even though the close relatives of the deceased deposed in their respective testifications of the accused demanding dowry from the deceased, on anvil whereof, the prosecution assays of hence cruelty standing proven to be perpetrated by them upon the deceased yet the learned trial Court dispelled the vigour of their testimonies on the ground of PW-1 not in her testimony voicing therein with specificity the articles demanded as dowry from the deceased by the accused. Also the factum of PW-1 testifying of the accused Akhilesh demanding dowry from the deceased at a 'Tika ceremony' whereupon the learned trial Court concluded of with the holding of 'Tika ceremony' not being a secretive function wherein the participants are only the deceased and the accused rather when participants therein are other than them rather forestalled accused Akhilesh to make a demand upon the deceased. Consequently it held qua the aforesaid demand made thereat by the accused Akhilesh upon the deceased being unamenable for acceptance. Both the aforesaid grounds as stand meted by the learned trial Court to dispel the deposition of PW-1 hold no force as when in her testification PW-1 echoes of accused Akhilesh demanding cash as dowry from the deceased rendered unnecessary the drawing of any inference, of, for want of any articulation with specificity by PW-1 qua the articles demanded as dowry by accused Akhilesh from the deceased, her testification qua the facet aforesaid holding no sinew. Also the further ground meted by the learned trial Court to conclude of demand of dowry by accused Akhilesh from the deceased at the 'Tika ceremony' being contrived given the said ceremony per se holding a huge gathering whereat the making of the demand stood per se baulked is also a specious besides a nebulous reason ensueable from the factum of accused Akhilesh would yet take to only in the presence of the deceased besides in the presence of his close relatives make its demand. Since demand for dowry is made clandestinely also when its demand is not openly proclaimed it is inapt for the learned trial Court to conclude of the occasion whereat it stood purportedly made holding a public gathering hence precluding its proclamation by the accused. Since the demand for dowry made by the accused Akhilesh upon the deceased stands concluded to hold veracity, in sequel when it stood not saturated, it appears of the accused during the stay of the deceased at her matrimonial home concerting with importunacy to beget its satiation from the deceased. As a corollary, the deceased stood tormented also she stood subjected to mental cruelty whereupon hence she stood instigated to commit suicide. The continuance of during her stay at her matrimonial home with stealth the makings of demands of dowry by the accused upon the deceased is a cleverly camouflaged concert assayed by the accused within the precincts of the matrimonial home hence deterring the deceased who was a new entrant thereat to make communications thereof to her neighbours may be also to her parents also given her reticence standing reared by her natural aspirations to salvage her matrimony with accused Akhilesh. Preponderantly with the deceased committing suicide within a short span of hers solemnizing marriage with the accused renders workable the presumption articulated in Section 113A of the Indian Evidence Act (hereinafter referred to as the Act), which stands extracted hereinafter:-

> "113A. Presumption as to abetment of suicide by a married woman – when the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the Court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband."

wherein a mandate stands embedded of with a married woman committing suicide within seven years of her marriage, courts of law holding leverage to draw a presumption of hence the husband besides the in-laws of the deceased abetting the commission of suicide by a married lady. Consequently, with the presumption embedded in Section 113A of the Act per se standing attracted hereat renders the inculpation of the accused to be sustainable prominently given the factum of the deceased within a span of six months of hers solemnizing marriage with accused Akhilesh committing suicide at her matrimonial home. Even otherwise, the paramountcy of truth or falsity of the suicide note comprised in Ext.PW-1/B standing preempted by the Investigating Officer by his omitting to secure the apposite opinion of the handwriting expert is a palpably omission, which is a sure pointer of the investigations held by him being skewed besides slanted. Consequently, omissions by the Investigating Officer qua the paramount facet aforesaid constrains an adverse inference vis.a.vis the accused also fillips a deduction of especially when the accused omitted to concert upon the Investigating Officer qua his eliciting the apposite opinion qua the authorship of Ext.PW-1/B of their omission standing prodded by theirs fabricating suicide note Ext.PW-1/B. The aforesaid suspicion when stands reared, enables this Court to fortifyingly draw against them the presumption embodied in Section 113A of the Act. It also constitutes relevant circumstance of inculpation of the accused it holding conjunction with the relevant incriminatory circumstances against the accused. It also nails a conclusion qua the findings of acquittal recorded by the learned trial Court meriting interference.

11. A wholesome analysis of the evidence on record portrays that the appreciation of evidence as done by the learned trial Court suffers from a gross perversity and absurdity hence it can be held of the learned trial Court in recording findings of acquittal its committing a legal misdemeanor, inasmuch as its mis-appreciating the evidence on record or its omitting to appreciate relevant and admissible evidence. In aftermath this Court deems it fit and appropriate that the findings of acquittal recorded by the learned trial Court merit interference.

12. In view of the above discussion, we find merit in this appeal, which is accordingly allowed and the judgement of acquittal rendered by the learned trial Court is quashed and set-aside. Accordingly, accused Akhilesh Kumar, Roshani Devi and Tripta Devi are held guilty for theirs committing offences punishable under Sections 498-A, 306 and 201 read with Section 34 IPC whereas accused Ishwar Singh is held guilty for his committing offences punishable under Section 201 read with Section 34 IPC

13. Let the accused/convict be produced before this Court on 03/8/2016 for theirs being heard on quantum of sentence.

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

Smt. Sudesh Kumari & another .....Appellants
Versus
Sh. Kapil Gautam & others ......Respondents

FAO No. 197 of 2011
Decided on : 29.07.2016

Motor Vehicles Act, 1988- Section 166- Monthly income of the deceased was Rs. 6,000/- per month- deceased was bachelor and 50% of the amount is to be deducted towards personal expenses- claimants have lost source of dependency of Rs. 3,000/- per month- multiplier of '17' is applicable and claimants are entitled to Rs. 3,000 x 12 x 17= Rs. 6,12,000/- under the head 'loss of dependency- a sum of Rs. 10,000/- each also awarded under the heads 'loss of love and affection', 'loss of estate' and 'funeral expenses'- thus, claimants are entitled to Rs. 6,12,000/- + Rs. 30,000/- = Rs. 6,42,000/- along with interest at the rate of 7.5% per annum from the date of filing of the claim petition till its realization. (Para-7 to 16)

Cases referred:

Sarla Verma (Smt.) and others vs Delhi Transport Corporation and another, AIR 2009 SC 3104
Reshma Kumari & others versus Madan Mohan and another, 2013 AIR (SCW) 3120
Munna Lal Jain & another versus Vipin Kumar Sharma & others, 2015 AIR SCW 3105
United India Insurance Co. Ltd. and others v Patricia Jean Mahajan & others, (2002) 6 SCC 281
Santosh Devi versus National Insurance Company Ltd. and others, 2012 AIR SCW 2892
Amrit Bhanu Shali and others versus National Insurance Company Limited and others, (2012) 11 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, ILR 2015 (III) HP 1149

For the Appellants : Mr. Pawan Gautam, Advocate.
For the Respondents: Mr. Ramesh Sharma, Advocate, for respondents No. 1 & 2.
Ms. Seema Sood, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

This appeal is directed against award dated 14th December, 2009, made by the Motor Accident Claims Tribunal, Una, Himachal Pradesh (hereinafter referred to as "the Tribunal") in MAC Petition No. 6 of 2008, titled Smt. Sudesh Kumari versus Sh. Kapil Gautam & others, whereby compensation to the tune of Rs.2,25,000/- with interest @ 9% per annum from the date of filing of the claim petition till its realization, was awarded in favour of the claimants and against the respondents (for short, "the impugned award").

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

3. The claimants have questioned the impugned award on the ground of adequacy of compensation.

4. The only dispute in this appeal is -whether the amount awarded is inadequate. The answer is in the affirmative for the following reasons.

5. Admittedly, the deceased was 26 years of age at the time of accident, was a driver by profession.

6. The claimants in the claim petition have pleaded that the monthly income of the deceased was Rs.8,000/- per month at the relevant time.

7. The claimants have examined PW-5, employer of the deceased, who has stated that the deceased was earning Rs.8,000/- per month, but unfortunately, the Tribunal has fallen

in an error in granting compensation to the tune of Rs.2,25,000/- in *lump sum* to the claimants, without making any assessment and calculation.

8. Keeping in view the facts of the case, I deem it proper to hold that the deceased was not earning less than Rs.6,000/- per month.

9. The deceased was a bachelor and 50% is to be deducted towards his personal expenses while keeping in view the ratio laid down by the Apex Court in **Sarla Verma (Smt.) and others** versus **Delhi Transport Corporation and another**, reported in **AIR 2009 SC 3104,** upheld by a larger Bench of the Apex Court in a case titled as **Reshma Kumari & others** versus **Madan Mohan and another,** reported in **2013 AIR (SCW) 3120.** Accordingly, it is held that the claimants have lost source of dependency to the tune of Rs.3,000/- per month.

10. The multiplier of '17' is applicable in this case, as per the 2nd Schedule appended to the Motor Vehicles Act read with the ratio laid down by the Apex Court in ***Sarla Verma's, Reshma Kumari's and Munna Lal Jain's,*** cases, *supra* read with the judgment rendered by the Apex Court in case titled as **Munna Lal Jain & another versus Vipin Kumar Sharma & others,** reported in **2015 AIR SCW 3105.**

11. Viewed thus, the claimants are held entitled to the amount of Rs.3,000/- x 12 x 17 = Rs.6,12,000/-, under the head 'loss of dependency'.

12. Keeping in view the recent judgments of the Apex Court, a sum of Rs.10,000/- each, is also awarded under the heads 'loss of love and affection', 'loss of estate' and 'funeral expenses', in favour of the claimants.

13. The Tribunal has also fallen in an error in awarding interest @ 9% per annum, which was to be awarded as per the prevailing rates.

14. It is a beaten law of the land that the rate of interest should be awarded as per the prevailing rates, in view of the judgments rendered by the Apex Court in cases titled as **United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others,** reported in (**2002) 6 SCC 281; 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.

15. Having said so, I deem it proper to reduce the rate of interest from 9% per annum to 7.5% per annum from the date of filing of the claim petition till its realization.

16. Accordingly, the claimants are held entitled to total compensation to the tune of Rs.6,12,000/- + Rs.30,000/- = Rs.6,42,000/- with interest at the rate of 7.5% per annum from the date of filing of the claim petition till its realization.

17. The amount of compensation is enhanced and the impugned award is modified, as indicated above. The appeal is accordingly disposed of.

18. 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.

19. 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.

United India Insurance Co. Ltd. .....Appellant.
Versus
Smt. Gianti Gupta and others .....Respondents

FAO (MVA) No. 19 of 2011.
Judgment reserved on 15th July, 2016
Date of decision: 29th July, 2016.

Motor Vehicles Act, 1988- Section 149- Claimants pleaded that deceased was standing by the side of the road- he was hit by a tractor- this fact was not specifically denied by owner and driver- owner and driver had not questioned the award- a plea was taken by the insurer that deceased was travelling as gratuitous passenger- however, no evidence was led to prove this fact- report of the investigator also proved that driver had a valid driving licence at the time of accident- in these circumstances, insurer was rightly held liable- appeal dismissed. (Para-12 to 24)

For the appellant: Mr. Ashwani K. Sharma, Senior Advocate, with Mr. Nishant Kumar, Advocate.
For the respondents: Mr. Vivek Darhel, Advocate, for respondents No. 1 to 9.
Nemo for respondents No. 10 and 11.
Mr. Manish Gupta, Advocate, for respondents No. 12 and 13.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice .

This appeal is directed against the judgment and award dated 1.9.2010, made by the Motor Accident Claims Tribunal, Solan in M.A.C. Petition No. 20-S/2 of 2007, titled *Gianti Gupta and others versus Shri Ram Lal and others,* whereby compensation to the tune of Rs.5,81,600/- with interest @ 9% per annum came to be awarded in favour of the claimants and against the respondents and insurer came to be saddled with the liability, hereinafter referred to as "the impugned award", for short, on the grounds taken in the memo of appeal.

2. The claimants, driver and owner have not questioned the impugned award on any ground, thus it has attained finality so far it relates to them.

3. The insurer has questioned the impugned award on the ground that the deceased was a gratuitous passenger and the insured has committed willful breach. Thus, the Tribunal has fallen in an error in saddling it with the liability.

4. The only question to be determined in this appeal is whether the Tribunal has rightly directed the insurer to satisfy the award? The answer is in affirmative for the following reasons.

5. The claimants being the victims of a vehicular accident, filed claim petition before the Tribunal, for the grant of compensation to the tune of Rs.30 lacs, as per the break-ups given in the claim petition, on the ground that the driver, namely, Rajinder Gupta, on 7.3.2007, at National Highway No. 22 at Parwanoo, had driven the tractor bearing registration No. HP-12-

4715, rashly and negligently, and hit the deceased, who was standing by the side of the road to answer the call of nature, sustained the injuries and succumbed to the same.

6. Respondents contested and resisted the averments contained in the claim petition by filing separate replies.

7. Following issues were framed by the Tribunal on 5.11.2007:

(i) *Whether the deceased had died on account of injuries caused due to rash/negligent driving of the tractor by respondent No.3? OPP*

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

(iii) *Whether the deceased was a gratuitous passenger and his risk was not covered by the insurance policy purchased by respondent No.1 and 2? OPR-4.*

(iv) *Whether the respondent No.3 was not holding valid and effective driving licence at the time of accident? OPR-4.*

(v) *Whether the petition is bad for non-joinder of necessary parties? OPR-4.*

(vi) *Relief.*

8. Claimants No. 1 and 2 appeared in the witness-box as PW1 and PW2 respectively. On the other hand respondents examined as many as 11 witnesses and have also placed the documents on record.

9. The Tribunal, after scanning the evidence held that the claimants have proved that the driver, namely, Rajinder Gupta has driven the offending vehicle, i.e., tractor rashly and negligently and caused the accident in which the deceased, who was standing by the side of the road, to answer the call of nature, sustained the injuries and succumbed to the injuries.

10. I have gone through the impugned award, evidence and the record. The Tribunal has rightly recorded the findings to the effect that the driver, namely, Rajinder Gupta, had driven the offending vehicle rashly and negligently and hit the deceased, who was standing by the side of the road to answer the call of nature, sustained the injuries and succumbed to the same. Thus, the findings returned on issue No. 1 are upheld.

11. Before I deal with issue No. 2, I deem it proper to deal with issues No. 3 to 5 at the first instance. It was for the insurer to plead and prove that the deceased was travelling in the tractor as a gratuitous passenger and risk was not covered.

12. The positive case of the claimants, as discussed hereinabove, is that the deceased, who was standing by the side of the road to answer the call of nature, was hit by the tractor and it is not specifically denied by the owner and driver. Even the owner and driver have not questioned the impugned award. The claimants have proved that the deceased was not travelling in the tractor but was standing by the side of the road to answer the call of nature, was hit by the tractor, sustained injuries and succumbed to the injuries. Thus, it cannot be said and held that the deceased was a gratuitous passenger. The Tribunal has recorded the findings and discussed statements of all the witnesses, including the officers from the Insurance Company and police, are well reasoned, require no interference. Accordingly, the findings returned by the Tribunal on issue No. 3 are upheld.

13. **Issue No.4.** It was for the insurer to plead and prove that the driver was not having a valid and effective driving licence at the time of accident, has not led any evidence to that effect. However, the claimants have proved the investigation report Ext. PW6/A which does disclose that the driver was having a valid and effective driving licence w.e.f 22.3.1999 to 24.7.2013. The Tribunal has rightly returned the findings on issue No. 3, are accordingly, upheld.

14. **Issue No.5.** It was for the insurer to plead and prove that the claim petition suffers from non- joinder of necessary parties, has not led any evidence. Even otherwise, this issue has not been called for. Accordingly, the findings returned on this issue are upheld.

15. **Issue No.2.** The adequacy of compensation is not in dispute. The factum of insurance is admitted. Having said so, the findings returned by the Tribunal on issue No. 2, are upheld.

16. The insurer is directed to deposit the amount, within six weeks from today in this Registry, if not already deposited. On deposit, the entire amount be released to the claimants, strictly, in terms of the conditions contained in the impugned award, through payees' cheque account or by depositing the same in their bank accounts.

17. Viewed thus, the impugned award is maintained and the appeal is dismissed.

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

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